

138 FERC ¶ 61,212  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Carolina Power & Light Co.	Docket Nos. ER10-1760-001
	ER10-1760-002
Florida Power Corp.	ER10-1758-001
	ER10-1758-002

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS  
AND NOTICE OF CHANGE IN STATUS

(Issued March 23, 2012)

1. In this order, the Commission accepts an updated market power analysis for the Southeast region and a notice of change in status filed June 30, 2011 by Progress Energy, Inc. (Progress Energy), on behalf of its affiliates with market-based rate authorization, Carolina Power & Light Co. d/b/a Progress Energy Carolinas, Inc. (Progress Energy Carolinas) and Florida Power Corp. d/b/a Progress Energy Florida, Inc. (Progress Energy Florida) (collectively, Applicants). As discussed below, the Commission concludes that Applicants continue to satisfy the Commission's standards for market-based rate authority in the Southeast region, excluding the Progress Energy Carolinas—East, Progress Energy Carolinas—West, and Duke Energy Carolinas balancing authority areas and Peninsular Florida.<sup>1</sup>

---

<sup>1</sup> Applicants do not have and are not seeking market-based rate authority in Peninsular Florida and the Progress Energy Carolinas—East and Progress Energy Carolinas—West balancing authority areas. Also, as discussed herein, Applicants currently are not seeking market-based rate authority in the Duke Energy Carolinas balancing authority area.

## I. Background

2. Applicants explain that Progress Energy is a North Carolina corporation and is headquartered in that state. Applicants state that Progress Energy, along with its subsidiaries, owns approximately 22,000 megawatts (MW) of generation capacity. Applicants further explain that Progress Energy owns, directly and indirectly, all of the common stock of its two major electric subsidiaries and varying percentages of other non-regulated subsidiaries.<sup>2</sup>

3. Applicants explain that Progress Energy Carolinas and Progress Energy Florida are market-based rate sellers and transmission owners in the Southeast Region. With respect to Progress Energy Carolinas, Applicants state that Progress Energy Carolinas is a vertically integrated electric utility organized in North Carolina that provides generation, transmission, and distribution services to retail and wholesale customers in the Carolinas. According to Applicants, Progress Energy Carolinas operates the Progress Energy Carolinas-East and Progress Energy Carolinas-West balancing authority areas. Applicants also explain that Progress Energy Carolinas provides service to 1.5 million retail customers over 70,000 miles of distribution and transmission lines. They further state that Progress Energy Carolinas provides power supply services to wholesale customers through cost-based rates and market-based rates that have been approved by the Commission. Additionally, Applicants state that Progress Energy Carolinas provides wholesale transmission and ancillary services pursuant to a joint open access transmission tariff (OATT) with Progress Energy Florida.<sup>3</sup>

4. Applicants state that Progress Energy Florida is a vertically integrated electric utility organized in Florida that provides generation, transmission, and distribution services to retail and wholesale customers. Applicants explain that Progress Energy Florida operates the Progress Energy Florida balancing authority area. Applicants state that the company's retail service area covers about 20,000 square miles in central Florida, including metropolitan St. Petersburg, Clearwater, and the greater Orlando area. According to Applicants, Progress Energy Florida maintains more than 35,000 miles of distribution and transmission lines serving approximately 1.6 million retail customers. Applicants state that Progress Energy Florida provides power supply services to wholesale customers through cost-based rates and market-based rates that have been authorized by this Commission. Applicants further state that Progress

---

<sup>2</sup> Updated Market Power Analysis at 2.

<sup>3</sup> *Id.*

Energy Florida provides wholesale transmission and ancillary services pursuant to its joint OATT with Progress Energy Carolinas.<sup>4</sup>

5. Applicants note that they have Commission approval to make sales at market-based rates in all markets except Progress Energy Carolinas—West, Progress Energy Carolinas—East, and Peninsular Florida.<sup>5</sup> Applicants also note that Progress Energy Carolinas and Progress Energy Florida have authority under their market-based rate tariffs to make sales of ancillary services at market-based rates in certain RTO markets and to third-parties.<sup>6</sup>

6. Applicants state that they also own interests in two other energy-related subsidiaries, APOG, LLC (APOG) and NuStart Energy Development, LLC (NuStart). Applicants explain that Progress Energy Carolinas and Progress Energy Florida each own a 10 percent interest in APOG, which provides technical, engineering, and procurement support services to member nuclear facilities. Applicants also explain that Progress Energy Service Company, LLC, a wholly-owned subsidiary of Progress Energy, holds a 10 percent interest in NuStart, which was created to submit a proposal in response to a Department of Energy solicitation seeking applications for financial assistance from power generation companies for projects that enable a new nuclear power plant to be ordered and licensed for deployment in the United States within a decade.<sup>7</sup>

## II. Filings

7. On June 30, 2011, Applicants filed an updated market power analysis for the Southeast Region in accordance with the regional schedule adopted in Order No. 697.<sup>8</sup>

---

<sup>4</sup> *Id.*

<sup>5</sup> Peninsular Florida is defined as all of that portion of the State of Florida lying to the east of Progress Energy Florida's points of interconnection with Gulf Power Company, and to the south of the points of interconnection of those transmission lines jointly owned by Florida Power & Light Company and Jacksonville Electric Authority with Georgia Power Company and south of the points of interconnection of the City of Tallahassee and Progress Energy Florida with Georgia Power Company. *Id.* at 2 n.4.

<sup>6</sup> *Id.* at 3-4.

<sup>7</sup> *Id.*

<sup>8</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at PP 882-893, *clarified*, 121 FERC ¶ 61,260, at P 9, P 10, App. D-1 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055

(continued...)

In their updated market power analysis, Applicants explain that Progress Energy is in the process of merging with Duke Energy Corporation (Duke Energy).<sup>9</sup> Applicants state that under the proposed merger, Progress Energy will become a wholly-owned subsidiary of Duke Energy, which owns Duke Energy Carolinas, LLC and various affiliates (Potential Duke Affiliates) that have Commission authority to make sales of electricity at market-based rates in all markets except the Duke Energy Carolinas balancing authority area. Further, Applicants explain that, in accordance with Order No. 697, the Potential Duke Affiliates, like Applicants, are prohibited from making sales into the Progress Energy Carolinas' balancing authority areas and Peninsular Florida with one limited exception.<sup>10</sup> Likewise, Applicants state that they are subject to the restriction contained in the Potential Duke Affiliates' market-based tariffs prohibiting them from making sales at market-based rates in the Duke Energy Carolinas balancing authority area. Accordingly, Applicants state that they are not seeking market-based rate authority in Peninsular Florida, the Progress Energy Carolinas balancing authority areas, or the Duke Energy Carolinas balancing authority

---

(2008), *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9<sup>th</sup> Cir. 2011).

<sup>9</sup> On April 4, 2011, Progress Energy and Duke Energy filed an application to merge under section 203 of the FPA in Docket No. EC11-60-000 (Merger Proceeding). On September 30, 2011, the Commission issued an order authorizing the proposed merger of Progress Energy and Duke Energy on the condition that the companies file a proposal to mitigate failures of the Competitive Analysis Screen in the Duke Energy Carolinas and Progress Energy Carolinas-East balancing authority areas. *Duke Energy Corp.*, 136 FERC ¶ 61,245, at P 145 (2011). Progress Energy and Duke Energy subsequently filed a mitigation proposal, which the Commission rejected on December 14, 2011. *Duke Energy Corp.*, 137 FERC ¶ 61,210, at P 1 (2011). The Commission rejected the mitigation proposal without prejudice to Progress Energy and Duke Energy proposing mitigation measures that remedy the screen failures identified by the Commission. *Id.* P 92.

<sup>10</sup> On May 23, 2011, the Commission granted Duke Energy Carolinas a limited waiver to allow it to make market-based rate sales to Progress Energy Carolinas in the Progress Energy Carolinas-East balancing authority area pursuant to an agency marketing arrangement between Progress Energy Carolinas and the City of Fayetteville, North Carolina. This waiver is effective until no later than June 30, 2012 when the agency marketing agreement expires. *Carolina Power & Light Co.*, 135 FERC ¶ 61,173 (2011).

areas.<sup>11</sup> Applicants maintain that they continue to satisfy the Commission's standards for market-based rate authority in all markets in the Southeast Region outside of these markets. Applicants further state that, in the event that the proposed merger with Duke Energy is not consummated, they own no generation in the Duke Energy Carolinas balancing authority area, and, therefore, would satisfy the Commission's standards for market-based rate authority in that market.<sup>12</sup>

8. On the same day that they filed their updated market power analysis, Applicants filed a notice of change in status notifying the Commission that they placed the Richmond County Combined Cycle power block 5 (the Richmond County units) located in North Carolina into commercial operation on June 1, 2011. Applicants explain that the combined net summer rating for these units is 635 MW. Applicants argue that the addition of this generation does not materially affect the conditions that the Commission relied upon in granting them market-based rate authority. In support, Applicants explain that the updated market power analysis includes a sensitivity analysis demonstrating that they continue to pass the Commission's horizontal market power analysis when the addition of these units is taken into account.<sup>13</sup>

### **III. Notices and Responsive Pleadings**

9. Notice of Applicants' notice of change in status was published in the *Federal Register*, 76 Fed. Reg. 41,784 (2011), with interventions or protests due on or before July 21, 2011. None was filed.

10. Notice of Applicants' updated market power analysis was published in the *Federal Register*, 76 Fed. Reg. 41,777 (2011), with interventions or protests due on or before August 29, 2011. The North Carolina Electric Membership Corporation (NCEMC) filed a timely motion to intervene, and the Florida Municipal Power Agency (FMPA) filed a timely motion to intervene and protest.

---

<sup>11</sup> Updated Market Power Analysis at 5.

<sup>12</sup> *Id.* Applicants state that the analysis of the Duke Energy Carolinas balancing authority area is included "in the event that the merger between Progress Energy and [Duke Energy] is not consummated and the Progress Companies wish to resume market-based rates in the [Duke Energy Carolinas balancing authority area]." Applicants further explain that their analysis of the Duke Energy Carolinas balancing authority area treats Progress Energy and Duke Energy as non-affiliates. *Id.* n.11.

<sup>13</sup> Change in Status Filing at 1.

11. In its protest, FMPA argues that Applicants' updated market power analysis must be reviewed in conjunction with the Commission's review of Progress's application to merge with Duke Energy. FMPA states that, as it has noted in its pleadings in that proceeding, a careful study of the Florida market power situation would be necessary before the merger could be approved. According to FMPA, the Commission's analysis of the market power review in the instant proceeding cannot be made without considering the likelihood that the merger will increase market power in Florida. FMPA maintains that it is undeniable that Progress Energy Florida has market power in Peninsular Florida given the fact that Applicants do not have market-based rate authority in Peninsular Florida and are not seeking such authority.<sup>14</sup>

12. On September 7, 2011, Applicants filed an answer to FMPA's protest. In their answer, Applicants argue that FMPA's assertions in the Merger Proceeding that the Commission should require a market power analysis in Florida are irrelevant to the Commission's review of Applicants' updated market power analysis. Applicants note that neither Applicants nor Duke Energy Carolinas have market-based rate authority in the Progress Energy Carolinas balancing authority area, the Duke Energy Carolinas balancing authority area, or Peninsular Florida, and that none of these parties are seeking market-based rate authority in these areas. Applicants state that, given that the Peninsular Florida market is not a consideration in this case, there is no basis for FMPA's request that the Commission consider Applicants' triennial market power update in conjunction with Progress's application to merge with Duke Energy.<sup>15</sup>

#### **IV. 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 of FMPA and NCEMC make them parties to this proceeding.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it provided information that assisted us in our decision-making process.

---

<sup>14</sup> FMPA Protest at 3-4.

<sup>15</sup> Applicants' Answer at 1-2.

## **B. Substantive Matters**

15. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.<sup>16</sup> As discussed below, the Commission concludes that Applicants continue to meet the Commission's requirements for market-based rate authority in all markets except Progress Energy Carolinas–East, Progress Energy Carolinas–West, and Peninsular Florida. We further note that Applicants are subject to the restriction contained in the Potential Duke Affiliates' market-based rate tariffs prohibiting them from making sales at market-based rates in the Duke Energy Carolinas balancing authority area.<sup>17</sup>

### **1. Horizontal Market Power**

16. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.<sup>18</sup> The Commission has stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess horizontal market power, while failure of either screen creates a rebuttable presumption that the applicant has horizontal market power.<sup>19</sup>

17. Applicants performed indicative screen analyses for the PJM Interconnection, L.L.C. (PJM) market and the South Carolina Electric and Gas Company (SCE&G), Santee Cooper, Southern Company (Southern), Tennessee Valley Authority (TVA), and Duke Energy Carolinas balancing authority areas.

18. We have reviewed Applicants' pivotal supplier and wholesale market share indicative screens and determined that Applicants pass the screens in the PJM market and in the SCE&G, Santee Cooper, Southern, and TVA balancing authority areas using the conservative assumption of no non-affiliate imports<sup>20</sup> and including the

---

<sup>16</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, P 399, P 408, P 440.

<sup>17</sup> Updated Market Power Analysis at 4-5.

<sup>18</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62.

<sup>19</sup> *Id.* P 33, PP 62-63.

<sup>20</sup> While Applicants used non-affiliate imports to perform the analysis, we have determined that when using the conservative assumption of no non-affiliate imports (specifically, setting row H in the pivotal supplier screen and row P in the wholesale market share screen to zero), Applicants pass the screens in the relevant geographic markets. *See id.* P 379.

sensitivity analysis accounting for the increased generation from the Richmond County units. We further note that Applicants' analysis indicates that they pass the indicative screens in the Duke Energy Carolinas balancing authority area. However, consistent with Order No. 697, Applicants may not make sales in the Duke Energy Carolinas balancing authority area at market-based rates while the Merger Proceeding is pending or once the proposed merger is consummated.<sup>21</sup>

19. We disagree with FMPA's assertion that the Commission must require a market power analysis of Peninsular Florida. Applicants are not seeking market-based rate authority in Peninsular Florida.<sup>22</sup> Therefore, we find that FMPA's arguments are beyond the scope of the instant proceeding.

20. Accordingly, we find that Applicants continue to satisfy the Commission's requirements for market-based rates regarding horizontal market power in the Southeast Region except the Progress Energy Carolinas–East, Progress Energy Carolinas–West, and Duke Energy Carolinas balancing authority areas and Peninsular Florida.<sup>23</sup>

---

<sup>21</sup> *Id.* P 501 (“The Commission will continue to require that, for purposes of affiliate abuse, companies proposing to merge will be treated as affiliates under their market-based rate tariffs while their proposed merger is pending.”)

<sup>22</sup> We note, however, that in the event that the merger is ultimately consummated, Duke Energy, like Applicants, would be prohibited from making sales at market-based rates in Peninsular Florida. *See* Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 at P 77.

<sup>23</sup> As noted above, Applicants are currently prohibited from making sales at market-based rates in the Duke Energy Carolinas balancing authority area unless specifically authorized by the Commission to do so. In the event that the merger is not consummated and Applicants wish to resume making sales at market-based rates in the Duke Energy Carolinas balancing authority area, Applicants must notify the Commission of their intent to do so. On the other hand, in the event that the merger is consummated, Applicants must revise their market-based rate tariffs to reflect the restriction on making sales at market-based rates in the Duke Energy Carolinas balancing authority area.

## 2. Vertical Market Power

21. The Commission requires, in cases where a public utility or any of its affiliates owns, operates, or controls transmission facilities, that there be a Commission-approved OATT on file or that the seller has received waiver of the OATT requirement before granting a seller market-based rate authorization.<sup>24</sup> Applicants state that they have OATTs on file with the Commission.<sup>25</sup>

22. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.<sup>26</sup> The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities; sites for generation capacity development; and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).<sup>27</sup> The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.<sup>28</sup> In Order No. 697, the Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow interveners to demonstrate otherwise.<sup>29</sup>

23. Applicants state that neither they nor their affiliates own or control intrastate natural gas transportation or intrastate natural gas storage in the Southeast Region. They state that they also do not own or control physical sources of coal supplies or control who may access transportation of coal supplies in the Southeast Region. Applicants explain that Progress Energy Florida does own one site, the Levy County site, for new capacity development in Florida, but state that Progress Energy Florida does not own sites that could be used to create barriers to entry in the relevant markets. Applicants further assert that Progress Energy Carolinas is considering the expansion

---

<sup>24</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

<sup>25</sup> See *Carolina Power & Light Co.*, Docket No. OA96-198-000 (November 22, 2000) (delegated letter order); *Florida Power Corp.*, Docket No. OA97-362-000 (January 19, 2001) (delegated letter order).

<sup>26</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

<sup>27</sup> *Id.* P 447; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

<sup>28</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

<sup>29</sup> *Id.* P 446.

of an existing site that it owns at the Shearson Harris plant for new capacity development, but that it does not own sites that could be used to create barriers to entry in the relevant markets. Applicants affirmatively state that neither Applicants nor any of their affiliates have erected barriers to entry into the Southeast Region and that they will not erect barriers into the Southeast Region.

24. Based on Applicants' representations, we find that Applicants satisfy the Commission's requirements for market-based rate authority regarding vertical market power in the Southeast Region.

### C. Reporting Requirements

25. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report (EQR) containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or longer) market-based power sales during the most recent calendar quarter.<sup>30</sup> Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.<sup>31</sup>

---

<sup>30</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, 125 FERC ¶ 61,103 (2008). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit EQRs to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

<sup>31</sup> The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2011). Failure to file an EQR (without an appropriate request for extension), or failure to report an agreement in an EQR, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

26. Applicants must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.<sup>32</sup> This includes the timely submission of land acquisition reports.<sup>33</sup>

27. Additionally, Applicants must file an updated market power analysis for all regions in which they are designated as Category 2 sellers in compliance with the regional reporting schedule adopted in Order No. 697.<sup>34</sup> The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) Applicants' updated market power analysis is hereby accepted, as discussed in the body of this order.

(B) Applicants' notice of change in status is hereby accepted, as discussed in the body of this order.

(C) Applicants are hereby directed to file an updated market power analysis according to the regional reporting schedule adopted in Order No. 697.

(D) In the event the merger is consummated, Applicants are directed to revise their market-based rate tariffs to reflect the restriction on making sales at market-based rates in the Duke Energy Carolinas balancing authority area as discussed in this order. In the event the merger is not consummated and Applicants wish to resume making sales at market-based rates in the Duke Energy Carolinas balancing

---

<sup>32</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 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42 (2011).

<sup>33</sup> *See* Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 at P 18 (requiring market-based rate sellers to report the acquisition of control of sites for new generation capacity development on a quarterly basis instead of within 30 days of the acquisition); Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 at PP 21-24; 18 C.F.R. § 35.42(d) (2010); *Notice of New Docket Prefix "LA" for Land Acquisition Reports and Guidelines for Filing Under Order No. 697-C*, Docket No. RM04-7-006, 75 Fed. Reg. 22,125 (2010).

<sup>34</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 848-850.

authority area, Applicants are hereby directed to submit a filing notifying the Commission of their intent to make such sales as discussed in this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.