

155 FERC ¶ 61,192
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Florida Power & Light Company

Docket No. ER16-628-001

ORDER ACCEPTING MARKET-BASED RATE TARIFF REVISIONS SUBJECT TO
CONDITION

(Issued May 20, 2016)

1. In this order, we accept, subject to condition, tariff revisions filed by Florida Power & Light Company (FPL) on December 23, 2015, to become effective May 21, 2016, as requested. As discussed below, we conclude that FPL may remove certain restrictions on its market-based rate authority from its market-based rate tariff. FPL is directed to submit a compliance filing within 30 days of the date of this order to revise its market-based rate tariff, as discussed below.

I. Background

2. On December 23, 2015, as amended on March 21, 2016, pursuant to section 205 of the Federal Power Act,¹ FPL submitted a market power analysis and proposed revisions to its market-based rate tariff.² FPL explains that its market-based rate tariff currently authorizes FPL to engage in sales of energy, capacity, and ancillary services

¹ 16 U.S.C. § 824d (2012).

² On February 19, 2016, the Director of the Division of Electric Power Regulation – West issued a letter under delegated authority directing FPL to submit additional information with respect to its December 23, 2015 filing. Florida Power & Light Co., Docket No. ER16-628-000 (Feb. 19, 2016) (delegated letter order). FPL submitted its response to the letter on March 21, 2016.

at market-based rates outside of Peninsular Florida.³ FPL proposes to amend its market-based rate tariff to authorize sales within the Peninsular Florida balancing authority areas of Florida Power Corporation (d/b/a Duke Energy Florida, LLC) (Duke Florida), Jacksonville Electric Authority (Jacksonville Electric), Seminole Electric Cooperative (Seminole), Tampa Electric Company (Tampa Electric), and City of Tallahassee (Tallahassee). FPL does not seek authorization for market-based rate sales in the FPL balancing authority area or several other balancing authority areas within Peninsular Florida.

3. FPL states that it is a franchised public utility that provides wholesale and retail electric service to customers in Florida. It represents that it owns approximately 24,100 megawatts (MW) of generation in Peninsular Florida, and a 76 percent share (656 MW, summer rating) of a facility located in the Southern Company balancing authority area, and has long-term firm power purchases totaling 1,694 MW. In addition, FPL owns transmission facilities in Florida, and those transmission facilities are administered pursuant to the FPL Open Access Transmission Tariff (OATT).

4. FPL states that it is a wholly-owned direct subsidiary of NextEra Energy, Inc. (NextEra). FPL states that through NextEra Energy Resources, LLC (NextEra Resources), NextEra owns or operates merchant generating facilities in the U.S. and Canada with a combined net generating capacity of over 19,000 MW. However, FPL states that none of the NextEra Resources generating facilities are located in the Southeast region. FPL states that two power marketers owned by NextEra Energy Resources – NextEra Energy Power Marketing, LLC (NEPM) and NEPM II, LLC (NEPM II) – are authorized by the Commission to sell power at market-based rates within the Southeast region. FPL states that each of the market-based rate tariffs held by NextEra Resource entities, including NEPM and NEPM II, contains a restriction prohibiting sales of energy or capacity to, or purchases of energy or capacity from, Peninsular Florida, without first receiving advance approval from the Commission pursuant to section 205 of the Federal Power Act. In addition, NextEra Resource

³ FPL has a voluntary limitation on its market-based rate authority with respect to sales within Peninsular Florida. *See* FPL's December 23, 2015 Filing at 1 n.5; *Florida Power & Light Co.*, 81 FERC ¶ 61,107, at 61,394 (1997) ("In addition, FP&L recognizes that the Commission previously has established trial-type evidentiary hearings to address the impact of any transmission constraints into Peninsular Florida. In an effort to avoid litigation on this issue here, FP&L proposes to limit its sales at market-based rates, to customers located outside of Peninsular Florida." (footnotes omitted)). FPL's market-based rate tariff defines Peninsular Florida as the area in the State of Florida located east of the Apalachicola River.

entities and NextEra Energy Transmission, LLC own various interconnection and transmission facilities that either have OATTs on file or have received waiver of the OATT requirement.

II. Notice of Filings

5. Notice of FPL's December 23, 2015 and March 21, 2016 filings was published in the *Federal Register*,⁴ with interventions and protests due on or before April 11, 2016.

6. On January 4, 2016, Seminole filed a motion to intervene and comments. On January 7, 2016, Florida Municipal Power Agency (FMPA) filed a motion to intervene.⁵ On January 12, 2016 and on January 14, 2016, Tampa Electric and Reedy Creek Improvement District each filed a motion to intervene. On January 29, 2016, the Orlando Utilities Commission (Orlando), Tampa Electric and Jacksonville Electric each filed a motion to intervene and comments; the City of Homestead, Florida, filed a motion to intervene and protest; and Seminole and FMPA filed a joint protest. On February 8, 2016, FPL filed an answer. On February 11, 2016, Seminole and FMPA filed an answer to FPL's February 8, 2016 answer. On April 11, 2016, Seminole and FMPA filed comments on FPL's March 21, 2016 filing.

7. The comments and protests primarily concern whether the relevant geographic market for purposes of determining whether FPL satisfies the Commission's requirements for market-based rate authorization is a single market consisting of all of Peninsular Florida or individual balancing authority areas within Peninsular Florida. In addition, some of the comments pertain to clarifying certain tariff provisions.

8. Tampa Electric states that the proposed revised language in Section 8(a) of the tariff provides that sales at market-based rates will be limited to customers within the specified balancing authority areas as stated above and Tampa Electric requests clarification as to whether FPL seeks authorization to sell at the metered boundaries

⁴ 80 Fed. Reg. 81,539 (2015); 81 Fed. Reg. 16,172 (2016).

⁵ Seminole's January 4, 2016 motion to intervene included a motion for an extension of time to respond to FPL's December 23, 2015 filing, which was granted. *See* Notice of Extension of Time, Docket No. ER16-628-000 (Jan. 11, 2016) (extending deadline from January 13, 2016 to January 29, 2016). In FMPA's January 7, 2016 motion to intervene, FMPA represented that it supports Seminole's motion for an extension of time. The intervention deadline was further extended to April 11, 2016 in light of FPL's March 21, 2016 amendment.

of the balancing authority areas specified in its application, as well as within those balancing authority areas. Tampa Electric states that if such authorization is intended by FPL and granted by the Commission, then it is important that the meaning of the pertinent conditions in the Mitigated Sales provision (Section 2 of the tariff) be clearly understood by FPL and its customers and competitors.

9. Seminole, in its January 4, 2016 comments, states that the “Applicability” section of FPL’s market-based rate tariff (Section 3) is seemingly inconsistent with the relief FPL is seeking in this proceeding and will need to be revised. Section 3 states that the tariff is applicable to all sales of energy and/or capacity outside of Peninsular Florida not otherwise subject to a particular rate schedule.

10. Orlando states that if FPL is allowed to sell power and energy in additional balancing authority areas in Florida, this will have a significant impact on transmission and generation planning and energy markets throughout Florida. Orlando states that if FPL receives market-based rate authority in additional balancing authority areas in Florida, it may intentionally or unintentionally favor market-based rate eligible purchasers over others and would allow FPL to exert undue market power.

11. In Seminole’s and FMPA’s January 29, 2016 protest, they argue that the Commission should reject FPL’s proposal or, alternatively, set the matter for hearing and settlement judge procedures. They state that recognition of the correct geographic market, which they contend is the entire Peninsular Florida market, materially changes the results of the market power analyses. They contend that while FPL passes the market share screens for the four first-tier balancing authority areas individually, FPL fails the market share screen when Peninsular Florida as a whole is recognized to be the relevant geographic market.

12. Seminole and FMPA assert that FPL’s request should be rejected because, contrary to the Commission’s direction in Order No. 697,⁶ FPL has failed to provide an analysis of each of its first-tier balancing authority areas. They state that FPL provided the results of the analysis for those balancing authority areas for which FPL

⁶ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh’g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *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. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

seeks market-based rate authority, but has not provided the data and results with respect to the balancing authority areas for which FPL apparently recognizes that it would fail the Order No. 697 screens and hence for which FPL does not seek such authority.

13. Seminole and FMPA state that Peninsular Florida is essentially an electrical island with a highly concentrated wholesale market dominated by two sellers of electric capacity and energy with FPL owning or controlling over 40 percent of the Florida Regional Coordinating Council's (FRCC) total capacity. Seminole and FMPA cite the limited Florida/Georgia interface and assert that consumers in Peninsular Florida are dependent on Peninsular Florida's own generation assets for nearly 95 percent of their capacity needs. They further assert that FPL's dominance in Peninsular Florida is exemplified by its dominance of natural gas shipping into Peninsular Florida.

14. Seminole and FMPA assert that FPL's filing is similar to an application submitted in 2003, in which a filer requested market-based rate authority in Peninsular Florida and the Commission ordered "hearing procedures to examine whether transmission constraints, if any, in and at the border of the Florida market, as well as the unique geography of Peninsular Florida, result in the applicant and its affiliates having the potential to exercise generation market power and/or transmission market power in Florida."⁷ Seminole and FMPA note that the applicants in that case subsequently withdrew their request and market-based rates for Peninsular Florida were not adopted. Seminole and FMPA assert that the geographical and electrical isolation of Florida has not subsequently changed.

15. Seminole and FMPA further identify the following structures of the Peninsular Florida wholesale electric market in support of the use of Peninsular Florida as the relevant geographical market: Peninsular Florida's balancing authority areas are characterized by loads and resources that, due to their location, overlap and are intertwined; Peninsular Florida has a single security Reliability Coordinator; Peninsular Florida has a unified reserve-sharing arrangement; transmission capacity limits are assessed on a FRCC-wide basis rather than for individual utilities within the FRCC; and Peninsular Florida's trading patterns are not restricted to balancing authority areas.

16. Seminole and FMPA contend that the reason that FPL passes the market share screen in its filing is because transmission constraints into the targeted balancing authority areas – the simultaneous transmission import limits (SILs) – operate in the screen model to prevent enough of FPL's generating capacity from being delivered to those balancing authority areas such that FPL does not exceed the 20 percent threshold

⁷ Seminole Electric and FMPA January 29 Protest at 3-4 (citing *DeSoto County Generating Co., LLC*, 105 FERC ¶ 61,245 (2003) (*DeSoto*)).

for failure of the screen. They assert that if the SILs were increased, FPL's market share would likewise increase.

17. Seminole and FMPA also argue that barriers to entry serve to preserve and enhance existing market power. They state that in Florida, there are significant barriers to entry that make a reduction in market concentration unlikely in the near-term. They state that there is limited available natural gas transportation capability into Peninsular Florida, and FPL is the dominant shipper. They also state that Florida law poses a barrier to entry, as Florida law and policy limits the construction of new generation.

18. Homestead states that it agrees with and supports Seminole's and FMPA's January 29, 2016 protest. Homestead requests that the Commission reject FPL's filing or, in the alternative, suspend the filing for five months, subject to refund, and set it for a full evidentiary hearing and settlement judge procedures.

19. Jacksonville Electric is also concerned with the timing of the proposal, in conjunction with shifts in energy infrastructure within the state. Jacksonville Electric further states that Florida's energy market and infrastructure is unique, given that Florida is a peninsula with the bulk of the state's energy demand on the coasts, which results in limited interconnections with other regional energy infrastructure such as natural gas pipelines.

20. Jacksonville Electric states that FPL should consider the potential impacts of its proposal on a state-wide basis, such as changes in demand and supply and the price for natural gas outside of the individual balancing authority areas, the impacts on the limited interconnections, and the state wide impacts related to impending state and federal regulations such as those emanating from the Clean Power Plan.

21. Lastly, Jacksonville Electric states that existing regulations and planning in the region assume that FPL will operate at cost-based rates. Jacksonville Electric states that cause for concern exists because stakeholders, including the Florida Public Service Commission, relied on existing cost-based rate analyses. Jacksonville Electric believes the proposed changes should not be approved in the absence of a more comprehensive analysis.

22. FPL filed an answer on February 8, 2016, stating that it disagrees with the argument that all of Peninsular Florida is the relevant geographic market. FPL states that in Order No. 697 the Commission stated that a broader geographic market can only be used upon a demonstration that there are no frequently binding transmission constraints between the balancing authority areas within the proposed broader market. FPL states that protesters have failed to make the required demonstration. FPL responds that Seminole's and FMPA's arguments concern previous cases that pre-date Order No. 697, do not address the Commission's current requirements with respect to departing from the balancing authority area-based default geographic market, and do not take into account

the more recent orders in which the Commission considered balancing authority areas within Peninsular Florida to be separate relevant markets.⁸ FPL notes that, in *Tampa Electric Co.*, the Commission recently accepted screen analyses using specific balancing authority areas in Peninsular Florida.⁹

23. FPL states that the Commission has been clear with respect to the types of evidence it considers in support of a request to expand the relevant geographic market (assuming the threshold determination regarding lack of transmission constraints has been met) and that such factors include the use of centralized commitment and dispatch, the existence of a single transmission rate, the use of a common OASIS for scheduling transmission across multiple systems, and a correlation in price movements within the proposed geographic market. FPL states that Seminole and FMPA fail to acknowledge and address this guidance. FPL states that Seminole and FMPA claim that transmission capacity limits in Peninsular Florida are established on an FRCC-wide basis, referring to the Florida Transmission Transfer Capability System (FTTCS). FPL states that the FTTCS, however, is a tool used by participating FRCC entities with the same North American Electric Reliability Corporation (NERC) MOD-028 calculation methodology to calculate total transmission capacity and available transmission capacity consistently with one another. FPL states that there is no common OASIS for scheduling service across the multiple transmission systems in Peninsular Florida, nor is there centralized dispatch, a single transmission rate, or any evidence presented by Seminole and FMPA of price correlations within Peninsular Florida.

24. FPL states that Seminole and FMPA argue that the unique circumstances of Peninsular Florida have been long-recognized by the Commission, pointing to materials involving the GridFlorida regional transmission organization proposal and the reserve sharing and reliability coordination in place for members of the FRCC. FPL states that each of these actual and proposed activities involved reliable system operations within an integrated transmission network, not the recognition or establishment of a single market for generation.

25. FPL disagrees with Seminole's and FMPA's argument that FPL failed to comply with Order No. 697 by not submitting market power screens for first-tier balancing authority areas in which FPL does not seek market-based rate authorization. FPL states that relevance of a geographic market involves whether a market power analysis is required in order to support a request for market-based rate authorization. FPL states

⁸ FPL February 8 Answer at 3.

⁹ *Id.* at 9 & n.32 (citing *Tampa Electric Co.*, 153 FERC ¶ 61,237 (2015)).

that market power screens are required for first-tier balancing authority areas only if the seller seeks market-based rate authorization in a specific balancing authority area.

26. With regard to Seminole's and FMPA's claim that Florida law creates a barrier to entry, FPL states that although Order No. 697 does allow intervenors to introduce evidence of barriers to entry, such barriers to entry must affect a seller's ability to exercise market power in order to be relevant. FPL further states that Seminole and FMPA offer no explanation of how those siting requirements could affect the market power analysis submitted by FPL in conformance with Order No. 697.

27. FPL responds to Tampa Electric's question regarding FPL's intent with respect to its proposed revision to Section 8(a) of the market-based rate tariff. FPL states that it did not intend its use of the word "within" in the proposed revisions to Section 8(a) to imply any authorization inconsistent with Commission policy. FPL states that Section 2 of the FPL tariff already authorizes FPL to engage in sales "in" all balancing authority areas where FPL has been granted market-based rate authority, consistent with the standard language required by the Commission. FPL states that to clarify any confusion regarding the meaning of Section 8(a), and conform FPL's use of terms to the Commission's standard tariff provisions, FPL would not object to the Commission directing FPL on compliance to amend its proposed revision to Section 8(a) to replace the word "within" with "in." FPL adds that it did not propose any revisions to Section 3 of its market-based rate tariff which states that the market-based rate tariff is applicable to sales outside of Peninsular Florida not otherwise subject to a particular rate schedule and sales of ancillary services in the markets identified in Section 1 of the tariff. FPL states that to avoid any confusion as to the application of the restrictions proposed in Section 8(a), FPL would not oppose also being directed by the Commission on compliance to include the amended revisions to Section 8(a) within Section 3 of the market-based rate tariff.

28. In Seminole's and FMPA's answer filed on February 11, 2016, they disagree with FPL's contention that Order No. 697 bars Commission consideration that Peninsular Florida is the appropriate geographic market. They disagree with FPL that in order for the Commission to consider the use of Peninsular Florida as the relevant geographic market, Seminole and FMPA would need to demonstrate that there are no frequently binding transmission constraints within Peninsular Florida. Seminole and FMPA argue that Peninsular Florida is the natural and *de facto* relevant geographic market and FPL dominates that market. Seminole and FMPA claim that FPL has market power both within its own balancing authority area and throughout Peninsular Florida. Seminole and FMPA assert that a buyer within a balancing authority area in which FPL seeks market-based rate authority will generally need to seek supplies within the broader Peninsular Florida market. Seminole and FMPA state that they demonstrated in their protest that Peninsular Florida is the appropriate relevant geographic market because, among other things, there is a single peninsular-wide market and FPL dominates that market. Seminole and FMPA contend that availability of natural gas transportation capability to

make new generation feasible is in question in part because of FPL's dominance of the existing and projected pipeline capacity by contract or ownership.

29. Seminole and FMPA assert that the cases FPL cites (including *Tampa Electric Co.*) to support its use of the Order No. 697 default balancing authority area by balancing authority area market power analysis are not relevant. Seminole and FMPA state that Tampa's application was unopposed, "presumably because, unlike FPL, [Tampa's] size and position in Peninsular Florida do not raise any of the serious market power concerns that are raised in connection with FPL."¹⁰ Seminole and FMPA also assert that the cases FPL cites in which the default balancing authority area "was employed to evaluate the competitive implications of the acquisition of utility assets in Peninsular Florida under section 203 of the Federal Power Act" are inapt because "the implications of the acquisition of utility facilities and property for the competitiveness of the wholesale market in Peninsular Florida were insignificant in those cases and not at all comparable to according the single largest supplier in Peninsular Florida the market-based rate authority here sought by FPL."¹¹ Further, Seminole and FMPA state that FPL fails to explain what it is about Order No. 697 that undercuts the relevance of *DeSoto* to FPL's request in this case. Seminole and FMPA submit *DeSoto* is on point.¹²

30. In Seminole's and FMPA's April 11, 2016 comments, they continue to take issue with the appropriate relevant geographic market. They argue that additional balancing authority areas in Peninsular Florida should be examined, including all first-tier balancing authority areas, not only those the applicant wishes the Commission to review, such as the balancing authority areas of FPL, FMPA, Gainesville Regional Utilities, Homestead, and City of New Smyrna Beach.

III. Discussion

A. Procedural Matters

31. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

¹⁰ Seminole and FMPA February 11 Answer at 7.

¹¹ *Id.* at 7-8.

¹² *Id.* at 8.

32. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

33. As discussed below, we will accept, subject to condition,¹³ FPL's proposed revisions to its market-based rate tariff allowing for sales within the balancing authority areas of Duke Florida, Jacksonville Electric, Seminole, Tampa Electric, and Tallahassee, effective May 21, 2016, as requested.¹⁴ We will require a compliance filing with respect to certain sections of the market-based tariff, as discussed below.

1. Market-Based Rate Authorization

34. 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.¹⁵

a. Horizontal Market Power

35. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.¹⁶ The

¹³ The Commission can revise a proposal filed under section 205 of the Federal Power Act as long as the filing utility accepts the change. *See City of Winnfield v. FERC*, 744 F.2d 871, 875-77 (D.C. Cir. 1984). The filing utility is free to indicate that it is unwilling to accede to the Commission's conditions by withdrawing its filing.

¹⁴ We note that FPL is not being granted authority to make third-party sales of operating reserves to a public utility that is purchasing ancillary services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers. If FPL seeks such authority, it must make the required showing and receive Commission authorization prior to making such sales. *See Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies*, Order No. 784, FERC Stats. & Regs. ¶ 31,349, at PP 200-202 (2013), *order on clarification*, Order No. 784-A, 146 FERC ¶ 61,114 (2014).

¹⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440.

¹⁶ *Id.* P 62.

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.¹⁷

36. FPL prepared the pivotal supplier and wholesale market share screens for the Duke Florida, Jacksonville Electric, Seminole, and Tampa Electric balancing authority areas,¹⁸ consistent with the requirements of Order No. 697.¹⁹

37. We have reviewed FPL's pivotal supplier and wholesale market share screens and we find that FPL passes both screens in each of these balancing authority areas. Accordingly, we find that FPL satisfies the Commission's requirements for market-based rates regarding horizontal market power.²⁰

38. As discussed below, we are not persuaded by the arguments raised in the protests asserting that Peninsular Florida is the appropriate geographic market and we will not require FPL to submit additional analyses studying Peninsular Florida as the relevant geographic market.

39. The default relevant geographic market for market-based rate sellers outside the regional transmission organization/independent system operator (RTO/ISO) organized markets is, "first, the balancing authority area in which the seller is physically located,

¹⁷ *Id.* PP 33, 62-63.

¹⁸ FPL notes that because the Tallahassee balancing authority area is not first-tier to the FPL balancing authority area, there is no requirement to perform the screens for the Tallahassee balancing authority area.

¹⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 231-232.

²⁰ In response to Seminole's and FMPA's argument that FPL's request should be rejected because it failed to provide an analysis of each of its first-tier balancing authority areas, we note that "[t]he intent of the indicative screens is to identify the sellers that raise no horizontal market power concerns and can otherwise be considered for market-based rate authority." *Id.* P 62. Given that FPL is not seeking market-based rate authority in these other first-tier balancing authority areas, FPL need not submit indicative screens for those balancing authority areas.

and second, the markets directly interconnected to the seller's balancing authority area (first-tier balancing authority areas)."²¹

40. However, in Order No. 697, the Commission recognized that the default relevant geographic market may not be appropriate in all circumstances and provided additional guidance and clarification to help inform market participants regarding the factors it believes are significant to consider when defining the market.²² For example the Commission stated that:

When assessing an alternative geographic market, the Commission looks for assurance that no frequently recurring physical impediments to trade exist within the alternative geographic market that would prevent competing supply in the alternative geographic market from reaching wholesale customers. Any proposal to use an alternative geographic market (*i.e.*, a market other than the default geographic market) must include a demonstration regarding whether there are frequently binding transmission constraints during historical seasonal peaks examined in the screens and at other competitively significant times that prevent competing supply from reaching customers within the proposed alternative geographic market. We will require that a demonstration be made based on historical data and that a sensitivity analysis be performed analyzing under what circumstances transmission constraints would bind.²³

²¹ *Id.* P 232 (footnotes omitted). However, “[w]here a generator is interconnecting to a non-affiliate owned or controlled transmission system, there is only one relevant market (*i.e.*, the balancing authority area in which the generator is located).” *Id.* n.217. The Commission has also recognized submarkets as discussed below. Additionally, in Order No. 816, the Commission noted the unusual circumstances associated with defining the relevant geographic market of an independent power producer (IPP) located in a generation-only balancing authority area and defined the default relevant geographic market(s) for such IPPs as the balancing authority areas of each transmission provider to which the IPP’s generation-only balancing authority area is directly interconnected. *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric, Capacity and Ancillary Services by Public Utilities*, 80 Fed. Reg. 67,056 (Oct. 30, 2015), Order No. 816, FERC Stats. & Regs. ¶ 31,374, at PP 46, 61 (2015).

²² Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 267.

²³ *Id.* P 268.

41. Seminole and FMPA offer several reasons why the relevant geographic market should be expanded to encompass all of Peninsular Florida rather than the individual balancing authority areas studied by FPL. However, Seminole's and FMPA's argument fails to show that there are not physical impediments to trade within Peninsular Florida and ignores the internal constraints within Peninsular Florida, as demonstrated by the Commission-approved SIL values. For example, the SIL values for FPL are zero in all seasons; the SIL value for Duke Florida is zero in the winter, and the SIL values for Jacksonville Electric are zero in the winter and fall. The SIL values for Tampa Electric and Seminole are relatively low in the summer. The low SIL values suggest that there are significant transmission constraints between balancing authority areas in Peninsular Florida.²⁴ Seminole and FMPA do not challenge these SIL values. Thus, even if Peninsular Florida were a single market, the Commission-approved SIL values suggest that the Commission would have to consider the potential for several "sub-markets" within Peninsular Florida. If submarkets were found, the ultimate effect would be approximately the same – the relevant geographic market for sellers would then be the individual submarkets located within Peninsular Florida, because sellers must study submarkets as separate relevant geographic markets.²⁵

42. In Order No. 697, the Commission stated that it also considers whether there is other evidence that would support the existence of an alternative geographic market, for example evidence that customers can access the resources outside of the default geographic market on similar terms and conditions as those inside the default geographic market.²⁶ The Commission noted that it had previously stated that the operation of a single central unit commitment and dispatch function for the proposed geographic market would be an indicator of a single market. The Commission stated that other evidence of a single market could include a demonstration that: there is a single transmission rate; there is a common OASIS platform for scheduling transmission service across separate balancing authority areas; or there is a correlation of price movements between the areas

²⁴ There also may be transmission constraints within Peninsular Florida's balancing authority areas but such constraints are not addressed in SIL studies.

²⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 231 ("However, where the Commission has made a specific finding that there is a submarket within an RTO/ISO, that submarket becomes the default relevant geographic market for sellers located within the submarket for purposes of the market-based rate analysis.").

²⁶ *Id.* P 269.

being considered as an expanded geographic market.²⁷ However, Seminole and FMPA have not provided this type of evidence.

43. In support of their arguments, Seminole and FMPA identify certain functions or services provided by the FRCC.²⁸ For example, they assert that Peninsular Florida has a single security Reliability Coordinator, a unified reserve-sharing agreement, and transmission capacity limits assessed on a FRCC-wide basis rather than for individual utilities within the FRCC. However, such functions commonly are provided by the Regional Entities of NERC and the Commission never has found that a Regional Entity (that is not also an RTO/ISO) is a relevant geographic market.

44. Moreover, we note that generation dispatch and open access transmission service in Peninsular Florida are provided by individual balancing authority areas. These services are not provided by the FRCC or another entity on a Peninsular Florida-wide basis, as FRCC solely performs reliability-related functions.

45. As discussed above, Seminole and FMPA also note the limited Florida/Georgia interface and assert that consumers in Peninsular Florida are dependent on Peninsular Florida's own generation assets for nearly 95 percent of their capacity needs.²⁹ The limited transfer capability into Peninsular Florida is an important factor that affects the amount of supply available to buyers in Florida but it does not demonstrate that Peninsular Florida should be the relevant geographic market. Moreover, significant binding transmission constraints typically would support use of a smaller geographic market rather than a larger geographic market. Therefore, we do not agree with Seminole and FMPA that the Commission should examine transmission constraints at the border of Florida in the context of this proceeding. While Seminole and FMPA are correct that the Commission set the matter of transmission constraints for hearing in *DeSoto*, we find that such a hearing is unnecessary here.

46. With regard to Seminole's and FMPA's contention that loads and resources, due to their location, overlap and are intertwined, we note that this is not unique to

²⁷ *Id.* P 270.

²⁸ The FRCC region is Peninsular Florida.

²⁹ Seminole and FMPA January 29 Protest at 19.

Peninsular Florida. For example, some balancing authority areas in other regions have embedded load that is served by a remote supplier.³⁰

47. Jacksonville Electric's arguments in support of performing a state-wide analysis are largely speculative, and fail to address the requirements for establishing an alternative geographic market set forth by the Commission in Order No. 697. For example, Jacksonville Electric argues that FPL's analysis should consider the potential impacts of its proposed market-based rate tariff on the future demand and price of natural gas in Florida. However, the Commission's market power analyses for electric energy and capacity do not consider the impact of electric energy sales on the price and demand for any other fuels, including natural gas. Moreover, Jacksonville Electric fails to explain how establishing Peninsular Florida as the relevant geographic market for FPL, as opposed to the individual balancing authority areas within Peninsular Florida, would provide insight into the projected demand and price of natural gas in Florida. Similarly, we find Jacksonville Electric's concerns about the impact of FPL's proposed market-based rate tariff on Florida's compliance with the Clean Power Plan to be speculative and beyond the scope of this proceeding.

48. Based on the information in the record, and consistent with Order No. 697, we find that Seminole and FMPA have not presented a compelling case for using an alternative relevant geographic market. Thus, we find that FPL's horizontal market power analysis based on individual balancing authority areas as relevant markets is appropriate.

b. Vertical Market Power

49. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved OATT on file or that such entity has received waiver of the OATT requirement under 18 C.F.R. § 35.28(d)(1) (2015) or satisfies the requirements for blanket waiver under 18 C.F.R. § 35.28(d)(2).³¹

³⁰ For example, Avista Corporation wheels power supplied by the Bonneville Power Administration to federal customers embedded within Avista's balancing authority area. *See Puget Sound Energy, Inc.*, 135 FERC ¶ 61,254, at P 19 (2011).

³¹ *See Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities*, Order No. 807, FERC Stats. & Regs. ¶ 31,367, at P 57, *order on reh'g*, Order No. 807-A, 153 FERC ¶ 61,047 (2015) (waiving the OATT requirements of 18 C.F.R. § 35.28, the Open Access Same-Time Information System requirements of Part 37, and the Standards of Conduct requirements of Part 358, under certain conditions,

(continued ...)

50. FPL states that its transmission facilities are subject to a Commission-approved OATT.³² FPL states that certain of FPL's affiliates own and operate transmission and these affiliates either have an OATT or appropriate tariff on file with the Commission or have received a waiver from the obligation to file an OATT.³³ FPL states that NextEra owns NextEra Energy Transmission, LLC (NextEra Transmission), which in turn owns New Hampshire Transmission, LLC (NHT), which owns the Seabrook Substation in New Hampshire.³⁴ FPL states that NHT provides wholesale transmission service to its affiliate, NextEra Energy Seabrook, LLC, through a Local Network Service Tariff on file with the Commission.³⁵ FPL states that ISO New England Inc. has operational control of the transmission facilities associated with the Seabrook Substation.

51. FPL states that NextEra Resources' subsidiaries own various interconnection facilities used solely for connecting generating facilities to the transmission grid and that none of the subsidiaries of NextEra Resources own or control transmission facilities other than the facilities necessary to interconnect generating facilities to the transmission grid. FPL states that three affiliates that own generation tie lines have filed OATTs with the Commission with respect to third party service on their interconnection facilities.³⁶ FPL

for entities that own interconnection facilities). *See also Balko Wind Transmission, LLC*, 152 FERC ¶ 61,011, at PP 24-25 (2015).

³² FPL, FERC FPA Electric Tariff, FPL OATT.

³³ FPL December 23 Filing at 13 & n.35.

³⁴ FPL states that NextEra Transmission also owns NextEra Energy Transmission West, LLC (NEET West), which develops, owns, and operates transmission facilities planned by the California Independent System Operator Corporation (CAISO). FPL states that NEET West has submitted, in Docket No. ER15-2239-000, a transmission owner tariff including a cost of service formula rate and, prior to energization of the projects, will transfer functional control of the facilities to CAISO. *Id.* at 5-6. *See also NextEra Energy Transmission West, LLC*, 154 FERC ¶ 61,009 (2016) (accepting and suspending tariff, for a nominal period, subject to condition and establish hearing and settlement judge procedures regarding proposed base return on equity).

³⁵ FPL December 23 Filing at 5 (citing *New Hampshire Transmission, LLC*, FERC Electric Tariff No. 3).

³⁶ *Id.* at 4 & n.14 (citing *See Sagebrush, a California Partnership*, 130 FERC ¶ 61,093, *order on reh'g*, 132 FERC ¶ 61,234 (2010); *Sky River LLC*, 136 FERC ¶ 61,162 (2011); *Peetz Logan Interconnect, LLC*, 136 FERC ¶ 61,075 (2011); *Peetz Logan Interconnect, LLC*, 142 FERC ¶ 61,035 (2013)). *See also id.* at 13.

states that some affiliates owning interconnection facilities rely on the waiver provided by the Commission in accordance with 18 C.F.R. § 35.28(d).

52. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.³⁷ 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, intrastate natural gas storage or distribution facilities; sites for new 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).³⁸ 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.³⁹ 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 intervenors to demonstrate otherwise.⁴⁰

53. Regarding other barriers to entry, FPL states that it is affiliated with intrastate natural gas transportation facilities. FPL states that its affiliates own or control several intrastate pipelines in Texas and one pipeline in Louisiana. FPL states that neither FPL nor its affiliates own or control any sites for generation capacity development, other than those for which they are currently planning to build new generation facilities. FPL states

³⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

³⁸ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176. We note that the Commission no longer requires market-based rate sellers to provide information on sites for generation capacity development in market-based rate applications and triennial updated market power analyses. *See Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 816, FERC Stats. & Regs. ¶ 31,374, at P 18 (2015).

³⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447. *See also* Order No. 816, FERC Stats. & Regs. ¶ 31,374 at PP 354, 356 (confirming that the affirmative statement regarding barriers to entry must be made with regard to a seller and its affiliates and amending 18 C.F.R. § 35.37 (e)(3) to specify that “a Seller is required to make an affirmative statement that it and its affiliates have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.”).

⁴⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 446.

that neither FPL nor its affiliates own or control sources of coal supplies or the transportation of coal supplies, such as barges, and rail cars.

54. Seminole and FMPA raise concerns about the natural gas pipeline capacity held by FPL and a Florida law governing need determinations for new generation capacity and suggest that they create barriers to entry for new generation capacity in Peninsular Florida.⁴¹ However, we are not persuaded that either of these factors gives FPL the ability to exercise vertical market power. It has not been demonstrated that FPL can influence the price or availability of natural gas supply to competing generators in Peninsular Florida. In addition, Seminole and FMPA have not shown why the Florida need determination law specifically provides FPL the ability to erect barriers to entry to new unaffiliated generation capacity in Peninsular Florida.

55. Finally, consistent with Order No. 697, FPL affirmatively states that it has not erected barriers to entry and will not erect barriers to entry in the future.⁴²

56. Based on FPL's representations, we find that FPL satisfies the Commission's requirements for market-based rates regarding vertical market power.

2. Tariff Provisions

57. Based on the discussion above regarding the need to clarify certain language in FPL's market-based rate tariff to avoid confusion, we direct FPL to submit a compliance filing within 30 days of the date of this order to revise its market-based rate tariff in Section 8(a) to replace the word "within" with "in," and to also include the amended revisions to Section 8(a) within Section 3 of its tariff.

3. Reporting Requirements

58. An entity with market-based rate authorization must file an Electric Quarterly Report (EQR) with the Commission, consistent with Order Nos. 2001⁴³ and

⁴¹ Seminole and FMPA January 29 Protest at 11-13, 26.

⁴² We interpret this statement to apply to FPL and its affiliates, and our authorizations herein are predicated on FPL complying with this commitment. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447. *See also* Order No. 816, FERC Stats. & Regs. ¶ 31,374 at PP 354, 356.

⁴³ *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,

(continued ...)

768,⁴⁴ to fulfill its responsibility under FPA section 205(c)⁴⁵ to have rates on file in a convenient form and place.⁴⁶ FPL must file EQRs electronically with the Commission consistent with the procedures set forth in Order No. 770.⁴⁷ Failure to timely and accurately file an EQR is a violation of the Commission's regulations for which FPL may be subject to refund, civil penalties, and/or revocation of market-based rate authority.⁴⁸

59. FPL 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.⁴⁹

60. Additionally, FPL must file updated market power analyses for all regions in which it is designated as a Category 2 seller in compliance with the regional reporting

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, FERC Stats. & Regs. ¶ 31,282 (2008).

⁴⁴ *Electricity Mkt. Transparency Provisions of Section 220 of the Fed. Power Act*, Order No. 768, FERC Stats. & Regs. ¶ 31,336 (2012), *order on reh'g*, Order No. 768-A, 143 FERC ¶ 61,054 (2013).

⁴⁵ 16 U.S.C. § 824d(c) (2012).

⁴⁶ *See Revisions to Electric Quarterly Report Filing Process*, Order No. 770, FERC Stats. & Regs. ¶ 31,338, at P 3 (2012) (citing Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 31).

⁴⁷ Order No. 770, FERC Stats. & Regs. ¶ 31,338.

⁴⁸ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2015). Forfeiture of market-based rate authority may require a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

⁴⁹ *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 (2015).

schedule adopted in Order No. 697.⁵⁰ The Commission also reserves the right to require such an analysis at any intervening time.⁵¹

The Commission orders:

(A) FPL's revised market-based rate tariff is hereby accepted for filing, subject to condition, effective May 21, 2016, as requested, as discussed in the body of this order.

(B) FPL is hereby directed to make 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)

Kimberly D. Bose,
Secretary.

⁵⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 882-893.

⁵¹ *Id.* P 853.