



revised market-based rate tariffs filed by the Progress Energy Affiliates<sup>1</sup> (which provide that the Progress Energy Affiliates will not enter into transactions at market-based rates in the Florida Power control area) and initiate an investigation (in Docket No. EL04-23-000) under Section 206 of the Federal Power Act (FPA)<sup>2</sup> concerning whether transmission constraints, if any, in and at the border of the Florida market and the unique geography of peninsular Florida result in Progress Energy Affiliates having the potential to exercise generation market power and/or transmission market power in Florida. This order benefits customers because it ensures that market-based rates remain just and reasonable within peninsular Florida.

## **I. Background**

### **A. Corporate Structure**

2. Progress Energy, Inc. (Progress Energy) is a Florida-based public utility holding company. It owns both regulated and unregulated power companies, including two traditional electric utilities, Florida Power Corporation (Florida Power) (located in peninsular Florida) and Progress Energy Carolina (located in North Carolina and also known as Carolina Power & Light (CP&L)), both of which have market-based rate authority.<sup>3</sup> Progress Ventures, a direct, wholly-owned subsidiary of Progress Energy, is the intermediate holding company for unregulated trading operations. Progress Ventures indirectly owns several companies with market-based rate authority and also indirectly owns DeSoto, a merchant generating facility in the Florida Power & Light Company (FP&L) control area that is currently selling its output at cost-based rates to FP&L.

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<sup>1</sup> The Progress Energy Affiliates are: Progress Energy Carolina, Progress Ventures, and five power producers indirectly owned by Progress Ventures (Effingham County Power, LLC; MPC Generating, LLC (MPC Generating); Rowan County Power, LLC; Walton County Power, LLC; and Washington County Power, LLC). The five power producers have market-based rate authority and own and operate generating facilities located in Duke Power or Southern Company's control areas.

<sup>2</sup> 16 U.S.C. § 824e (2000).

<sup>3</sup> Florida Power's three-year market power update is pending before the Commission in Docket No. ER97-2846-003. CP&L's next three-year market power review is due to be filed on or before February 7, 2004. Progress Energy's other affiliates' next three-year market power review is due to be filed on or before February 28, 2006.

**B. Previous Commission Orders Involving the Progress Energy Companies**

3. On April 22, 1996, Progress Power Marketing, Inc. (PPM), an entity without ownership or control of any generating facilities, filed an application with the Commission requesting blanket authority to charge market-based rates. PPM submitted a generation dominance analysis based on a hub and spoke analysis to support its contention that its traditional utility affiliate, Florida Power, did not possess generation market power.

4. Seminole Electric Cooperative, Inc. (Seminole) and Florida Municipal Power Agency (FMPA) protested the filing. Seminole and FMPA argued that PPM's generation dominance study was flawed and significantly understated Florida Power's market power as it failed to account for the unique geography of peninsular Florida and the transmission capacity limitations. Seminole and FMPA maintained that a hearing was necessary to investigate generation market power and, in particular, the impact of transmission constraints on generation market power. On August 2, 1996, in Progress Power Marketing, Inc., 76 FERC ¶ 61,155 (1996) (Progress Power Marketing), the Commission conditionally accepted for filing PPM's proposed market-based rate schedule and, rather than applying its generation dominance analysis, set for hearing the issue of the impact of any transmission constraints on Florida Power's and thus PPM's ability, if any, to exercise generation market power in localized markets in Florida.

5. On February 7, 1997, PPM filed a Settlement Agreement between PPM, Florida Power, FMPA, and Seminole. Under the Settlement Agreement, PPM retained authority to make sales at market-based rates outside of peninsular Florida and agreed to refrain from making sales at market-based rates within peninsular Florida to any "Affected Customer"<sup>4</sup> during any hour in which a constraint is declared pursuant to the operating procedures governing transmission constraints established by the Florida Electric Coordinating Group Operating Committee. On May 1, 1997, in Docket Nos. ER96-1618-000, et al., the Commission accepted the Settlement Agreement by letter order. PPM has since cancelled its authority to make wholesale sales at market-based rates.<sup>5</sup>

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<sup>4</sup> Affected Customer was defined as any utility in peninsular Florida that, as a result of a constraint, is limited in its ability to engage in energy purchases with any other potential supplier.

<sup>5</sup> Progress Power Marketing, Inc., Docket No. ER03-966-000, delegated letter order dated July 17, 2003.

6. On May 5, 1997, Florida Power submitted an application requesting authorization to engage in sales of energy and capacity at market-based rates. In the application, Florida Power stated that it did not seek authorization for, and would not use its tariff for, sales within peninsular Florida.<sup>6</sup> Florida Power explained that its market-based rate tariff was more limited in scope than the settlement tariff approved for market-based sales by its marketing affiliate, PPM, and, therefore, the transmission constraint problems identified in Progress Power Marketing did not apply. On June 26, 1997, in Florida Power Corporation, 79 FERC ¶ 61,385 (1997) (Florida Power), the Commission granted Florida Power's request to sell energy and capacity at market-based rates outside of peninsular Florida.

7. Following the Commission's acceptance of Florida Power's market-based rate proposal, the Commission granted each of the Progress Energy Affiliates market-based rate authority in their respective market-based rate proceedings.<sup>7</sup> In their applications for market-based rate authority, the Progress Energy Affiliates did not specifically indicate that they intended to make sales into peninsular Florida. As accepted by the Commission, the respective market-based rate tariffs do not include a general restriction on market-based sales within peninsular Florida.

8. At the time that CP&L and MPC Generating received market-based rate authority, they were not affiliated with Florida Power. In July 2000, with the Commission's

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<sup>6</sup> For purposes of the application, "peninsular Florida" referred to all of that portion of the State of Florida "lying to the east of Florida Power [Corp's] points of interconnection with Gulf Power Company, and to the south of the points of interconnection of those transmission lines jointly owned by Florida Power & Light Company and Jacksonville Electric Authority with Georgia Power Company and south of the points of interconnection of the City of Tallahassee and Florida Power [Corp.] with Georgia Power Company." Application at 1, n.1.

<sup>7</sup> See Progress Ventures Inc., Docket No. ER01-2928-000, delegated letter order issued January 25, 2002; Effingham County Power, LLC, Docket No. ER01-1418-000, delegated letter order issued May 4, 2001; Rowan County Power, Docket No. ER01-1419-000, delegated letter order issued May 4, 2001; Walton County Power, LLC, Docket No. ER01-1310-000, delegated letter order issued April 4, 2001; Washington County Power, LLC, Docket No. ER03-398-000, delegated letter order issued April 17, 2003; Carolina Power & Light Company, 82 FERC ¶ 61,004 (1998); MEP Investments, LLC, et al., 87 FERC ¶ 61,209 (1999) (MPC Generating, LLC (formerly Monroe Power Company)).

approval of the merger between Florida Progress Corporation (and its public utility subsidiaries) and CP&L Holdings (and its public utility subsidiaries), CP&L and MPC Generating became affiliates of Florida Power.<sup>8</sup>

**C. Docket No. ER03-1383-000**

9. On September 25, 2003, Progress Energy filed an application under Section 205 of the FPA<sup>9</sup> requesting authority for its indirect subsidiary DeSoto to make sales at market-based rates. DeSoto proposes to prohibit sales within Florida Power's control area but otherwise does not limit sales within peninsular Florida. DeSoto also seeks authority to sell ancillary services at market-based rates under the terms set forth in Avista Corporation.<sup>10</sup> Progress Energy requests an effective date of November 25, 2003.

10. DeSoto, which is located within the FP&L control area in DeSoto County, Florida, has two tolling agreements with FP&L for the output of DeSoto that entitle FP&L to 284 MW of capacity and up to 3,000 hours of DeSoto operation. The tolling agreements extend until at least May 31, 2005, at which point FP&L or DeSoto can exercise an option to extend the contracts by two years.<sup>11</sup>

11. DeSoto submits a generation dominance study purported to demonstrate that DeSoto and the Progress Energy affiliates are not pivotal suppliers in any of the control areas, other than Florida Power's, within peninsular Florida. DeSoto states that it does not include an analysis of Florida Power's control area because its proposed tariff prohibits DeSoto from entering into transactions in Florida Power's control area without first receiving Commission approval under Section 205 of the FPA.

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<sup>8</sup> See CP&L Holdings, Inc., et al., 92 FERC ¶61,203 (2000) (Merger Order), order denying reh'g, 94 FERC ¶ 61,096 (2001) (Merger Rehearing Order).

<sup>9</sup> 16 U.S.C. § 824d (2000).

<sup>10</sup> See Avista Corporation, 87 FERC ¶ 61,223 (1999), order on reh'g, 89 FERC ¶ 61,136 (1999).

<sup>11</sup> The Commission accepted the tolling agreements by delegated letter order dated May 29, 2002 in Docket No. ER02-1446-000.

**D. Docket No. ER03-1389-000**

12. On September 25, 2003, Progress Energy, on behalf of several of its affiliates, submitted a request for clarification as to whether these companies, known as the Progress Energy Affiliates,<sup>12</sup> have market-based rate authority within peninsular Florida.

13. Progress Energy states that it seeks this clarification because Florida Power currently lacks authority to make market-based rate sales within peninsular Florida. As the Progress Energy Affiliates' market-based rate tariffs only prohibit sales to an affiliate with a franchised control area, Progress Energy seeks clarification that the Progress Energy Affiliates' market-based rate authority allows sales within peninsular Florida (with the exception of the Florida Power control area). Progress Energy proposes to revise the market-based rate tariffs to provide that the Progress Energy Affiliates may not enter into any transaction in the Florida Power control area without first receiving Commission approval of the transaction under Section 205 of the FPA. Progress Energy requests an effective date of November 25, 2003.

**II. Notice of Filings and Pleading**

14. Notices of Progress Energy's filings were published in the Federal Register, 68 Fed. Reg. 57,889 and 68 Fed. Reg. 57,888 (2003), with comments, interventions and protests due on or before October 16, 2003.

15. On October 14, 2003, Reedy Creek Improvement District filed a motion to intervene in both dockets. On October 16, 2003, Seminole and FMPA<sup>13</sup> filed a joint motion to intervene and protest in both dockets, and a motion to consolidate the dockets. On October 31, 2003, Progress Energy filed an answer to the protest filed by Seminole and FMPA.

16. In their protest, Seminole and FMPA state that they have long been concerned about the adverse impact of market-based rate sales in the electrically isolated and highly concentrated Florida market. For that reason, FMPA and Seminole were active parties in the proceeding in which PPM obtained, by settlement agreement, restricted authority to make market-based rate sales within peninsular Florida.

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<sup>12</sup> See supra note 1.

<sup>13</sup> Both Seminole and Florida Municipal purchase power and/or transmission services from Florida Power.

17. In the instant filing, Seminole and FMPA again argue that Florida Power's market power is significantly understated because of transmission constraints which exist due to the unique geography of peninsular Florida. They conclude that the Supply Margin Assessment analysis (SMA) should not be applied on a control area-by-control area basis in Florida; rather, the proper geographic market for assessing market power is peninsular Florida, and in that market, Progress Energy is a pivotal supplier. They also state that Progress Energy's proposed commitment to prohibit sales at market-based rates only in Florida Power's control area would not adequately mitigate market power at other locations in the peninsular Florida market.

18. Seminole and FMPA also state that Progress Energy is not asking for a minor clarification of its affiliates' market-based rate authority, but is seeking a major expansion of the Progress Energy Affiliates' market-based rate authority. They assert that neither Florida Power nor PPM has obtained the broad authorization to make sales within peninsular Florida which Progress Energy currently seeks. Seminole and FMPA argue that expanding the Progress Energy Affiliates' market-based rate authority could lead to dramatic changes in the way business is conducted in Florida, where neither Florida Power nor FP&L (the two largest utilities) are currently authorized to sell at market-based rates.

19. With respect to DeSoto's market-based rate application, Seminole and FMPA argue that the DeSoto generation dominance analysis is flawed by not properly accounting for transmission constraints into and within peninsular Florida. They request the Commission reject both filings, or, alternatively, set the matter for hearing to consider the market power issues.

### **III. Analysis**

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

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene make the entities that filed them parties to these proceedings.

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest unless otherwise ordered by the decisional authority.<sup>14</sup> We are not persuaded to allow Progress Energy's answer, and will, therefore, reject it.

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<sup>14</sup> 18 C.F.R § 385.213(a)(2) (2003).

## **B. DeSoto's Market-Based Rate Authority**

### **1. Overview**

22. On September 25, 2003, Progress Energy filed an application requesting that the Commission grant DeSoto market-based rate authority to make sales into all markets, including peninsular Florida, with the exception of Florida Power's control area.

23. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. For an affiliate of a transmission-owning public utility to demonstrate the absence or mitigation of market power, the public utility must have on file with the Commission an open access transmission tariff (OATT) for the provision of comparable services. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.<sup>15</sup>

### **2. Generation Market Power**

24. In AEP, the Commission announced a new generation market power screen, the SMA, to be applied to market-based rate applications on an interim basis pending a generic review of new analytical methods for analyzing market power.<sup>16</sup> Thus, the SMA screen would be applied to all sales other than those into ISOs and RTOs with Commission-approved market monitoring and mitigation.

25. Progress Energy states that DeSoto and Progress Energy subsidiaries pass the SMA screen that was applied to each Florida Reliability Coordinating Council (FRCC) control area in peninsular Florida, as designated by the North American Electric Reliability Council (NERC), with the exception of Florida Power's control area.<sup>17</sup> DeSoto's two generating units are located within FP&L's control area. Progress Energy

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<sup>15</sup>See, e.g., Progress Power Marketing, Inc., 76 FERC & 61,155 at 61,919 (1996), Letter Order Approving Settlement, 79 FERC & 61,149 (1997); Northwest Power Marketing Co., L.L.C., 75 FERC & 61,281 at 61,899 (1996); accord, Heartland Energy Services, Inc., et al., 68 FERC & 61,223 at 62,062-63 (1994).

<sup>16</sup>AEP Power Marketing, Inc., et al., 97 FERC & 61,219 (2001) (AEP), reh'g pending.

<sup>17</sup>Progress Energy states that Florida Power and DeSoto own a total of fifteen operational units in control areas within Florida and that all of Florida Power's generation is located within the Florida Power control area.

also states that nine of the FRCC control areas have sufficient rival capacity and power purchases in place to serve expected peak load even in the absence of additional competitive supply that might be imported into each of these markets.<sup>18</sup> It asserts that DeSoto passes the SMA screen in FP&L's control area, in which the DeSoto plant is located, even assuming that FP&L receives no power through its long-term tolling agreements with DeSoto from the DeSoto Plant. Progress Energy adds that New Smyrna Beach, the remaining control area, has insufficient owned capacity, scheduled power purchases or new capacity to meet peak demand without relying on imported power. However, Progress Energy states that its study indicates that power from Progress Energy Affiliates is not necessary to serve peak load and, therefore, no Progress Energy Affiliate can be thought of as a pivotal supplier in this market. Progress Energy concludes that DeSoto's request for market-based rate authority in all markets, including peninsular Florida, with the exception of Florida Power's control area, raises no competitive concerns in generation markets.

26. Seminole and FMPA argue that Florida Power's market power is significantly understated because it fails to account for the unique geography of peninsular Florida and current transmission constraints. In particular, Seminole and FMPA state that while application of the SMA on a control area-by-control area basis may make sense in other parts of the country, because of unique characteristics in the Florida market, it is not an appropriate measure of the ability of Progress Energy to exercise market power in peninsular Florida.

27. Further, Seminole and FMPA state that Progress Energy affiliates have repeatedly recognized the FRCC's unique circumstances. For example, in GridFlorida LLC, Docket No. RT01-67-000, Florida Power argued in favor of an FRCC-only RTO (i.e., a peninsular Florida RTO), stating: "The State of Florida, unlike any other State or region, is a peninsula surrounded by water on three sides with limited interconnections with other regions . . . unlike other regions where constraints at regional boundary interfaces can hamper reliability, coordination, and market facilitation, the majority of the transmission constraints in the FRCC are internalized within the region."<sup>19</sup> Accordingly, Seminole and FMPA request that the Commission reject the filing or, in the alternative, set the matter for hearing to consider market power issues.

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<sup>18</sup> Progress Energy is referring to JEA (formerly Jacksonville Electric Authority), Florida Municipal Power Agency, FP&L, Gainesville Regional Utilities, the City of Tallahassee, the City of Homestead, Seminole Electric Cooperative, Inc., Reedy Creek Improvement District and Tampa Electric Co.

<sup>19</sup> See February 16, 2001 Answer of FP&L, Florida Power (a Progress Energy affiliate), and Tampa Electric Company, Docket No. RT01-67-000, at 23-25.

28. As we pointed out in Southern Company Services, Inc., 75 FERC ¶ 61,130 at 61,442 (1996), to evaluate whether an applicant lacks generation dominance, the Commission must define the relevant geographic markets for the applicant's generation products. Progress Energy and its affiliates, including DeSoto, have not presented any new evidence which would suggest that transmission constraints in peninsular Florida no longer exist. In light of interveners' allegations regarding transmission constraints in and at the border of the Florida market and the unique geography of peninsular Florida, we find that there are factual issues beyond simply applying the SMA.<sup>20</sup> Our preliminary analysis of DeSoto's proposed market-based rate tariff indicates that it has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, we will accept the tariff for filing, suspend it for five months to become effective on April 23, 2004, subject to refund, and set for hearing the issue of the impact of any transmission constraints on DeSoto's, and its affiliates', ability, if any, to exercise generation market power in Florida. In these circumstances, because we cannot determine, absent the hearing ordered herein, the extent to which transmission constraints may impact DeSoto's, and its affiliates' ability, to exercise generation market power, we believe it is appropriate to exercise our discretion to suspend the filing for the maximum five-month period.<sup>21</sup>

### 3. Transmission Market Power

29. When an affiliate of a transmission-owning public utility seeks market-based rate authorization, the Commission has required the public utility to have an OATT on file before granting such authorization.

30. Progress Energy states that DeSoto's application does not raise transmission market power concerns. Progress Energy asserts that DeSoto and its unregulated generating affiliates do not own transmission facilities other than those as may be necessary to interconnect their facilities to the transmission grid.

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<sup>20</sup> We also take official notice of the transcripts of a public meeting in Tallahassee, Florida on September 15, 2003, in Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, Docket No. RM01-12-000 and GridFlorida, LLC., Docket No. RT01-67-000. Panelists claimed that peninsular Florida posed unique circumstances in regard to market-based rates and competitive markets in general.

<sup>21</sup> West Texas Utilities Co., 18 FERC ¶ 61,189 at 61,375 & n.5 (1982) (“[I]n cases in which . . . other, extraordinary factors indicate that wholesale customers may suffer irreparable harm absent a five-month suspension, we shall order a maximum suspension.”).

31. DeSoto's regulated affiliates, Florida Power and CP&L, provide service on their transmission systems through open access transmission tariffs, but they have not taken the further step of turning over operational control of their transmission facilities to an independent entity, despite a commitment to the Commission in Docket Nos. EC00-55-000 and ER00-1520-000 to do so. Accordingly, we also set for hearing whether existing transmission operating conditions and constraints, if any, result in the potential for DeSoto, and its affiliates, to exercise market power and adversely affect electricity product prices and/or limit transmission access.

32. The Commission's July 13, 2000 approval of the merger between Florida Progress Corporation (and its public utility subsidiaries) and CP&L Holdings (and its public utility subsidiaries) was based, in part, upon their commitment to join a Commission-approved regional transmission organization (RTO) and transfer operational control of their transmission facilities to such RTO. In particular, the merger applicants in that case stated that Florida Power and CP&L are "each unequivocally committed to complying with FERC Order No. 2000 and to turning over operational control of its transmission system to a Commission-approved RTO" on or before December 15, 2001.<sup>22</sup> The Commission stated that "we accept Applicants' RTO commitments and rely on them in approving this merger."<sup>23</sup>

33. On rehearing, the Commission stated:

CP&L is a participant in the GridSouth RTO proposal filed by utilities located in SERC and Florida Power Corp is a participant in the GridFlorida RTO proposal filed by utilities located in Florida. Both proposals were filed to comply with Order No. 2000, both were

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<sup>22</sup> Merger Order, 92 FERC at 61,055-56. Specifically, merger applicants stated that, within 90 days after closing of the merger, CP&L would file an application for approval of a new Southeastern RTO or an application to join a Commission-approved RTO, and Florida Power would file an application for approval of a Florida RTO. They stated that they believed they would begin full participation in an RTO by December 15, 2001 based on statements that Florida RTO, Alliance RTO, Midwest ISO and Southeastern RTO would commence operations as Commission-approved RTOs at that time. Id. at 61,056.

<sup>23</sup> Id.

filed by October 15, 2000 and in both Applicants propose to transfer operational control of their transmission facilities by December 15, 2001. Therefore, Applicants have fulfilled their RTO commitment, as clarified in the July 12 Order.<sup>24</sup>

34. Notwithstanding Florida Power's commitment to join a Commission-approved RTO, Florida Power has not turned over operational control of its transmission system to a Commission-approved RTO. We believe that customers would benefit from the establishment of an RTO in the region, which would promote reliability of the electric grid and enhance economic efficiency. All customers would realize the benefits of a well-regulated, well-functioning electric market with Commission-approved market monitoring and mitigation.<sup>25</sup> Transmission planning by an independent entity may also help to alleviate some of the transmission constraint concerns raised by Seminole and FMPA. In a recent technical conference in Tallahassee, the idea of a peninsular Florida RTO was broadly supported by a wide variety of panelists. We anticipate the establishment of an RTO in Florida which reflects the unique characteristics of Florida's power system and meets the objectives of the Florida Power Service Commission. Therefore, three months after the date of this order, we direct Florida Power and CP&L to file a report on the status and prognosis of their commitment made in the merger proceeding to join an RTO.

#### 4. Other Barriers to Entry

35. Progress Energy states that neither it nor its subsidiaries own or control any key input to power plant construction, generation or transportation. Progress Energy further states that it and its subsidiaries lack market power regarding generation sites, fuel transportation facilities and any other factors that could create entry barriers to market participation. Should DeSoto or any of its affiliates deny, delay or require unreasonable terms, conditions or rates for natural gas service to a potential electric competitor in bulk power markets, that electric competitor may file a complaint with the Commission that could result in the suspension of DeSoto's authority to sell power at market-based rates.<sup>26</sup>

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<sup>24</sup> Merger Rehearing Order, 94 FERC at 61,394.

<sup>25</sup> Further, with respect to the issues herein, the Commission has stated previously that all sales, including bilateral sales, into an ISO or RTO with Commission-approved market monitoring and mitigation are exempt from the SMA and, instead, will be governed by the specific thresholds and mitigation provisions approved for the particular markets.

<sup>26</sup> See, e.g., Louisville Gas & Electric Co., 62 FERC ¶ 61,016 (1993).

## 5. Affiliate Abuse/Reciprocal Dealing

36. Progress Energy states that DeSoto's proposed code of conduct reflects the Commission's model code of conduct and establishes protective ground rules to prevent affiliate abuse in transactions between DeSoto and the regulated affiliates, Florida Power and CP&L. Our review indicates that Desoto's code of conduct meets our requirements and is hereby accepted.

37. On November 17, 2003, in Docket No. EL01-118-000, the Commission issued a final order which establishes Market Behavior Rules to govern market-based rate sellers' conduct in the wholesale market. In the order, the Commission requires sellers to include the Market Behavior Rules at such time as they file any amendments to their market-based rate tariffs or (if earlier) at such time as they seek continued authorization to sell at market-based rates.<sup>27</sup> Accordingly, DeSoto is directed to comply with the Commission's final order in Docket No. EL01-118.

## 6. Waivers, Authorization and Reporting Requirements

38. Progress Energy requests the following waivers and authorizations: (1) waiver of the accounting and other requirements of Parts 41, 101 and 141 of the Commission's regulations; (2) permission to file an abbreviated statement with respect to Part 45 of the Commission's regulations relating to interlocking directorships; (3) a waiver of the reporting requirements of subparts B and C of Part 35 of the Commission's regulations, except Section 35.12(a), 35.13(b) and 35.16; and (4) a blanket authorization under Part 34 of all future issuances of securities and assumption of liability. In light of our decision to accept and suspend DeSoto's market-based rate tariff for five months and set the issues of generation market power and transmission market power for hearing, we will defer ruling on this request at this time

### C. Progress Energy Affiliates' Market-Based Rate Authority

39. As noted above, when the Commission granted each of the Progress Energy Affiliates market-based rate authority, none of the affiliates indicated that they intended to make sales at market-based rates into peninsular Florida. As a result, the transmission constraint issues referenced in Progress Power Marketing, including the impact of any such transmission constraints on the ability of the Progress Energy Affiliates, if any, to exercise generation market power in localized markets in Florida, were not raised before

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<sup>27</sup> Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003).

the Commission. Similarly, the issue of whether the restrictions that Florida Power voluntarily imposed on its market-based rate authority should likewise apply to the Progress Energy Affiliates was never raised, much less addressed.

40. In the instant filing, Progress Energy and its affiliates request that the Commission accept Progress Energy's SMA analysis and the facts presented as justifying authority for the Progress Energy Affiliates to make market-based rate sales in peninsular Florida, with the exception of Florida Power's control area. As noted above, in Florida Power, Florida Power explained that it sought Commission authorization to engage in power sales only outside peninsular Florida, and for that reason, the transmission constraint problems identified in Progress Power Marketing did not apply. On this basis, the Commission accepted Florida Power's market-based rate proposal, and noted that Florida Power had not indicated any intent to alleviate transmission constraints in peninsular Florida.

41. In the instant proceeding, the Progress Energy Affiliates have submitted revised market-based rate tariffs. Because those tariffs provide that the Progress Energy Affiliates will not enter into transactions at market-based rates in the Florida Power control area without first receiving Commission approval of the transactions under Section 205 of the FPA, we will accept those tariffs for filing, to become effective on November 25, 2003, as requested.

42. However, in light of the hearing that we establish in Docket No. ER03-1383-000, concerning whether DeSoto's request for authority to make sales at market-based rates into peninsular Florida is just and reasonable, we also will initiate an investigation under Section 206 of the FPA, in Docket No. EL04-23-000, concerning whether transmission constraints, if any, in and at the border of the Florida market and the unique geography of peninsular Florida result in the Progress Energy Affiliates having the potential to exercise generation market power and/or transmission market power in Florida.

43. In cases where, as here, the Commission institutes a Section 206 investigation on its own motion, Section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the Commission's intent to institute a Section 206 proceeding in the Federal Register, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with our precedent,<sup>28</sup> we will establish a refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the investigation is published in the Federal Register.

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<sup>28</sup> See, e.g., Canal Electric Co., 46 FERC ¶ 61,153 (1989).

44. Section 206(b) also requires that if no final decision is rendered in the Commission's investigation by the refund effective date or by the conclusion of the 180-day period commencing upon the initiation of a proceeding pursuant to Section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. Therefore, we will direct the presiding judge to provide a report to the Commission no later than 15 days in advance of the refund effective date in the event the presiding judge has not by that date issued an initial decision. The judge's report, if required, shall advise the Commission of the status of the investigation and provide an estimate of the expected date of issuance of an initial decision. This, in turn, will allow the Commission, on or before the refund effective date, to estimate the date when it expects to render its decision.

#### **D. Motion to Consolidate**

45. Seminole and FMPA request that the Commission consolidate Docket No. ER03-1389-000 and Docket No. ER03-1383-000 to save time and resources as the same applicant, customers and issues are involved in both dockets.

46. We will deny the motion. The Commission typically consolidates proceedings only for purposes of hearing and decision.<sup>29</sup> As we are not setting Docket No. ER03-1389-000 for hearing, there is no need to consolidate that docket with Docket No. ER03-1383-000. However, because Docket No. ER03-1383-000 and Docket No. EL04-23-000 raise common issues of law and fact, we will consolidate them for purposes of hearing and decision.

#### **E. Hearing Procedures**

47. As discussed above, we will set DeSoto's application in Docket No. ER03-1383-000 for hearing and institute a Section 206 proceeding in Docket No. EL04-23-000. The purpose of the hearing in these consolidated dockets is to examine whether transmission constraints, if any, in and at the border of the Florida market and the unique geography of peninsular Florida result in DeSoto, and its affiliates (including all of its affiliates which own or control generation or transmission facilities) having the potential to exercise generation market power and/or transmission market power. To the extent that the

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<sup>29</sup> See, e.g., New York Independent Operator, Inc., 145 FERC ¶ 61,108 (2003); Arizona Public Service Company, 90 FERC ¶ 61,197 (2000).

Administrative Law Judge's Initial Decision finds that DeSoto, and/or its affiliates, have the potential to exercise market power, the Commission will address the issue of the appropriate remedies in a future order in this proceeding. In particular, the hearing shall consider, but not be limited to, the following, issues:

- (1) definition of the relevant geographic market(s), including whether the peninsula itself is a single market, taking into account transmission constraints, if any, and the unique geography of peninsular Florida;
- (2) an assessment of the potential for the exercise of market power due to transmission constraints and the effect on electricity prices in relevant markets within Florida;
- (3) identification and evidence of any existing transmission constraints within and into Florida;
- (4) given our concerns regarding potential transmission constraints, a determination of how generation capacity of alternative suppliers should be calculated; and
- (5) a determination of whether transmission capacity under the operational control of DeSoto's affiliates should be attributed to DeSoto, or its affiliates, for the purposes of determining the potential to exercise market power.

The Commission orders:

(A) DeSoto's proposed market-based rate tariff is hereby accepted for filing and suspended for five months, to become effective April 24, 2004, subject to refund, as discussed in the body of this order.

(B) The Progress Energy Affiliates' revised market-based rate tariffs are hereby accepted for filing, to become effective November 25, 2003, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organizational Act and by the Federal Power Act, particularly Sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter 1), a public hearing shall be held in Docket Nos. ER03-1383-000 and EL04-23-000, concerning whether transmission constraints, if any, in and at the border of the Florida market and the unique geography of peninsular Florida result in DeSoto, and its affiliates

(including Progress Energy Affiliates), having the potential to exercise generation market power and/or transmission market power in Florida, as discussed in the body of this order.

(D) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge for that purpose, pursuant to 18 C.F.R. § 375.304 (2003), must convene a prehearing conference in this proceeding to be held within approximately fifteen (15) days after issuance of this order, in a hearing or conference room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided for in the Commission's Rules of Practice and Procedure.

(E) Docket Nos. ER03-1383-000 and EL04-23-000 are hereby consolidated for purposes of hearing and decision.

(F) The Secretary shall promptly publish notice of the Commission's initiation of the proceeding in Docket No. EL04-23-000 in the Federal Register.

(G) The refund effective date in Docket No EL04-23-000, established pursuant to Section 206(b) of the FPA, shall be 60 days following publication in the Federal Register of the notice discussed in Ordering Paragraph (F).

(H) The presiding judge shall advise the Commission, no later than 15 days prior to the refund effective date established in Docket No. EL04-23-000, in the event that the presiding judge has not by that date issued an initial decision, as to the status of the proceeding and a best estimate when the proceeding will be disposed of by the presiding judge.

(I) Consistent with the procedures the Commission adopted in Order No. 2001, DeSoto must file electronically with the Commission Electric Quarterly Reports no later than 30 days after the end of the reporting quarter. DeSoto must file its first Electronic Quarterly Report no later than 30 days after the first quarter that DeSoto commences sales under its market-based rate schedule.

(J) DeSoto is hereby directed to file an updated market analysis within three years of the date of this order and every three years thereafter.

(K) DeSoto is hereby directed to inform the Commission of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based rate pricing.

Docket No. ER03-1383-000, et al.

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(L) Seminole's and FMPPA's motion to consolidate is hereby denied, as discussed in the body of this order.

(M) Three months after the date of this order, Florida Power and CP&L are hereby directed to file a report on the status and prognosis of their commitment made in the merger proceeding to join an RTO.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.