

156 FERC ¶ 61,246  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Florida Power & Light Company

Docket No. ER16-628-003

ORDER DENYING REHEARING

(Issued September 30, 2016)

1. On May 20, 2016, the Commission issued an order that permitted Florida Power & Light Company (FPL) to amend its market-based rate tariff to authorize sales within certain balancing authority areas in Peninsular Florida.<sup>1</sup> On June 20, 2016, Seminole Electric Cooperative, Inc., the Florida Municipal Power Agency (FPMA), City of Homestead, Florida, and the Orlando Utilities Commission (collectively, Joint Parties) sought rehearing of the May 20 Order.

2. Joint Parties claim that the Commission erred by failing to use Peninsular Florida – instead of the individual Duke Florida, Jacksonville Electric, Seminole, and Tampa Electric balancing authority areas – as the relevant geographic market for applying the market power screens.<sup>2</sup> In particular, Joint Parties allege that the Commission erred in rejecting evidence of unique circumstances in Peninsular Florida presented by Seminole and FMPA in light of demonstrated transmission constraints within Peninsular Florida.<sup>3</sup> In addition, Joint Parties argue that the Commission failed to engage in reasoned

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<sup>1</sup> *Florida Power & Light Co.*, 155 FERC ¶ 61,192 (2016) (May 20 Order) (authorizing sales at market-based rates within the 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 balancing authority areas).

<sup>2</sup> FPL did not seek authorization for market-based rate sales in the FPL balancing authority area or several other balancing authority areas within Peninsular Florida.

<sup>3</sup> Rehearing Request at 4, 5-10.

decision-making by concluding that transmission constraints into Peninsular Florida and the existence of submarkets within Peninsular Florida obviated the need for the Commission to consider evidence of peninsular-wide market power.<sup>4</sup> Finally, Joint Parties contend that the Commission departed from prior precedent by authorizing FPL to make sales at market-based rates in Peninsular Florida without engaging in further discovery or a hearing regarding the market power concerns raised by Joint Parties.<sup>5</sup> For the reasons discussed below, we deny Joint Parties' request for rehearing.

## **I. Commission Determination**

### **A. Relevant Geographic Market**

3. As noted in the May 20 Order, 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, and second, the markets directly interconnected to the seller's balancing authority area (first-tier balancing authority areas)."<sup>6</sup> Joint Parties allege that the Commission failed to consider evidence of certain "unique circumstances," which purportedly render Peninsular Florida the relevant geographic market for assessing FPL's market power.<sup>7</sup>

4. As an initial matter, the Commission explained in the May 20 Order that, under Order No. 697, any proposal to use a geographic market other than the default geographic market "must include a demonstration regarding whether there are frequently binding

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<sup>4</sup> *Id.* at 4, 10-14.

<sup>5</sup> *Id.* at 5-6, 15-16.

<sup>6</sup> May 20 Order, 155 FERC ¶ 61,192 at P 39 (quoting *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 232 (footnotes omitted), *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)).

<sup>7</sup> Rehearing Request at 4, 5-10.

transmission constraints ... that prevent competing supply from reaching customers within the proposed alternative geographic market.”<sup>8</sup> Seminole and FMPA did not include this demonstration in their initial pleadings, a fact which Joint Parties do not dispute in the rehearing request. Instead, they interpret Order No. 697 to argue that this requirement applies only to *sellers* seeking market-based rate authority, whereas buyers may introduce evidence supporting alternative relevant geographic markets without making this demonstration.<sup>9</sup> Joint Parties are mistaken.

5. Order No. 697 does not, as Joint Parties insist, establish two separate standards for supporting a request to use an expanded geographic market, depending on whether the proponent is a seller or buyer. Based upon a reference to “the seller” in one sentence of Order No. 697, Joint Parties construct a rule whereby the Commission may not consider other evidence of an expanded market if a seller fails to make this threshold showing, but need not apply the same threshold to evidence of alternative markets presented by non-sellers.<sup>10</sup> While Order No. 697 assumes that, in most cases, the seller would be the entity proposing an alternative geographic market,<sup>11</sup> the Commission expressly stated that “[a]ny proposal to use an alternative geographic market” must include historical data and a sensitivity analysis addressing the potential for frequently binding transmission constraints.<sup>12</sup> While “[t]he Commission also considers whether there is other evidence that would support the existence of an alternative geographic market,” such as the evidence Seminole and FMPA presented in their initial protest, it will consider these factors only “once it has been established that historically there were no physical

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<sup>8</sup> May 20 Order, 155 FERC ¶ 61,192 at P 40 (quoting Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 268).

<sup>9</sup> Rehearing Request at 7-8, 13-14.

<sup>10</sup> *Id.* at 7 (quoting Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 268 (“If the *seller* fails to show that there are no frequently binding constraints at these critical times, then the Commission may not consider other evidence of an expanded market since we regard this as a necessary condition that must be satisfied to justify an expanded market.”) (emphasis added)).

<sup>11</sup> *See, e.g.*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 284 (noting that a seller can include a screen analysis based on an alternative geographic market in addition to its analysis based on the default geographic market).

<sup>12</sup> *Id.* P 268 (emphasis added).

impediments to trade.”<sup>13</sup> Nowhere does Order No. 697 exempt buyers from meeting this condition.<sup>14</sup> In fact, the Commission has applied this condition in assessing requests by non-sellers to use alternative geographic markets in multiple proceedings following the issuance of Order No. 697.<sup>15</sup>

6. Joint Parties’ rationale for bifurcating the transmission constraint demonstration – that the rule is designed to protect consumers by preventing sellers from obtaining market-based rate authority where transmission constraints prevent power purchasers from reaching competitive supply resources – does not explain why intervenors arguing for an alternative geographic market also should not be required to make this showing. In fact, Order No. 697 clarifies that, although the discussion generally refers to requests for a larger geographic market, “the same guidance is applicable for arguing that the market is smaller than the default geographic market.”<sup>16</sup> Accordingly, Joint Parties’ contention that Seminole and FMPA were not required to demonstrate that there are no physical impediments to trade prior to introducing evidence that the relevant geographic market should be expanded was based on a misinterpretation of Order No. 697.

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<sup>13</sup> *Id.* PP 269, 271.

<sup>14</sup> *See id.* P 273 (noting that “[s]ellers and intervenors” in both RTO/ISO markets and non-RTO/ISO markets could present historical evidence to demonstrate a larger geographic market) (emphasis added).

<sup>15</sup> *See, e.g., PPL Corp.*, 149 FERC ¶ 61,260, at P 97 (2014) (declining to consider other local geographic markets proposed by the PJM Interconnection, L.L.C. Independent Market Monitor based on the determination that the Market Monitor failed to demonstrate that binding transmission constraints within the proposed alternative geographic markets were frequent); *AEP Power Mktg., Inc.*, 124 FERC ¶ 61,274, at P 24 (2008) (finding that the Public Utilities Commission of Ohio had not made a showing that binding transmission constraints exist to support its proposal for an alternative geographic market); *Boralex Livermore Falls, LP*, 123 FERC ¶ 61,279 (2008) (denying, on rehearing, the Maine Public Utilities Commission’s (Maine Commission) contention that the Commission erred in failing to consider evidence supporting an alternative geographic market) (*Boralex*).

<sup>16</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 267 n.244.

7. In any event, the Commission nevertheless considered the evidence presented by intervenors regarding the relevant geographic market, and found it to be unavailing.<sup>17</sup> In particular, the Commission found that Seminole and FMPA failed to present evidence of the type of single central unit commitment and dispatch that would suggest that Peninsular Florida constituted a single market, instead relying on the type of centralized reliability functions that are not indicative of an alternative geographic market.<sup>18</sup> As the Commission noted in the May 20 Order, the Regional Entities of the North American Electric Reliability Corporation commonly provide such reliability functions on a regional basis without these non-RTO/ISO regions being considered relevant geographic markets.<sup>19</sup>

8. While Joint Parties are correct that Order No. 697 does not limit the factors that the Commission will consider – once the showing regarding frequently recurring physical impediments to trade has been made – in support of an alternative geographic market,<sup>20</sup> the evidence Joint Parties have presented regarding overlapping loads and resources between certain balancing authority areas and shared reserves and reliability functions fails to establish that customers “can access the resources outside of the default geographic market on similar terms and conditions as those inside the default geographic market.”<sup>21</sup> Joint Parties have not presented evidence demonstrating that entities in Peninsular Florida balancing authority areas plan and operate on a peninsula-wide basis.

9. Additionally, Joint Parties’ concerns regarding the impacts of the Clean Power Plan remain speculative and outside the scope of this proceeding.<sup>22</sup> In sum, Joint Parties have not presented any arguments in the rehearing request that compel the use of an expanded geographic market.

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<sup>17</sup> May 20 Order, 155 FERC ¶ 61,192 at PP 42-48.

<sup>18</sup> *Id.* PP 42-44.

<sup>19</sup> *Id.* P 44.

<sup>20</sup> Rehearing Request at 11-13. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 271 n.245 (noting that “the Commission will consider additional types of evidence that may be presented on a case-by-case basis”).

<sup>21</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 269.

<sup>22</sup> *See* Rehearing Request at 9-10; May 20 Order, 155 FERC ¶ 61,192 at P 47.

## **B. Transmission Constraints**

10. We also reject Joint Parties' claim that the Commission erred by referring to the existence of transmission constraints into, and potential submarkets within, Peninsular Florida in connection with its decision to decline to consider evidence of FPL's market power in Peninsular Florida.<sup>23</sup> In the May 20 Order, the Commission noted that low, and in some cases zero, simultaneous transmission import limits (SILs) suggest that there are significant transmission constraints between balancing authority areas in Peninsular Florida, which in turn suggests that even if the Commission were to consider Peninsular Florida to be a single market, it would need to consider the potential for several submarkets within Peninsular Florida.<sup>24</sup> The Commission further noted that the presence of significant binding transmission constraints generally supports the use of a smaller geographic market – rather than the larger geographic market requested by Seminole and FMFA.<sup>25</sup> Although they acknowledge the existence of sub-markets within Peninsular Florida, Joint Parties assert that the Commission nevertheless should have considered additional evidence of “why, given the unique circumstances, Peninsular Florida must be considered as the relevant market and why failure to do so raises anti-competitive concerns,”<sup>26</sup> and further allege that the transmission constraints increase FPL's market power and thus should be deemed support for enlarging the relevant geographic market.<sup>27</sup>

11. But again, Joint Parties failed to make the necessary threshold showing regarding transmission constraints. The Commission has confirmed that “the requirement to address transmission constraints is a ‘necessary condition’ that must be satisfied by those advocating adoption of an alternative geographic market.”<sup>28</sup> Not only did Seminole and FMFA fail to demonstrate that no frequently recurring physical impediments to trade

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<sup>23</sup> Rehearing Request at 4, 10-11, 14.

<sup>24</sup> May 20 Order, 155 FERC ¶ 61,192 at P 41.

<sup>25</sup> *Id.* P 45.

<sup>26</sup> Rehearing Request at 14.

<sup>27</sup> *Id.* at 10-11.

<sup>28</sup> *See Boralex*, 123 FERC ¶ 61,279 at P 25 (rejecting the Maine Commission's claim that the Commission applied this policy “too rigidly” by requiring the demonstration of binding transmission even though the Maine Commission presented other evidence that, it claimed, show that customers could not access competing supply).

exist within Peninsular Florida, but Commission-approved SIL values suggest that such internal transmission constraints do exist. As noted in the May 20 Order, the existence of internal transmission constraints tends to suggest that a larger geographic market would not be appropriate.<sup>29</sup>

### C. Hearing

12. Finally, we affirm the Commission's finding that an evidentiary hearing to consider market power concerns in Peninsular Florida is not warranted.<sup>30</sup> Joint Parties frame the Commission's decision not to hold a hearing on this issue as an unexplained departure from prior precedent,<sup>31</sup> but their reliance on *DeSoto* is misplaced. *DeSoto* pre-dated Order No. 697, in which the Commission established a clear process for determining the relevant geographic market to be used for market power assessments, including the requirement that any proposal to use a market other than the default geographic market include a demonstration regarding whether there are frequently binding transmission constraints.<sup>32</sup> Accordingly, the Commission's determination to set the question of whether transmission constraints in Florida resulted in the potential exercise of market power for hearing in *DeSoto* does not require the same result in this proceeding.<sup>33</sup> The Commission has broad discretion regarding procedural matters, including whether or not to set a matter for hearing, and we find that the Commission properly exercised such discretion in this proceeding.<sup>34</sup>

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<sup>29</sup> See *id.* P 34 n.29 (“The Commission has found a smaller geographic market appropriate in the face of an acknowledged load pocket.”) (citing *Pinnacle West Capital Corp.*, 120 FERC ¶61,153, at P 18 (2007)).

<sup>30</sup> See May 20 Order, 155 FERC ¶ 61,192 at P 45.

<sup>31</sup> Rehearing Request at 4, 15-16 (citing *DeSoto County Generating Co., LLC*, 105 FERC ¶ 61,245 (2003) (*DeSoto*)).

<sup>32</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 268.

<sup>33</sup> See *Exelon Corp.*, 138 FERC ¶ 61,167, at P 33 (2012) (declining a request by the Illinois Attorney General to hold a hearing on a potential relevant geographic submarket, and noting that no evidence was provided that frequent binding constraints create a submarket that is relevant to the proposed transaction).

<sup>34</sup> See *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978) (agencies have broad discretion over the formulation of their procedures); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1578 (D.C. Cir.

(continued ...)

The Commission orders:

The request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Clark is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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1992) (the Commission has discretion to mold its procedures to the exigencies of the particular case); *Woolen Mill Assoc. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990) (the decision as to whether to conduct an evidentiary hearing is in the Commission's discretion).