

122 FERC ¶ 61,079  
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 Company

Docket No. OA07-46-000

ORDER ACCEPTING COMPLIANCE FILING, AS MODIFIED

(Issued January 31, 2008)

1. On July 13, 2007, pursuant to section 206 of the Federal Power Act (FPA),<sup>1</sup> Florida Power & Light Company (FPL) submitted its compliance filing as required by Order No. 890,<sup>2</sup> with a May 14, 2007 requested effective date. In this order, we accept FPL's Filing, as modified, to be effective July 13, 2007, in compliance with Order No. 890, as discussed below.

**I. Background**

2. In Order No. 890, the Commission reformed the *pro forma* Open Access Transmission Tariff (OATT) to clarify and expand the obligations of transmission providers to ensure that transmission service is provided on a non-discriminatory basis. Among other things, Order No. 890 amended the *pro forma* OATT to require greater consistency and transparency in the calculation of available transfer capability, open and coordinated planning of transmission systems and standardization of charges for generator and energy imbalance services. The Commission also revised various policies governing network resources, rollover rights and reassignments of transmission capacity.

3. The Commission established a series of compliance deadlines to implement the reforms adopted in Order No. 890. Transmission providers that have not been approved as independent system operators (ISO) or regional transmission organizations (RTO), and whose transmission facilities are not under the control of an ISO or RTO, were directed to submit, within 120 days from publication of Order No. 890 in the *Federal Register*

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<sup>1</sup> 16 U.S.C. § 824e (2000 & Supp. V 2005).

<sup>2</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007).

(i.e., July 13, 2007), section 206 compliance filings that conform the non-rate terms and conditions of their OATTs to those of the *pro forma* OATT, as reformed in Order No. 890.<sup>3</sup>

## **II. Compliance Filing**

4. FPL states that all of the revisions to the FPL OATT are taken verbatim from the Order No. 890 *pro forma* OATT with a few exceptions, as discussed below. FPL states that consistent with Order No. 890, it has included: (1) provisions regarding the potential clustering of transmission studies in sections 19.10 and 30.4; (2) provisions regarding the crediting of imbalance penalty revenues to Schedule 4 (Energy Imbalance Service) and Schedule 9 (Generator Imbalance Service); (3) provisions regarding penalties in sections 28.6 and 30.4; and (4) creditworthiness procedures in a new Attachment L.

## **III. Notice of Filing and Responsive Pleadings**

5. Notice of FPL's filing was published in the *Federal Register*, 72 Fed. Reg. 41,727 (2007), with interventions and protests due on or before August 3, 2007. Seminole Electric Cooperative, Inc. (Seminole) filed a timely motion to intervene and protest. Florida Municipal Power Agency (FMPA) filed a timely motion to intervene and limited protest. On August 20, 2007, FPL filed an answer to the protests.

## **IV. Discussion**

### **A. Procedural Matters**

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept FPL's answer because it has provided information that assisted us in our decision-making process.

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<sup>3</sup> The original 60-day compliance deadline provided for in Order No. 890 was extended by the Commission in a subsequent order. *See Preventing Undue Discrimination and Preference in Transmission Service*, 119 FERC ¶ 61,037 (2007) (Order Extending Compliance Deadline).

**B. FPL's Compliance Filing**

8. As discussed below, we will accept FPL's compliance filing, as modified, to be effective July 13, 2007. We also direct FPL to file, within 30 days of the date of this order, a further compliance filing as discussed below.

**1. Imbalance Penalty Revenues Provisions**

9. In Order No. 890, the Commission determined that charges for both energy and generator imbalances would be based upon a tiered approach that reflects incremental costs. The Commission also required transmission providers to credit revenues in excess of incremental costs to all non-offending customers. As a result, the Commission directed transmission providers to develop, as part of their Order No. 890 compliance filings, a mechanism for crediting such revenues to all non-offending transmission customers (including affiliated transmission customers) and to the transmission provider on behalf of its own customers.<sup>4</sup>

**a. FPL's Filing**

10. FPL proposes in Schedule 4 and Schedule 9 that imbalance penalty revenues collected that are in excess of FPL's incremental costs be distributed in the next monthly billing period to non-offending transmission customers that are a part of FPL's Control Area and receive balancing services from the balancing services from FPL's generation. Specifically, under Schedule 4 and Schedule 9, FPL proposes that the allocation shall be to non-offending transmission customers taking service under either schedule using the non-offending transmission customer's load in FPL's Control Area, expressed in MWh, divided by the sum of: (1) all non-offending transmission customers' load in the transmission provider's Control Area taking Schedule 4 service, expressed in MWh; (2) all scheduled MWh of non-offending transmission customers in FPL's Control Area taking Schedule 9 service; and (3) bundled Native Load Customers' load in FPL's Control Area, expressed in MWh.

**b. Protests**

11. Seminole agrees that FPL provides for revenue crediting of the imbalance penalty revenues in Schedules 4 and 9, but argues that the effect of the formula is to provide the *bulk* of the penalty revenues to the transmission provider without apparent regard for the provision in Order No. 890 that states that the transmission provider is eligible to receive a *portion* of the unreserved use penalties that the transmission provider collects.<sup>5</sup>

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<sup>4</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 663, 667, 727.

<sup>5</sup> Seminole's Comments at 3-4 *citing* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 860.

Seminole also expresses concern that FPL's OATT is unclear regarding what constitutes a "non-offending" entity. Seminole believes that FPL's intent is that an offending entity is one that experiences deviations greater than +/- 1.5 percent (or greater than 2 MW), but Seminole seeks confirmation of its interpretation.

**c. FPL's Answer**

12. FPL responds that Order No. 890 clearly states: "Unreserved use penalties are assessed against transmission customers and should, therefore, be distributed to all non-offending transmission customers, whether affiliated with the transmission provider or not."<sup>6</sup> Further, in response to Seminole's request for clarification of the term non-offending customer in paragraph 860 of Order No. 890, FPL suggests that this question would more appropriately be directed to the Commission. FPL, however, explains that it believes that the Commission, in using the term "non-offending customer, meant a customer not penalized with a charge in excess of incremental cost."<sup>7</sup>

**d. Commission Determination**

13. We reject FPL's proposed methodology to distribute imbalance penalty revenues. We agree with Seminole that FPL's proposal is unclear and is not consistent with or superior to the requirements of Order No. 890 in specifying which non-offending customers (i.e., hourly or monthly) will receive penalty revenues. With respect to Seminole's request to clarify the definition of non-offending customer, we note that the Commission explained in Order No. 890-A that non-offending customers would include "those customers to whom the penalty component did not apply in the hour."<sup>8</sup> The Commission further explained that "customers that were out of balance, but within the first tier, should therefore be included in the distribution."<sup>9</sup> In addition, in discussing if customers with imbalances in the first deviation band should be considered as non-offending customers, the Commission concluded that it agreed "that it would not be appropriate to exclude these customers from receiving a *pro rata* portion of penalty revenues in other hours."<sup>10</sup>

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<sup>6</sup> *Id.* P 860.

<sup>7</sup> FPL Answer at 8.

<sup>8</sup> Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 333.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

14. Moreover, in *PacifiCorp*,<sup>11</sup> the Commission explained that PacifiCorp's proposed definition of non-offending customers was unduly restrictive. PacifiCorp's proposed definition allowed a transmission customer who experienced an imbalance within the first deviation band one time in an annual period to be excluded from the pool of non-offending customers eligible to receive penalty revenues. The Commission found that incurring an imbalance charge for one single hour in the entire year should not make a customer ineligible for a share of penalty revenues for the entire year. Therefore, consistent with Order No. 890-A and *PacifiCorp*, we direct FPL to file, within 30 days of the date of this order, a further compliance filing with a revised mechanism for the distribution of imbalance penalty revenues that defines non-offending customers on an hourly basis and only excludes offending customers from receiving penalty revenues for that offending hour.

15. Furthermore, in response to Seminole's argument concerning a transmission provider's eligibility to receive a portion of unreserved use penalties that the transmission provider collects, we note that, in Order 890-A, the Commission concluded that "there remains no reason to exclude the transmission provider from receiving an appropriate share of penalty revenues."<sup>12</sup>

16. Finally, we note that, here, FPL proposes to distribute imbalance penalty revenues not to all non-offending transmission customers but only to "non-offending Transmission Customers that are a part of the Transmission Provider's Control Area and receiving balancing services from the Transmission Provider's generation."<sup>13</sup> This is inconsistent with the requirement in Order No. 890 that revenues from imbalance charges in excess of incremental costs be credited to *all* non-offending customers.<sup>14</sup> Therefore, we direct FPL to provide language in its compliance filing that provides for the crediting of revenues from imbalance charges in excess of incremental costs to *all* non-offending customers.

## 2. Unreserved Use Penalties and Late Study Penalties Provisions

17. In Order No. 890, the Commission determined that transmission customers would be subject to unreserved use penalties in any circumstance where the transmission

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<sup>11</sup> *PacifiCorp*, 121 FERC ¶ 61,223 (2007).

<sup>12</sup> Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 332.

<sup>13</sup> FPL OATT, First Revised Sheet Nos. 164 and 179.

<sup>14</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 727, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 331.

customer uses transmission service that it has not reserved and the transmission provider has a Commission-approved unreserved use penalty rate explicitly stated in its OATT.<sup>15</sup>

**a. FPL's Filing**

18. FPL states that it added provisions regarding penalties for unreserved use in its OATT sections 28.6 and 30.4. FPL proposes in section 28.6 that where a network customer uses Network Integration Transmission Service or secondary service pursuant to section 28.4 to facilitate a wholesale sale that does not serve network load, the transmission customer shall pay a charge based on a rate equal to 200 percent of the rate for the firm point-to-point transmission service provided. FPL proposes that more than one assessment for a given duration will increase the penalty period to the next longest duration (e.g., daily, weekly, monthly). In addition, FPL proposes to add to section 30.4 penalties equivalent to those proposed in section 28.6 for network customers that schedule delivery of energy in excess of the Network Resource's capacity, as specified in a network customer's application pursuant to section 29, unless the network customer supports such delivery within the transmission provider's transmission system by either obtaining point-to-point transmission service or utilizing secondary service pursuant to section 28.4.

**b. Protests**

19. FMPA contends that although FPL includes the *pro forma* OATT provisions in section 19.9, which penalize a transmission provider for an overdue System Impact Study (SIS) and Facilities Study (FS), and includes penalty provisions for violations of sections 28.6 and 30.4, FPL omits a methodology to distribute those penalty revenues. FMPA asks that the Commission require FPL to supplement its compliance filing and suggests that FPL develop a methodology similar to that used in Schedules 4 and 9.

20. FMPA also states that although paragraph 861 of Order No. 890 is ambiguous as to when the transmission provider must file the distribution methodology, it is clear that there must be an annual informational filing that, at the very least, informs the Commission and the public as to the transmission provider's implementation of the penalty provisions. FMPA suggests that all penalty provisions in the FPL OATT contain the requirement that the transmission provider make an annual informational filing describing its assessment of penalties and distribution of penalty revenues.

**c. FPL's Answer**

21. FPL states that FMPA's arguments that the instant compliance filing should be modified to include tariff language regarding the distribution of penalty revenues are a

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<sup>15</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 834, 848.

collateral attack on Order No. 890. FPL explains that Order No. 890 clearly requires annual compliance filings rather than including specific tariff language regarding the distribution of penalty revenues.

**d. Commission Determination**

22. We accept FPL's proposed penalties for failure to meet study deadlines. However, we reject FPL's proposed unreserved use penalty methodology proposed in sections 28.6 and 30.4. We note that FPL proposes unreserved use penalties for network customers only and not for point-to-point transmission customers. We find this to be unduly discriminatory. In Order No. 890, the Commission "adopted the NOPR proposal that a transmission customer will be subject to unreserved use penalties in any circumstance where the transmission customer uses transmission service that it has not reserved."<sup>16</sup> The Commission further stated that it "will not exempt any class of transmission customer from the potential assessment of unreserved use penalties."<sup>17</sup> Therefore, if FPL chooses to charge unreserved use penalties, it must propose language in its compliance filing assessing such penalties to all classes of customers, as discussed above.

23. With regard to the applicability of unreserved use charges to all customers, section 13.4 of the *pro forma* OATT provides that the customer using the unreserved service shall be deemed to have executed a service agreement to govern that service (i.e., firm service) for purposes of assessing any appropriate charges and penalties. This means that all unreserved uses of the transmission provider's system are to be considered uses of firm point-to-point transmission service, even if the customer is taking network service or non-firm point-to-point service for the reserved portion of its service.<sup>18</sup> Accordingly, the modifications proposed to sections 28.6 and 30.4 of FPL's OATT are unnecessary.

24. Further, in Order 890-A, the Commission explained that each transmission provider "must submit a one-time compliance filing under FPA section 206 proposing the transmission provider's methodology for distributing revenues from late study penalties and, if applicable, unreserved use penalties."<sup>19</sup> The Commission also stated that "this one-time compliance filing can be submitted at any time prior to the first distribution of operational penalties. Transmission providers should request an effective date for this distribution mechanism as of the date of the filing and may begin implementing the methodology immediately, subject to refund if the Commission alters the distribution

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<sup>16</sup> *Id.* P 834.

<sup>17</sup> *Id.* P 837.

<sup>18</sup> Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 454.

<sup>19</sup> *Id.* P 472.

mechanism on review.”<sup>20</sup> Additionally, the Commission explained that a “transmission provider must report on its penalty assessments and distributions in an annual compliance report to be submitted on or before the deadline for submitting FERC Form-1, as established by the Commission’s Office of Enforcement each year.”<sup>21</sup>

25. Finally, we reject, as unsupported, FMPA’s request to require that all penalty provisions contain a requirement in the FPL OATT that the transmission provider make the annual informational filing. In this regard, we note that Order Nos. 890 and 890-A did not require that the methodology pertaining to the annual informational filings be included in a transmission provider’s OATT.

### **3. Clustering Provisions**

26. In Order No. 890, the Commission did not generally require transmission providers to study transmission requests in a cluster, although the Commission did encourage transmission providers to cluster studies when it is reasonable to do so. The Commission also explicitly required transmission providers to consider clustering studies if the customers involved request a cluster and the transmission provider can reasonably accommodate the request. As a result, the Commission directed transmission providers to include tariff language in their Order No. 890 compliance filings that describes how the transmission provider will process a request to cluster studies and how it will structure transmission customers’ obligations when they have joined a cluster.<sup>22</sup>

#### **a. FPL’s Filing**

27. FPL states that it added provisions regarding clustering transmission studies for Transmission Service Requests (TSR) in sections 19.10.

#### **b. Protests**

28. Seminole states that section 19.10, which addresses clustering TSRs, seems to address the points raised in Order No. 890. Seminole submits a red-lined version of section 19.10 to the Commission suggesting changes (some grammatical, some substantive).

29. FMPA contends that FPL’s proposal is inconsistent with the Commission’s encouragement to consider requests for cluster studies and FPL provides no express provision giving the customer the right to request a cluster study. FMPA states that

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* P 1370-71.

FPL's language provides that, "the [t]ransmission [p]rovider *may offer*" to perform a cluster study.<sup>23</sup> FMPA argues that FPL should include a sentence that states, "[a]n eligible customer may request a cluster study."<sup>24</sup> FMPA and Seminole contend that FPL should change the language in section 19.10 from "*may offer to cluster*" to "*will offer to cluster*."

30. In recognition that the Commission will not require cluster studies, but consistent with the Commission's desire to promote cluster studies in appropriate instances, FMPA suggests that a provision be added that would permit FPL to reject the request for a cluster study if FPL provides a reasonable, written explanation of its rationale for rejecting the request for a cluster study.

31. FMPA notes that FPL's proposal requires sequential requests to cluster. FMPA argues that if FPL means back-to-back requests, such proposal is not reasonable. FMPA argues that given the size of the FPL system and the amount of requests FPL receives, it seems unlikely that requests for transmission over a common set of facilities would enter the FPL queue back-to-back. FMPA further argues that a group of customers attempting to coordinate their requests for service over a common set of facilities could have their efforts to obtain a cluster study frustrated because an unrelated request entered the queue seconds (or less) in front of a group member's request. Thus, FMPA argues that a "sequential requests" requirement could prevent a cluster study and urges the Commission to require FPL to strike "sequential" from section 19.10.<sup>25</sup>

32. FMPA argues that section 19.10 appears to prohibit a customer from requesting that its TSR be clustered with other requests after the customer has executed an SIS. FMPA asserts that even where an SIS is under active development, if a customer requests the clustering of the ongoing study with other transmission requests not yet under study and the expanded cluster would be more efficient and economic or may result in more efficient and economic construction, it should be permitted. Thus, FMPA urges the Commission to require FPL to delete the sentence: "The [t]ransmission [p]rovider will consider clustering of such TSRs only prior to execution of a System Impact Study Agreement for such System Impact Study for the first such TSR."<sup>26</sup> Seminole proposes revised language so as not to limit the clustering election to be made by the time of the execution of the first SIS agreement in the cluster.

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<sup>23</sup> FMPA Protest at 4 *citing* First Revised Sheet No. 88, section 19.10.

<sup>24</sup> *Id.* at 4-5.

<sup>25</sup> *Id.* at 5.

<sup>26</sup> *Id.* at 6 *citing* First Revised Sheet No. 88.

33. FMPA contends that FPL's proposal appears to commit the customer irrevocably to the request, assuming FPL decides to offer the opportunity to perform a cluster study. FMPA argues that customers will not commit a blank check simply to participate in a cluster study. FMPA also recognizes that if a cluster study participant opts out, a new SIS or FS may be required, delaying the process and creating added costs. Similarly, Seminole argues that, if it is intended to require an eligible customer to take service regardless of the outcome of the facilities study (and thus pay for the new facilities), then the language needs to be revised to permit the customer to refuse such service, and thus, not have to pay for any new facilities.

34. FMPA asserts that FPL's requirement to "share in the cost of new facilities, in accordance with the provisions of the Tariff"<sup>27</sup> is ambiguous and may be counter to long-standing Commission policy. FMPA maintains that it is unclear to which costs FPL refers. FMPA contends that any requirement in the FPL OATT as to allocation of the cost of new facilities should distinguish between Direct Assignment Facilities, which could be allocated by an OATT provision, and Network Upgrades, to which the Commission's longstanding "higher of" policy will apply. FMPA states that another concern with FPL's cost-sharing provisions for new facilities is that they blur the distinction between Direct Assignment Facilities and Network Upgrades, creating quasi-Network Upgrades. FMPA argues that if customers independently agree to assign all of the costs of Direct Assignment Facilities among themselves, holding FPL harmless, FPL will be indifferent.<sup>28</sup>

35. Finally, FMPA expresses concern with FPL's allocation of the costs of the cluster study itself. Under FPL's proposal, FMPA contends that the costs of the cluster study are to be shared equally, with the exception that a transmission customer that makes a request that "may provide counter flow" will not pay any costs related to the studies or associated new facilities.<sup>29</sup> To the extent the studies demonstrate that a request provides counter flows beneficial to other transmission customers in the cluster study, FMPA agrees that the transmission customer that requests the counter flow should not pay costs for new facilities. However, FMPA argues that the costs of the cluster studies should be borne by all transmission customers on a *pro rata* basis, based upon the size of the transmission request. Therefore, larger requests that are generally more complicated to study will bear more costs than smaller, potentially less complicated requests. Seminole proposes clarifying language on the mitigation of problems provided by counter flow.

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<sup>27</sup> *See id.* at 7.

<sup>28</sup> *Id.* at 7-8.

<sup>29</sup> *Id.*

c. **FPL's Answer**

36. FPL states that FMPA and Seminole have raised overlapping issues with regard to the clustering provisions of OATT section 19.10. FPL states that it does not oppose FMPA's suggestion that a customer may request clustering and FPL will reasonably accommodate such a request so long as the conditions for a cluster study are met. FPL states that FMPA and Seminole suggest that FPL should be obligated to cluster studies if all conditions are met, rather than clustering studies at its discretion. FPL states that it does not oppose being obligated to cluster studies so long as all conditions are met and it is recognized that such studies will tend to be complicated and time-consuming. Therefore, FPL proposes that it be permitted to deem the necessary study period as an extenuating circumstance that would excuse FPL from the 60-day study period and from penalties thereunder.

37. Regarding the definition of sequential requests, FPL provides a provision in its answer that no potentially clustered TSR should be queued between other potentially clustered TSRs that decline clustering. FPL states that, if a TSR declines to be clustered, the TSRs before and after the declining TSR will need to be studied separately. FPL also acknowledges that both FMPA and Seminole have proposed modifications to the language requiring that the clustering election be made by the time of execution of the first SIS agreement in the cluster. However, FPL counters that it cannot agree to move back the election period or allow a later TSR to join a clustering study underway because either of these scenarios would undermine FPL's ability to meet the tariff requirements for timely completion of studies.

38. FPL states that FMPA and Seminole question the ability of a customer to withdraw a clustering election and/or withdraw a TSR. FPL agrees with FMPA and Seminole that a customer making a clustering election is not bound to pay for upgrades arising from the study<sup>30</sup> and a customer may withdraw its TSR at any time, and thereby, withdraw from the cluster. FPL explains that such a withdrawal may require new SIS agreements among remaining cluster customers and a re-start of the study process. FPL states that the withdrawing customer may submit a new request at any time.

39. FPL explains that the provision regarding the sharing of new facilities costs is not intended to change Commission policy on cost allocation. FPL contends that distinguishing between Direct Assignment Facilities and Network Upgrades is not necessary as no change in Commission policy is intended. Additionally, FPL opposes FMPA's suggested provision that would allow customers to agree to allocate costs differently than otherwise required. FPL explains that the suggested provision is potentially confusing in implying that cost allocation inconsistent with Commission

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<sup>30</sup> FMPA states that payment for upgrades arising from the study will be in accordance with Commission policy.

policy would be acceptable and it is unnecessary in the sense that customers can enter into agreements among themselves to reallocate cost responsibilities.

40. FPL states that FMPA acknowledges that TSRs providing counter flow should not be obligated to share in new facilities costs, but suggests that such requests should share in the cost of the studies. FPL explains that it does not agree with FMPA's suggestion because a TSR providing counter flow would not itself require a study of new facilities. FPL contends that the inclusion of a counter flow TSR can only benefit others in a cluster study and it should not share in the costs of a study from which it receives no benefit. FPL accepts clarifying language proposed by Seminole on the mitigation of problems provided by counter flow.

41. FPL opposes FMPA's suggestion that cluster study costs should be divided among TSRs based upon the size of the TSR. FPL contends that there are other factors potentially relevant to ultimate cost responsibility, such as relative priority, proposed service start date, specific source and sink points requested. FPL explains that it would be unduly complicated to determine the potential relevance of these factors to ultimate cost responsibility in advance for purposes of billing the study costs. Thus, FPL maintains that TSR study costs should be shared equally by each member of the cluster.

42. FPL proposes a revised section 19.10 (including corrections of a typographical nature) as set forth below:

**19.10 Clustering of Transmission Service Requests:** In the event the Transmission Provider receives more than one Transmission Service Request ("TSR") for Long Term Firm Point-to-Point Transmission Service and/or Network Integration Transmission Service, which the Transmission Provider determines: (i) will require a System Impact Study; (ii) will have overlapping time periods of service; and (iii) may be limited by the same facilities, ~~then the Transmission Provider may offer to cluster two or more sequential requests, which meet the aforementioned requirements, in the performance of a System Impact Study;~~ (iv) there exist no other valid requests that meet (i), (ii), and (iii) and are queued between the TSRs being considered for clustering that do not desire to be studied in a cluster; and (v) Transmission Provider can reasonably accommodate the cluster study within the 60-day study period provided for under this Tariff in light of the complexity involved in studying multiple requests for service simultaneously and the time needed to perform such study, then the Transmission Provider will, at the request of an Eligible Customer, offer to cluster two or more qualifying requests, which meet the aforementioned

requirements, in the performance of a System Impact Study. If the cluster study cannot be reasonably accommodated within the 60-day study period, then the Transmission Provider will estimate the reasonably necessary period to requesting Eligible Customers and, if the cluster study is elected, the reasonably necessary study period will be deemed an extenuating circumstance excusing the Transmission Provider from the 60-day study period and from penalties thereunder. The Transmission Provider will ~~consider~~ ~~clustering~~ ~~cluster~~ of such TSRs only prior to execution of a System Impact Study Agreement for such System Impact Study for the first such TSR. Transmission Eligible Customers agreeing to be clustered in the System Impact Study must also agree: (i) to remain in the cluster throughout the performance of a Facilities Study, if needed; and (ii) to share in the cost of new facilities, in accordance with ~~the provisions of the Tariff~~ FERC policy, that are determined to be required to accommodate the cluster of TSRs. Eligible Customers may withdraw from a cluster only by withdrawing their respective TSR. In the event a TSR included in a cluster study agreement is withdrawn: (i) the current study agreement(s) involving the cluster members are deemed to be terminated; (ii) the remaining members in the cluster will be offered the opportunity for re-study as a cluster; and (iii) the study process will be re-started with a System Impact Study. The TSRs study costs will be shared equally by each member of the cluster. Provided, additionally, to the extent the Transmission Provider receives one or more TSR for Long Term Firm Point-to-Point Transmission Service prior to the execution of a System Impact Study Agreement for the System Impact Study of clustered TSRs; that the Transmission Provider determines will flow counter to TSRs requiring a System Impact Study and will mitigate some (or all) of the problems identified, the impact of such requests will be analyzed within the System Impact Study of clustered TSRs, but the Eligible ~~Transmission~~ Customers, whose TSRs may provide counter flow, will not be responsible for any costs of studies or associated new facilities.<sup>31</sup>

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<sup>31</sup> FPL Answer at 6-7.

**d. Commission Determination**

43. We accept FPL's proposed section 19.10, as modified further below. We find the modifications that FPL made to section 19.10 in its Answer to be just and reasonable. We also agree with protesters' request that language in section 19.10 should be changed from "may offer" to cluster to "will offer" to cluster where the conditions for a cluster study are met.<sup>32</sup> Accordingly, we direct FPL to make these modifications in a compliance filing to be submitted within 30 days of the date of this order. However, this does not mean that FPL will be required to offer to cluster *all* studies. FPL will be required to cluster studies where the conditions for the cluster study are met and where it can reasonably accommodate such requests, as discussed below. Moreover, Order No. 890 did not require transmission providers to provide a written explanation of the determination of the reason why a transmission service request cannot be clustered, and we will not require FPL to provide such a written explanation here.

44. With respect to section 19.10(v), we agree that FPL should offer to cluster studies when it can reasonably accommodate the request,<sup>33</sup> but we find that the second sentence is not consistent with or superior to the requirements of Order No. 890.<sup>34</sup> This provision allows FPL the discretion to determine when a necessary study period will be deemed an extenuating circumstance to avoid following the 60-day study period requirement and subsequent late penalties. If FPL believes that a cluster study prevented it from meeting its OATT requirements to process transmission studies in a timely matter, FPL is free to raise that as an extenuating circumstance in a notification filing with the Commission, which will be reviewed on a case-by-case basis.<sup>35</sup>

45. We accept FPL's proposal, as modified by its Answer, which includes the criteria to qualify for clustering. FPL's proposal allows TSRs that may be limited by the same transmission facilities to be studied in a cluster. FPL explains that its intent is to include as a condition that there be no potentially clustered TSRs queued between other

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<sup>32</sup> FPL's Answer states that it agrees with this request and FPL proposes to incorporate it in the revised language. FPL Answer at 3, 6.

<sup>33</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1370.

<sup>34</sup> The second sentence of section 19.10(v) provides: "If the cluster study cannot reasonably be accommodated within the 60-day study period, then the [t]ransmission [p]rovider will estimate the reasonably necessary period to requesting Eligible Customers and, if the cluster study is elected, the reasonably necessary study period will be deemed an extenuating circumstance excusing the [t]ransmission [p]rovider from the 60-day study period and from penalties thereunder."

<sup>35</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1343.

potentially clustered TSRs that decline to be clustered. Therefore, FPL explains that both the TSRs before and after the declining TSR will have to be studied separately. In addition, FPL explains that clustering election must be made by the execution of the first SIS agreement in the cluster because it cannot move back the election period or allow a later TSR to join a clustering study already underway. FPL explains that the protesters' proposals would negatively affect FPL's capability of timely completing studies.<sup>36</sup> We find FPL's proposal to be reasonable.

46. Additionally, while FPL's proposal, as filed, could commit a customer irrevocably to the clustering request, FPL subsequently proposed to allow an eligible customer to withdraw from a cluster study by withdrawing its TSR. In the event a TSR included in a cluster study agreement is withdrawn, the remaining members in the cluster will be offered the opportunity for re-study as a cluster and the study process will be re-started with a System Impact Study. In Order No. 890, the Commission found that transmission providers are "in the best position to develop a clustering procedure that prevents a transmission customer from strategically selecting clusters in which it participates in an attempt to avoid responsibility for needed transmission system upgrades."<sup>37</sup> Therefore, we find that FPL's revised proposal is reasonable and we direct FPL to file this revision in a compliance filing to be submitted within 30 days of the date of this order.

47. However, we agree with FMPA's assertion that FPL's requirement that a customer "share in the cost of new facilities, in accordance with the provisions of the Tariff"<sup>38</sup> is ambiguous and unclear as to exactly how the sharing of costs of new facilities will be consistent with Commission policy. FPL does not specify how or under what circumstances the costs of new facilities will be shared among the participants of a cluster study. Therefore, we will direct FPL to file, in a compliance filing to be submitted within 30 days of the date of this order, revised language explaining its proposal to allocate the costs of new facilities among the participants of a cluster study. This additional language should include clarifying references to Direct Assignment Facilities and Network Upgrades in relation to the cost of new facilities that are constructed in response to requests for transmission service that are studied in a cluster. These clarifications will remove uncertainty for transmission customers and ensure consistency with Commission policy.

48. We agree with FPL that TSRs providing a counter flow should not share in the cost of the studies. As FPL explains in its answer, a TSR providing a counter flow would

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<sup>36</sup> FPL Answer at 4.

<sup>37</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1371.

<sup>38</sup> FMPA Protest at 7 *citing* First Revised Sheet No. 88.

not require a study of new facilities and its inclusion in a cluster study can only benefit others. Therefore, it should not share in the costs of a study from which it receives no benefit.

49. Lastly, we agree with FPL that the TSR study costs should be shared equally by each member of the cluster. The Commission found in Order No. 890 that “we are giving each transmission provider discretion to develop the clustering procedures it will use because we believe the transmission provider is in the best position to determine the clustering procedures that it can accommodate.”<sup>39</sup> As FPL explains, there are several factors relevant to cost responsibility that would be unduly complicated to determine in advance for purposes of billing the costs of the study.

#### **4. Rollover Rights Effective Date**

50. In Order No. 890, the Commission adopted a five-year minimum contract term in order for a customer to be eligible for a rollover right and adopted a one-year notice period. The Commission determined that this rollover reform should be made effective at the time of acceptance by the Commission of a transmission provider’s coordinated and regional planning process. The Commission explained that rollover reform and transmission planning are closely related because transmission service eligible for a rollover right must be set aside for rollover customers and included in transmission planning.<sup>40</sup>

51. FPL has included the rollover reforms adopted in Order No. 890 in section 2.2 of its revised tariff sheets, with a requested effective date of May 14, 2007. However, FPL’s Attachment K, setting forth its transmission planning process, which was filed December 7, 2007 in Docket No. OA08-29-000, has not yet been accepted.<sup>41</sup> This is contrary to Order No. 890’s requirement that rollover reforms are not to become effective until after a transmission provider’s Attachment K is accepted. Therefore, we direct FPL to file, within 30 days of the date of this order, a revised tariff sheet that reflects the previous language of section 2.2. FPL should re-file the rollover reform language established in Order No. 890 within 30 days of the Commission’s acceptance of its Attachment K, requesting an effective date commensurate with the date of that filing.

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<sup>39</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1371.

<sup>40</sup> *Id.* P 1231, 1265.

<sup>41</sup> The Commission extended the deadline for submitting Attachment K to December 7, 2007. *See Order Extending Compliance Action Date and Establishing Technical Conferences*, 120 FERC ¶ 61,103 (2007).

## 5. Effective Date

52. We deny FPL's request for a May 14, 2007 effective date for the proposed tariff sheets. Transmission providers that have not been approved as ISOs or RTOs, and whose transmission facilities are not under the control of an ISO or RTO, were directed to submit, within 120 days from publication of Order No. 890 in the *Federal Register* (i.e., July 13, 2007), section 206 compliance filings that conform the non-rate terms and conditions of their OATTs to those of the *pro forma* OATT, as reformed in Order No. 890.<sup>42</sup> Therefore, we direct FPL to remove all references to May 14, 2007 from its proposed tariff sheets and to submit, in a compliance filing to be filed within 30 days of the date of this order, the proposed tariff sheets to be effective July 13, 2007.

### The Commission orders:

(A) FPL's compliance filing, as modified, is hereby accepted, to be effective July 13, 2007, as discussed in the body of this order.

(B) FPL is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>42</sup> The original 60-day compliance deadline provided for in Order No. 890 was extended by the Commission in a subsequent order. *See* Order Extending Compliance Deadlines.