

152 FERC ¶ 61,066  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
Tony Clark, and Colette D. Honorable.

Osprey Energy Center, LLC  
Duke Energy Florida, Inc.

Docket Nos. EC15-96-000

Duke Energy Florida, Inc.

ER15-1787-000

ORDER AUTHORIZING PROPOSED DISPOSITION OF JURISDICTIONAL  
FACILITIES AND ACQUISITION OF EXISTING GENERATING FACILITIES AND  
REJECTING RELATED MITIGATION TARIFF FILING

(Issued July 24, 2015)

1. On March 13, 2015, as amended on June 4, 2015, Osprey Energy Center, LLC (Osprey) and Duke Energy Florida, Inc. (Duke Florida) (together, Applicants) filed an application under section 203(a)(1) of the Federal Power Act (FPA)<sup>1</sup> requesting authorization for a transaction in which Duke Florida will acquire from Osprey an existing 590 megawatt (MW) generating station and associated assets (Osprey Energy Center) (Proposed Transaction).<sup>2</sup> As part of the Application, Duke Florida proposes mitigation to address market power screen failures. On May 27, 2015, Duke Florida made a separate tariff filing under section 205 of the FPA<sup>3</sup> to implement the proposed mitigation.<sup>4</sup> As discussed below, we have reviewed the Proposed Transaction under the

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<sup>1</sup> 16 U.S.C. § 824b(a)(1) (2012).

<sup>2</sup> Joint Application for Authorization under Section 203 of the Federal Power Act, Docket No. EC15-96-000 (Mar. 13, 2015) (Application).

<sup>3</sup> 16 U.S.C. § 824d (2012).

<sup>4</sup> Mitigation Tariff for Day-Ahead Cost-Based Energy Sales from the Osprey Energy Center, Docket No. ER15-1787-000 (May 27, 2015) (Mitigation Tariff).

Commission's Merger Policy Statement<sup>5</sup> and authorize the Proposed Transaction under FPA section 203 as consistent with the public interest. We find that the proposed Mitigation Tariff is unnecessary, and thus reject Duke Florida's section 205 filing as moot.

## **I. Background**

### **A. Description of Applicants**

#### **1. Osprey**

2. Applicants state that Osprey is an indirect wholly owned subsidiary of Calpine Corporation (Calpine). Calpine is engaged in the development, financing, acquisition, ownership, and operation of independent power production facilities and the wholesale marketing of electricity in the United States and Canada.<sup>6</sup>

3. Applicants state that Osprey is an exempt wholesale generator and has been authorized to make wholesale sales of energy, capacity, and ancillary services at market-based rates. Osprey owns and operates the Osprey Energy Center which is currently interconnected with the transmission system owned and operated by Tampa Electric Company. Applicants state that all of the capacity and energy of the Osprey Energy Center is committed to Duke Florida under a long-term tolling agreement which commenced on October 14, 2014 and continues through January 2, 2017.<sup>7</sup>

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<sup>5</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008) (Supplemental Policy Statement). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

<sup>6</sup> Application at 4.

<sup>7</sup> *Id.* at 5.

## 2. Duke Florida

4. Applicants state that Duke Florida is a public utility that serves wholesale and retail customers in Florida. Duke Florida owns and operates generating facilities and transmission networks. Transmission service over those networks is provided pursuant to an open access transmission tariff. Duke Florida is a wholly owned subsidiary of Duke Energy Corporation (Duke Energy). Duke Energy is a diversified energy company with both regulated and unregulated utility operations that supplies, delivers, and processes energy for customers in the United States and international markets.<sup>8</sup>

### B. The Proposed Transaction

5. Applicants state that Duke Florida is expecting summer firm demand to grow to 9,307 MW by the summer of 2017. Applicants state that Duke Florida is planning to reduce the capacity of two units at its Crystal River Energy Complex by 130 MW in the spring of 2016 to comply with the Mercury Air Toxins Standards. Additionally, Applicants state that Duke Florida intends to retire Crystal River Unit 1 and Crystal River Unit 2 in 2018, along with existing steam units at the Suwannee Energy Center, and other combustion turbines.<sup>9</sup> Applicants state that in order to meet projected load growth and the 20 percent reserve margin mandated by the Florida Public Service Commission (Florida Commission), Duke Florida will need additional generation by the summer of 2017.<sup>10</sup>

6. Applicants state that Duke Florida evaluated several options in order to meet its capacity needs, including construction of new generation, power purchases from, or the acquisition of, existing generation owned by third parties, or the uprating of existing Duke Florida generation plants.<sup>11</sup> Duke Florida submitted a petition to the Florida Commission for a determination of need with respect to the construction of two new gas-fired combustion turbines with a combined capacity of 320 MW at its Suwannee Energy Center (Suwannee Combustion Turbines) and upgrades to the Hines Energy Center, which would add 220 MW of summer-only generating capacity. Applicants state that after the Florida Commission initiated a proceeding to address that petition, Calpine Construction Finance Company, L.P., and NRG Florida LP submitted evidence that

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<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.* at 7.

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

<sup>11</sup> *Id.* at 8.

acquisition of an existing facility, either the Osprey Energy Center or NRG Florida LP's Osceola Generating Center were more cost-effective options than the self-build proposal.<sup>12</sup> During the ongoing Florida Commission proceeding, Calpine submitted revised offers to Duke Florida to enter into a power purchase agreement for all or a portion of the Osprey Energy Center and to sell the facility to Duke Florida. After reaching an agreement in principle with Osprey to purchase power from the Osprey Energy Center under a two-year power purchase agreement and then purchase the facility, Duke Florida amended its petition before the Florida Commission and withdrew its request to build the Suwannee Combustion Turbines.<sup>13</sup> In January 2015, Duke Florida filed a further petition with the Florida Commission for a determination that acquiring the Osprey Energy Center or, in the alternative, moving forward with the construction of the Suwannee Combustion Turbines is the most cost effective generation alternative.<sup>14</sup>

7. Under the terms of the Proposed Transaction, pursuant to the Asset Purchase and Sales Agreement, as amended, Duke Florida will purchase the Osprey Energy Center and certain associated assets from Osprey for cash. The associated assets include a firm natural gas transportation agreement used to deliver fuel supplies to the Osprey Energy Center and a service agreement with Tampa Electric Company for 249 MW of partial path firm point-to-point electric transmission to Duke Florida's system.<sup>15</sup>

### **C. The Mitigation Tariff**

8. Duke Florida states that the Mitigation Tariff filing provides necessary detail regarding the implementation of the mitigation proposal presented in the Application (described further below). Duke Florida maintains that the Proposed Transaction does not present horizontal market power concerns, and states that it will implement the Mitigation Tariff only if the Commission conditions acceptance of the section 203 Application upon implementation of the proposed mitigation.

## **II. Notice of Filings and Responsive Pleadings**

9. Notice of the Application was published in the *Federal Register*, 80 Fed. Reg. 15,209 (2015), with interventions and protests due on or before April 27, 2015.

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<sup>12</sup> *Id.* at 8-9.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.* at 11.

Seminole Electric Cooperative, Inc. (Seminole) filed a timely motion to intervene and request for clarification. Duke Florida filed an answer to Seminole's request for clarification.

10. On May 20, 2015, Commission staff sent Applicants a letter requesting additional information regarding Applicants' horizontal market power study (Information Request). On June 4, 2015, Applicants submitted a response to the Information Request (Response). Notice of the Response was published in *Federal Register*, 80 Fed. Reg. 33,511 (2015), with interventions and protests due on or before June 18, 2015. None was filed.

11. Notice of the Mitigation Tariff filing was published in the *Federal Register*, 80 Fed. Reg. 31,368 (2015), with interventions and protests due on or before June 17, 2015. Osprey and Seminole filed timely motions to intervene.

12. On June 23, 2015, Duke Florida filed a supplement to the Application (Supplement), informing the Commission that it may acquire the remainder of the ownership interest in the Intercession City Plant Unit 11 (Unit 11), a resource attributed to Georgia Power in the Application's competition analysis. Duke Florida states that the output of Unit 11 (143 MW summer rating) was not deemed to be economic in Applicants' competition analysis, so a change of control would not affect the competitive screens. Notice of the Supplement was published in the *Federal Register*, 80 Fed. Reg. 38,191 (2015), with interventions and protests due on or before July 2, 2015. No responsive comments were filed.

### **III. Discussion**

#### **A. Procedural Matters**

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>16</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceedings in which they filed them.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>17</sup> prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept Duke Florida's answer because it has provided information that assisted us in our decision-making process.

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<sup>16</sup> 18 C.F.R. § 385.214 (2014).

<sup>17</sup> 18 C.F.R. § 385.213(a)(2) (2014).

**B. Substantive Matters****1. Standard of Review Under FPA Section 203**

15. FPA section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.<sup>18</sup> The Commission's analysis of whether a transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>19</sup> FPA section 203(a)(4) also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."<sup>20</sup> The Commission's regulations establish verification and informational requirements for entities that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.<sup>21</sup>

**2. Analysis of the Proposed Transaction****a. Effect on Horizontal Competition****i. Applicants' Analysis**

16. Applicants state that the Proposed Transaction presents no horizontal market power concerns, because Duke Florida already controls the Osprey Energy Center pursuant to a tolling agreement under which Duke Florida has authority to decide when the facility is available for operation. Therefore, Applicants assert that the Proposed Transaction will have no effect on concentration. Applicants state that the tolling

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<sup>18</sup> 16 U.S.C. § 824b(a)(4) (2012). Approval of the Proposed Transaction is also required by other regulatory agencies pursuant to their respective statutory authority before the Proposed Transaction may be consummated. See Application Exhibit L. Our findings under FPA section 203 do not affect those agencies' evaluation pursuant to their respective statutory authority.

<sup>19</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

<sup>20</sup> 16 U.S.C. § 824b(a)(4) (2012).

<sup>21</sup> 18 C.F.R. § 33.2(j) (2014).

agreement eliminates any overlap between generation facilities owned by Duke Florida and its affiliates, on the one hand, and the Osprey Energy Center, on the other hand.<sup>22</sup>

17. Nevertheless, Applicants submit a delivered price test under the assumption that Osprey controls the Osprey Energy Center (i.e., it assumes the tolling agreement does not allocate the capacity of the Osprey Energy Center to Duke) and recognizes that post-transaction firm transmission into the Duke Florida balancing authority area is limited to the 249 MW available under the service agreement with Tampa Electric Company. Applicants state that the Proposed Transaction passes the Commission's indicative Herfindahl-Hirschman Index (HHI) screens in all but one period under these conditions.<sup>23</sup> Applicants state that the one screen failure occurred during the summer off-peak time period, where there was an increase in HHI of 100 in a highly concentrated market.<sup>24</sup>

18. Applicants state that this screen failure and additional screen failures in a further sensitivity analysis in which prices were increased by 10 percent<sup>25</sup> are not indicative of competitive concerns for a number of reasons.<sup>26</sup> First, Applicants state that baseload capacity, like the Osprey Energy Center and much of Duke Florida's existing generation

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<sup>22</sup> Application at 13-14.

<sup>23</sup> The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails the relevant screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of Horizontal Market Power under the Federal Power Act*, Order Reaffirming Commission Policy and Terminating Proceeding, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

<sup>24</sup> Application at 14.

<sup>25</sup> This sensitivity analysis results in screen failures during six periods where the HHI increases between 95 and 2,015 points in a highly concentrated market.

<sup>26</sup> *Id.* at 15.

fleet, is not well-suited for a withholding strategy, “as it tends to be on the flat portion of the supply curve,” meaning that withholding such generation would be unlikely to raise prices enough to offset revenues from foregone sales.<sup>27</sup>

19. Second, Applicants state that Duke Florida is subject to federal and state restrictions that limit both the incentive and the ability to increase market prices. Applicants state that Duke Florida does not have market-based rate authority in Peninsular Florida. Applicants state that Duke Florida is required to credit back to its retail customers all gains from short-term wholesale sales that are at or below a three-year average approved by the Florida Commission. Above that three-year average level, Duke Florida must credit retail customers with 80 percent of the gains. Applicants state that this substantially limits any theoretical benefit that Duke Florida’s shareholders might derive from higher wholesale prices.<sup>28</sup>

20. Third, Applicants explain that the market for non-requirements, short-term wholesale power sales in the Duke Florida balancing authority area has low trading volume (less than 60,000 MWh in 2012-2013) and, therefore, there is not a significant opportunity to profit from an attempt to raise prices.<sup>29</sup>

21. Fourth, Applicants explain that the Proposed Transaction does not eliminate a competitor in the Duke Florida balancing authority area because the Osprey Facility is located in the Tampa Electric Company balancing authority area and prior to entering into the tolling agreement with Duke Florida, Osprey had made only limited sales in the Duke Florida balancing authority area. Further, Applicants assert that the results of the screens will not be materially different for a transaction in which Duke Florida builds a plant comparable to the Osprey Energy Center and Osprey continues to own and operate the Osprey Energy Center.<sup>30</sup> Applicants state that, because Duke Florida must increase its generation capacity to meet load growth and a 20 percent reserve margin required by the Florida Commission, if Duke Florida does not acquire the Osprey Energy Center, it will construct, own and operate Suwannee Combustion Turbines with an estimated capacity of 320 MW.<sup>31</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 16.

<sup>29</sup> *Id.* at 16-17.

<sup>30</sup> *Id.* at 17.

<sup>31</sup> *Id.* at 17-18.

22. Finally, Applicants state that Osprey should not be viewed a future competitor of Duke Energy because “there is a substantial likelihood that the Osprey Energy Center will be shut down” if the Proposed Transaction is not consummated.<sup>32</sup> Applicants explain that where “imminent failure” may “cause the assets of [a] firm to exit the relevant market . . . the [post transaction] performance in the relevant market may be no worse than market performance had the [transaction] been blocked and the assets left the market.”<sup>33</sup> Applicants explain that the Osprey Energy Center is an “economically challenged” facility that “faces a bleak future” if the Proposed Transaction cannot be consummated when the existing tolling agreement expires in 2017. In this regard, Applicants explain that other competitive generators in Peninsular Florida have been shutting down.<sup>34</sup>

**ii. Proposed Mitigation**

23. Duke Florida’s proposed mitigation would be in place from January 2, 2017 (i.e., the date of expiration of the tolling agreement) through December 31, 2018 (or a corresponding 24-month period if the Proposed Transaction closes before or after January 2, 2017) to address the screen failures when post-transaction firm transmission into the Duke Florida balancing authority area is limited to 249 MW under prices that are 10 percent higher than the base prices.<sup>35</sup> This analysis shows that the Proposed Transaction fails the Commission screens in six time periods. Duke Florida’s mitigation proposal is intended to address these screen failures. Under its proposal, Duke Florida commits to offer up to 244 MW on a must offer day-ahead basis to the extent that capacity is available from the Osprey Energy Center (Available Osprey Energy), to the extent that such energy is not committed to serve Duke Florida’s retail and wholesale native load, and is not subject to a planned outage, maintenance outage, or forced outage, or unavailable due to Tampa Electric Company transmission curtailment or interruption.<sup>36</sup>

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<sup>32</sup> *Id.* at 18.

<sup>33</sup> *Id.* (U.S. Dept. of Justice & Federal Trade Commission, “Horizontal Merger Guidelines” (1992), as revised (1997) at 33-34).

<sup>34</sup> *Id.* at 19.

<sup>35</sup> *Id.* at 22.

<sup>36</sup> *Id.*

24. Duke Florida proposes to offer Available Osprey Energy up to the following amounts in the six time periods in which there are screen failures: 231 MW Summer Peak; 244 MW Summer Off-Peak; 244 MW Winter Peak; 244 MW Winter Off-Peak; 157 MW Shoulder Peak and 17 MW Shoulder Off-Peak. Specifically, Duke Florida proposes to offer Available Osprey Energy on a business day-ahead basis in three blocks: 16-hour weekday on-peak block, an 8-hour weekday off-peak block, and a 24-hour block on weekends and North American Electric Reliability Corporation holidays.

25. Applicants state that Duke Florida will not hold back otherwise Available Osprey Energy to make day-ahead or next-hour off system sales provided the Osprey Energy Center will meet its minimum operating threshold of 157 MW or the Osprey Energy Center is off line for scheduled maintenance or a forced outage, or Tampa Electric Company curtails or interrupts the firm partial path point-to-point transmission.<sup>37</sup>

26. Applicants state that Duke Florida may recall Available Osprey Energy if: (1) Duke Florida experiences a change in load or a loss of a generating resource that cause the Available Osprey Energy to be needed to serve native load; (2) the Osprey Energy Center becomes unavailable or derated; or (3) Tampa Electric Company curtails or interrupts the firm partial path point-to-point transmission. Under these conditions, each buyer will be provided one hour's notice and will have the option to curtail or interrupt the transaction for the period and by the amount that Duke Florida determines that the Osprey Energy will not be available to continue the transaction or continue selling energy, but at Duke Florida's additional costs based on the generator that will be available or that will need to be committed to complete the transaction. Applicants state that when the buyer fails to take delivery, it will be obligated to pay the entire purchase price of the transaction, except that, if the failure to take delivery is caused by a transmission curtailment or interruption, Duke Energy, at its discretion, may either terminate or repurchase the Osprey Energy at 90 percent of Duke Energy's projected decremental cost during the period of the transmission curtailment.<sup>38</sup>

27. Applicants state that the Available Osprey Energy will be priced according to the Osprey Energy Center heat rate at the highest MW of Available Osprey Energy availability times a publicly-available gas index price (including delivery costs), plus \$1.78MW-hour, which is the cost of variable operation and maintenance for the Osprey Energy Center adjusted for startup costs.<sup>39</sup> Applicants state that Duke Florida will

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<sup>37</sup> *Id.* at 24.

<sup>38</sup> *Id.* at 25.

<sup>39</sup> *Id.*

establish an internet site with price and information for arranging the purchase and will retain records pursuant to the mitigation for three years following the conclusion of the mitigation.

**iii. Deficiency Response**

28. In their Response, Applicants provide the information requested by Commission staff, including revised simultaneous transmission import limit (SIL) files, updated information to reflect the 2017 closing of the Proposed Transaction, additional delivered price test sensitivities, and further details regarding certain calculations and inputs in the delivered price test modeling. Applicants provide a revised delivered price test based on 2017 conditions updating load and resource projections and a revised 2017 SIL study. Applicants state that the results of this delivered price test do not present any additional screen failures than the delivered price test originally submitted, and Duke Energy does not have any additional available economic capacity.<sup>40</sup>

29. Applicants state that using 2016 conditions, but with the upgrades at the Hines Energy Center included, is a conservative approach rather than using 2017 data. Applicants state that Duke Florida's uncommitted capacity would be less in 2017 than 2016 because of the forecasted increase in load and a reduction in resources.<sup>41</sup> Applicants' delivered price test analysis for available economic capacity under these updated conditions for 2016 shows one screen failure during the summer off-peak period for base prices, six screen failures under those conditions when prices are raised by 10 percent, and no screen failures when prices are reduced by 10 percent. For the updated 2017 conditions, Applicants' analysis shows two screen failures during the summer peak and shoulder peak under base prices, four screen failures when prices are raised by 10 percent, and one screen failure when prices are reduced by 10 percent.<sup>42</sup>

30. For comparison, Applicants submitted a delivered price test analysis that shows the resultant HHI change if, in 2017, the new combustion turbines at Suwannee were built and the Osprey Energy Center were retired from service. In that scenario, Applicants' analysis shows two screen failures during the summer peak and shoulder peak under base prices, two screen failures when prices are raised by 10 percent, and one screen failure when prices are reduced by 10 percent.<sup>43</sup>

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<sup>40</sup> Applicants' Response at 5.

<sup>41</sup> *Id.* at 4.

<sup>42</sup> *Id.*, Ex. B.

<sup>43</sup> *Id.*, Ex C.

iv. **Commission Determination**

31. As an initial matter, we decline to consider the tolling agreement between Applicants as obviating the need for the submission of a horizontal market power analysis. The tolling agreement was entered into on or near the same time as the agreement governing the Proposed Transaction and is linked. We will therefore not attribute the capacity of the Osprey Energy Center as Duke Florida's capacity before the Proposed Transaction for analyzing the effect on competition.

32. In Order No. 642, the Commission stated it will look beyond the HHI screens if a transaction proposed under section 203 does not meet the HHI thresholds set forth in the Merger Policy Statement. The Commission clarified that applicants with screen failures could address market conditions beyond the change in HHI "such as demand and supply elasticity, ease of entry and market rules, as well as technical conditions, such as the types of generation involved."<sup>44</sup> In the Supplemental Policy Statement, the Commission stated that "in horizontal mergers, if an applicant fails the Competitive Analysis Screen (one piece of the Appendix A analysis), the Commission's analysis focuses on the merger's effect on the merged firm's ability and incentive to withhold output in order to drive up the market price."<sup>45</sup>

33. Based on a review of the details of the Proposed Transaction, along with the evidence presented by Applicants, we find that the Proposed Transaction does not raise horizontal market power concerns. Our finding is based upon the specifics of this transaction, and relies upon several factors.

34. Applicants present a situation in which the change in HHI may overstate the effect on competition because of the specific circumstances of the Proposed Transaction. As Applicants note, the increase in Duke Florida's market share is driven largely by the increase in its available economic capacity that is entering the market. There is no corresponding reduction in available economic capacity in the market because a competitor in the market is not being eliminated. Moreover, Applicants indicate in this record that there is a need to increase Duke Florida's capacity to meet projected native load and a required reserve margin.

35. To meet this need for increased capacity, Applicants have initiated a proceeding before the Florida Commission that seeks an order that authorizes the Proposed Transaction or the construction of the Suwannee Combustion Turbines. Applicants state

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<sup>44</sup> *Duke Energy Corporation*, 136 FERC ¶ 61,245, at P 126 (2011).

<sup>45</sup> Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 60 (emphasis in original).

that the Proposed Transaction is preferable because it is the lower cost option of the two alternatives and holds certain reliability and environmental benefits. Although not conclusive, we note that the effect on competition of the Proposed Transaction is largely the same as the effect on competition of the alternative scenario, in which Duke Florida builds the Suwannee Combustion Turbines.<sup>46</sup> Further, Applicants have presented evidence that, absent the Proposed Transaction, at the expiration of the tolling agreement there is a likelihood that the Osprey Energy Center will exit the market, eliminating the supply from the Osprey Energy Center available to both the Duke Florida market as well as the Tampa Electric Company market. Therefore, the competitive effect of the Proposed Transaction is not substantially different than the likely alternative should the Proposed Transaction not occur.

36. Further, as Applicants note, in this case there are factors that reduce any potential ability or incentive to exercise market power, including a regulatory requirement for Duke Florida to credit all gains from short-term wholesale sales below a three-year average back to its retail customers and 80 percent of sales from wholesale off-system sales above that level to its retail customers, which would limit the incentive to make wholesale sales at elevated prices. Applicants also point to the “thin market” for non-requirements wholesale energy and state that there is not enough opportunity to raise prices, which limits the ability to gain or sustain any price increase. Further, Duke Florida is limited to cost-based sales in Peninsular Florida, which also limits the ability to profit from exercising its potential market power. The Commission has previously held that factors such as these demonstrate a lack of ability and incentive to exercise market power.<sup>47</sup>

37. Because we find that the Proposed Transaction does not raise horizontal market power concerns, we find that Duke Florida’s proposed mitigation is not necessary. As Duke Florida indicated in its filing, its adoption of the Mitigation Tariff is contingent upon the Commission requiring mitigation in the instant section 203 proceeding; since we do not require mitigation we reject the Mitigation Tariff as moot.

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<sup>46</sup> Application, Att. 1 at 3 and 8; Applicants’ Response at 3.

<sup>47</sup> See *Silver Merger Sub, Inc.*, 145 FERC ¶ 61,261, at P 36 (2013) (finding a provision to credit captive customers with off-system sales revenues and the need to purchase power to serve load to be indicators of a lack of market power); *Arizona Pub. Serv. Co.*, 141 FERC ¶ 61,154, at P 33 (2012) (finding a number of factors specific to that transaction mitigate market power, including: the type of facility, joint ownership, length of contracts, mechanism to credit back sales revenues to captive customers, and a lack of ability and incentive to withhold or raise prices).

**b. Effect on Vertical Competition****i. Applicants' Analysis**

38. Applicants state that the Proposed Transaction presents no vertical market power concerns. Applicants state that the Proposed Transaction does not involve any electric transmission facilities, other than the facilities used to interconnect the Osprey Energy Center to the transmission grid, or any other upstream inputs to electricity products. Applicants state that access to electric transmission facilities owned and controlled by Duke Florida and its affiliates is available on an open access basis pursuant to the terms of a joint open access transmission tariff. Applicants conclude that the Proposed Transaction presents no vertical market power concerns.<sup>48</sup>

**ii. Commission Determination**

39. With respect to vertical competition, the Commission has found that combining electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel) can harm competition if a transaction increases the ability or incentive of the parties to exercise vertical market power in wholesale electricity markets.<sup>49</sup> For example, by denying rival firms access to inputs or by raising their input costs, a firm could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.<sup>50</sup> Here there is no new combination of inputs to generation with the Osprey Energy Center. Additionally, Duke Florida's transmission facilities will continue to be subject to a Commission-approved open access transmission tariff.<sup>51</sup> Based on Applicants' representations, we find that there are no vertical market power concerns resulting from the Proposed Transaction.

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<sup>48</sup> Application at 29.

<sup>49</sup> See *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012) (*Exelon*).

<sup>50</sup> *Id.*

<sup>51</sup> See *Duke Energy Corp.*, 139 FERC ¶ 61,193 (2012) (accepting a joint open access transmission tariff for Duke Energy Carolina, Carolina Power & Light, and Duke Florida).

**c. Effect on Rates**

**i. Applicants' Analysis**

40. Applicants state that the Proposed Transaction will not have an adverse effect on rates. First, Applicants state that Osprey makes sales at market-based rates. Applicants also explain that each of Duke Florida's wholesale requirements contracts contains fixed demand charges that will not automatically adjust to reflect the costs of the Osprey Energy Center. Applicants state that to include those costs in the demand charges in those contracts, Duke Florida would have to submit a separate filing under section 205 of the FPA.<sup>52</sup> The contracts also include a fixed energy component and a variable energy component, which reflect actual fuel and variable operating and maintenance expenses incurred by Duke Florida. Applicants state that Duke Florida commits to hold wholesale requirements customers, as well as transmission customers, harmless from transaction-related costs for a period of five years starting with the date on which the Proposed Transaction is consummated absent a filing under section 205 of the FPA demonstrating that transaction-related costs are exceeded by transaction-related savings.<sup>53</sup> Applicants explain that the Proposed Transaction does not involve any transmission facilities other than those necessary to interconnect the Osprey Energy Center with Tampa Electric Company's transmission system, and such facilities are not the type of facilities that would be included in Duke Florida's transmission rate base or would otherwise impact rates.<sup>54</sup>

**ii. Request for Clarification**

41. Seminole asks that Applicants clarify whether the Proposed Transaction, as described in the Application, includes only certain limited facilities necessary to interconnect the Osprey Energy Center with Tampa Electric Company's transmission system, or, in addition, approximately \$150 million in additional transmission facilities to directly connect the Osprey Energy Center to Duke Florida's system, as described in Duke Florida's petition at the Florida Commission.<sup>55</sup>

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<sup>52</sup> Application at 31.

<sup>53</sup> *Id.* at 31-32.

<sup>54</sup> *Id.* at 32.

<sup>55</sup> Seminole Request at 4.

**iii. Answer**

42. Duke Florida states that, through discussions with Seminole's counsel, it understands that Seminole seeks clarification whether the costs associated with future network transmission upgrades are covered by Duke Florida's hold harmless commitment. In that regard, Duke Florida states that it has informed Seminole that Duke Florida does not consider the costs associated with future transmission network upgrades to be subject to a hold harmless commitment that would affect Duke Florida's ability to recover a portion of such costs through Commission-jurisdictional transmission rates. Duke Florida does not intend for the costs it incurs for the new transmission network upgrades to be treated as "Transaction-related costs" subject to the hold harmless commitment that Duke Florida made in connection with the Proposed Transaction.<sup>56</sup>

**iv. Commission Determination**

43. We emphasize at the outset that our analysis of rate effects under section 203 of the FPA differs from the analysis of whether rates are just and reasonable under section 205 of the FPA. Our focus here is on the effect that the Proposed Transaction will have on jurisdictional rates, whether that effect is adverse, and whether any adverse effect will be offset or mitigated by benefits that are likely to result from the Proposed Transaction.<sup>57</sup>

44. Based on the record in this proceeding, we find that Applicants have shown that the Proposed Transaction will not have an adverse effect on rates. We accept Duke Florida's commitment to hold customers harmless for five years from costs related to the Proposed Transaction. We interpret Duke Florida's hold harmless commitment to apply to all transaction-related costs, including costs related to consummating the Proposed Transaction and transition costs. As noted above, Applicants clarified that the hold harmless commitment does not include future costs that may be needed to directly interconnect the Osprey Facility to the Duke Florida transmission system. Regardless of

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<sup>56</sup> Applicants' Answer at 3.

<sup>57</sup> See, e.g., Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123 (noting that an increase in rates "can be consistent with the public interest if there are countervailing benefits that derive from the transaction"); see also *ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 24 (2010); *ALLETE, Inc.*, 129 FERC ¶ 61,174, at P 19 (2009); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307, at PP 25-28 (2008); *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at PP 120-128 (2007).

the terms of Duke Florida's hold harmless commitment, we remind Duke Florida that the Commission historically has not permitted rate recovery of acquisition premiums.<sup>58</sup>

45. The Commission has established that, where applicants make hold harmless commitments in the context of section 203 transactions, in order to recover transaction-related costs, applicants must demonstrate offsetting benefits at the time they apply to recover those costs. The Commission has clarified its procedures for recovery of such costs under FPA sections 203 and 205.<sup>59</sup> Consistent with those clarifications, and given Duke Florida's commitment to hold wholesale requirements customers and transmission customers harmless from transaction-related costs, if Duke Florida seeks to recover transaction-related costs incurred prior to the consummation of the Proposed Transaction or in the five years after the consummation of the Proposed Transaction, then Duke Florida must make that filing in a new FPA section 205 docket<sup>60</sup> and submit that same filing as a concurrent informational filing in this FPA section 203 docket.<sup>61</sup> The Commission will notice the new section 205 filing for public comment.

46. In the FPA section 205 proceeding, the Commission will determine first, whether Duke Florida has demonstrated offsetting savings, supported by sufficient evidence, to customers served under Commission jurisdictional rate schedules such that recovery of transaction-related costs is consistent with the hold harmless commitment and, second, whether the resulting new rate is just and reasonable in light of all the other factors underlying the proposed new rate. In the FPA section 205 filing, Duke Florida must: (1) specifically identify the transaction-related costs it is seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the Proposed Transaction. Duke Florida must show that the proposed rate is just and reasonable in addition to providing appropriate evidentiary support, such as reasonable documentation and estimates of the costs avoided, demonstrating that transaction-related costs have been offset by transaction-related savings in order to recover those transaction-related costs and comply with its hold harmless commitment. Those savings must be realized prior to, or concurrent with, any authorized recovery of transaction-related costs, and cannot be based on estimates or projections of future savings, but must be based on a demonstration

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<sup>58</sup> *Exelon*, 138 FERC ¶ 61,167 at P 118.

<sup>59</sup> *Exelon Corp.*, 149 FERC ¶ 61,148, at PP 106-109 (2014).

<sup>60</sup> The Commission will not authorize the recovery of transaction-related costs in an annual informational filing under existing formula rates.

<sup>61</sup> Upon receipt, the Commission will not act on or notice the concurrent informational filing.

of actual transaction-related savings realized by jurisdictional customers.<sup>62</sup> The Commission will consider rates not to be “just and reasonable” if they include recovery of costs subject to a hold harmless commitment made in connection with an FPA section 203 application and if applicants fail to show offsetting savings due to the transaction.<sup>63</sup>

47. The Commission will be able to monitor Duke Florida’s hold harmless commitment under its authority under FPA section 301(c)<sup>64</sup> and the books and records provision of the Public Utility Holding Company Act of 2005.<sup>65</sup> Moreover, the commitment is fully enforceable based on the Commission’s authority under FPA section 203.

**d. Effect on Regulation**

**i. Applicants’ Analysis**

48. Applicants state that the Proposed Transaction will not have an adverse effect on federal or state regulation. Applicants state that the wholesale sales of the output of the Osprey Energy Center will continue to be subject to the Commission’s jurisdiction. Further Applicants state the Proposed Transaction will not affect the ability of the Florida Commission to regulate retail rates.<sup>66</sup>

**ii. Commission Determination**

49. We find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. The Proposed Transaction will not create a regulatory gap at the federal level, and no state has alleged that it lacks the authority to review the Proposed Transaction or raised concerns about the effect of the merger on state regulation. As to the state level, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the

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<sup>62</sup> See *Audit Report of National Grid, USA*, Docket No. FA09-10-000 (Feb. 11, 2011) at 55; see also *Ameren Corp.*, 140 FERC ¶ 61,034, at PP 36-37 (2012).

<sup>63</sup> *Exelon Corp.*, 149 FERC ¶ 61,148 at P 107.

<sup>64</sup> 16 U.S.C. § 825(c) (2012).

<sup>65</sup> 42 U.S.C. § 16452 (2012).

<sup>66</sup> Application at 32-33.

Commission may set the issue for hearing and it will address such circumstances on a case-by-case basis.<sup>67</sup>

e. **Cross-Subsidization**

i. **Applicants' Analysis**

50. Applicants assert that, based on facts and circumstances known to them or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns, or provides transmission service over, jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contracts between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and service agreements subject to review under sections 205 and 206<sup>68</sup> of the FPA.<sup>69</sup>

ii. **Commission Determination**

51. We find that, based on Applicants' representations, the Proposed Transaction will not result in the cross-subsidization of a non-utility associate company by a utility company, or in a pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

3. **Accounting Entries**

52. Attachment 7 of the Application includes proposed accounting entries recording Duke Florida's acquisition of the Osprey Energy Center.<sup>70</sup> Applicants propose to clear

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<sup>67</sup> Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

<sup>68</sup> 16 U.S.C. § 824e (2012).

<sup>69</sup> Application at Ex. M.

<sup>70</sup> Applicants represent that they will submit final accounting entries to the

(continued...)

the acquisition through Account 102, Electric Plant Purchased or Sold, and record the original cost of the Facility and related accumulated depreciation on their books. Duke Florida anticipates a negative acquisition adjustment representing the difference between the net book value of the assets acquired and the consideration to be paid. Duke Florida proposes to record the amount as a credit to Account 114, Electric Plant Acquisition Adjustments and then clear Account 114 to Account 108, Accumulated Provision for Depreciation of Electric Utility Plant.

53. The proposed recording of the facility on Duke Florida's books at depreciated original cost is consistent with the Commission's Uniform System of Accounts.<sup>71</sup> Also, the Commission has held that negative acquisition adjustments recorded in Account 114 should be cleared to Account 108.<sup>72</sup>

#### **4. Other Considerations**

54. Order No. 652 requires that sellers with market-based rate authority 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>73</sup> To the extent that the foregoing authorization results in a change in status, Applicants are advised that they must comply with the requirements of Order No. 652.

55. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215.<sup>74</sup> Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information database, and operating systems. If affiliates, personnel or

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Commission within six months of closing of the Transaction.

<sup>71</sup> Electric Plant Instruction (EPI) No. 5, Electric Plant Purchased or Sold, and Instructions to Account 102, Electric Plant Purchased or Sold, 18 C.F.R. Part 101 (2014).

<sup>72</sup> See, e.g., *Southwestern Public Service Company and New Mexico Electric Service Company*, 23 FERC ¶ 61,153 (1983).

<sup>73</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). See 18 C.F.R. § 35.42 (2014).

<sup>74</sup> 16 U.S.C. § 824o (2012).

investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

(A) The Proposed Transaction is hereby authorized, as discussed in the body of this order.

(B) The Mitigation Tariff is hereby rejected, as discussed in the body of this order.

(C) Applicants must inform the Commission of any material change in circumstances that departs from the facts or representations that the Commission relied upon in authorizing the Proposed Transaction within 30 days from the date of the material change in circumstances.

(D) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(E) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(F) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(G) Applicants shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(H) If Duke Florida seeks to recover transaction-related costs through its transmission rates, it must make a filing in a new FPA section 205 docket and submit concurrently an informational filing in the instant FPA section 203 docket. In the FPA section 205 filing, Duke Florida must: (1) specifically identify the transaction-related costs they are seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the transaction.

(I) Duke Florida shall account for the Proposed Transaction in accordance with the instructions to Electric Plant Instruction No. 5, Account 102, Electric Plant Purchased or Sold, and Account 114, Electric Plant Acquisition Adjustments of the Uniform System of Accounts. Duke Florida shall submit its final accounting entries within six months of the date that the transaction is consummated, and the accounting submissions shall provide all the accounting entries and amounts related to the transfer along with narrative explanations describing the basis for the entries.

(J) Applicants shall notify the Commission within 10 days of the date on which the Proposed Transaction is consummated.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.