

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Tampa Electric Company

Docket No. ER07-173-000

ORDER ON MARKET-BASED RATES AND ACCEPTING MARKET-BASED RATE
TARIFF REVISION

(Issued December 21, 2006)

1. In this order, the Commission finds that Tampa Electric Company (Tampa Electric) has rebutted the presumption of market power for the Reedy Creek Improvement District (Reedy Creek) control area. Accordingly, the Commission accepts for filing Tampa Electric's proposed market-based rate tariff revision which removes the prohibition on sales into the Reedy Creek control area to become effective January 2, 2007, as requested.¹

I. Background

2. On March 3, 2005, the Commission issued an order on Tampa Electric's updated market power analysis.² The market power analysis using the indicative screens indicated that Tampa Electric passed the pivotal supplier screen in all control areas considered, but failed the wholesale market share screen for each of the four seasons in the Tampa Electric control area and for one season in the Reedy Creek control area.

3. As the Commission stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding pursuant to section 206 of the Federal Power Act (FPA) and establishes a rebuttable presumption of market power in the section 206 proceeding.³ Accordingly, because Tampa Electric's filing indicated that it failed the wholesale market

¹ FERC Electric Tariff, First Revised Volume No. 5, First Revised Page No. 1A (supersedes Original Page No. 1A).

² *Tampa Electric Company*, 110 FERC ¶ 61,206 (2005) (March 3 Order).

³ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 at P 201 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

share screen for both the Tampa Electric and Reedy Creek control areas, the Commission instituted a section 206 proceeding to investigate generation market power in the Tampa Electric and Reedy Creek control areas.

4. Tampa Electric was directed, within 60 days from the issuance of the March 3 Order, to either: (1) file a Delivered Price Test (DPT) analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it would adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.⁴

5. Tampa Electric submitted its mitigation proposal which, among other things, prohibited sales at market-based rates into the Tampa Electric and Reedy Creek control areas. This mitigation proposal was conditionally accepted by the Commission on November 17, 2005, subject to Commission acceptance of a subsequent compliance filing.⁵

6. On February 28, 2006, the Commission accepted Tampa Electric's compliance filing regarding its proposal to mitigate the presumption of generation market power in the control areas of Tampa Electric and Reedy Creek, which included revised market-based rate tariffs prohibiting sales at market-based rates into these two control areas.⁶ The Commission also terminated the proceeding instituted in Docket No. EL05-68-000 pursuant to section 206 of the FPA.

7. On November 3, 2006, Tampa Electric submitted a proposed market-based rate tariff revision which would remove the prohibition on sales at market-based rates into the Reedy Creek control area and restore Tampa Electric's authority to make market-based

⁴ *Id.* at P 201, 207-09.

⁵ *Tampa Electric Company*, 113 FERC ¶ 61,159 (2005).

⁶ *Tampa Electric Company*, 114 FERC ¶ 61,221 (2006). The mitigation proposal accepted by the Commission provided that, for the Tampa Electric control area, Tampa Electric will not make any sales in that control area without first receiving authorization of the transaction from the Commission, the transaction will be cost-justified, and will apply to any wholesale customer that is part of the Tampa Electric control area, not just those customers that are physically connected. For the Reedy Creek control area, Tampa Electric will make any sale of less than one year at the currently-effective cost-based rates in Service Schedule B of First Revised Rate Schedule FERC No. 54 on file with the Commission, will not make sales of one year or more without first receiving authorization of the transaction from the Commission, and the transaction will be cost-justified.

rate power sales in the Reedy Creek control area. In support of this revision, Tampa Electric has included a DPT analysis which it contends indicates that Tampa Electric does not possess generation market power in the Reedy Creek control area and therefore rebuts the presumption of market power in the Reedy Creek control area previously established by its failure of the wholesale market share screen for that control area.⁷ In its November 3 filing, Tampa Electric also states that it satisfies the transmission market power, other barriers to entry, and affiliate abuse parts of the Commission's market-based rate analysis.

8. Tampa Electric requests that the revised market-based rate tariff become effective January 2, 2007.

II. Notice and Responsive Pleadings

9. Notice of Tampa Electric's November 3 filing was published in the *Federal Register*, 71 Fed. Reg. 66,768 (2006), with interventions or protests due on or before November 24, 2006. On November 6, 2006, Reedy Creek filed comments in support of Tampa Electric's proposed tariff amendment for the Reedy Creek control area stating that allowing Tampa Electric to resume sales at market-based rates in the Reedy Creek control area will be good for competition. On November 21, 2006, Reedy Creek filed a motion to intervene and additional comments in support of Tampa's filing.

III. Discussion

10. As discussed below, the Commission concludes that Tampa Electric satisfies the Commission's standards for market-based rate authority in the Reedy Creek control area.

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motion to intervene of Reedy Creek serves to make it a party to this proceeding.

B. Analysis

1. Generation Market Power

12. As discussed more fully below, after reviewing the DPT submitted by Tampa Electric for the Reedy Creek control area, the Commission finds that Tampa Electric satisfies the Commission's generation market power standard for the grant of market-

⁷ The November 3 filing does not include a request to eliminate the mitigation for the Tampa Electric control area.

based rate authority in the Reedy Creek control area. Accordingly, for the Reedy Creek control area, the presumption of market power as it relates to the generation part of the Commission's four part market-based rate analysis has been rebutted.

a. Delivered Price Test

13. In the April 14 Order, the Commission stated that an applicant's failure of one or more of the indicative screens establishes a rebuttable presumption of market power. If such an applicant chooses not to proceed directly to mitigation, it must present a more thorough analysis using the Commission's DPT.⁸ The DPT is used to analyze the effect on competition for transfers of jurisdictional facilities in section 203 proceedings,⁹ using the framework described in Appendix A of the Merger Policy Statement and revised in Order No. 642.¹⁰ The DPT is a well established test that has been used routinely to analyze market power in the merger context for many years, and it has been affirmed by the courts.¹¹ The DPT has also been used to examine generation market power for the grant of market-based rate authority.¹²

14. The DPT defines the relevant market by identifying potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity for each season/load period.¹³ The results of the DPT can be used for pivotal supplier, market share and market

⁸ April 14 Order, 107 FERC ¶ 61,018 at P 105-12.

⁹ 16 U.S.C. § 824b (2000).

¹⁰ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,984 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

¹¹ *See, e.g., Wabash Valley Power Associates, Inc. v. FERC*, 268 F. 3d 1105 (D.C. Cir. 2001).

¹² *Duke Power*, 111 FERC ¶ 61,506 (2005); *Kansas City Power & Light Co.*, 113 FERC ¶ 61,074 (2005).

¹³ Super-peak, peak, and off-peak, for winter, shoulder and summer periods and an additional highest super-peak for the summer.

concentration analyses. A detailed description of the mechanics of the DPT is provided in Appendix F of the April 14 Order, which refers to Appendix A of the Merger Policy Statement and Order No. 642 for a complete description of the DPT and its requirements.

15. Using the economic capacity for each supplier, applicants should provide pivotal supplier, market share and market concentration analyses. Examining these three measures with the more robust output from the DPT will allow applicants to present a more complete view of the competitive conditions and their positions in the relevant markets.

16. Under the DPT, to determine whether an applicant is a pivotal supplier in each of the season/load periods, applicants should compare the load in the destination market to the amount of competing supply (the sum of the economic capacities of the competing suppliers). The applicant will be considered pivotal if the sum of the competing suppliers' economic capacity is less than the load level (plus a reserve requirement that is no higher than state and regional reliability council operating requirements for reliability) for the relevant period. The analysis should also be performed using available economic capacity to account for applicants' and competing suppliers' native load commitments. In that case, native load in the relevant market would be subtracted from the load in each season/load period. The native load subtracted should be the average of the actual native load for each season/load period.

17. Each supplier's market share is calculated based on economic capacity (the DPT's analog to installed capacity). The market shares for each season/load period reflect the costs of the applicant's and competing suppliers' generation, thus giving a more complete picture of the applicant's ability to exercise market power in a given market. For example, in off-peak periods, the competitive price may be very low because the demand can be met using low-cost capacity. In that case, a high-cost peaking plant that would not be a viable competitor in the market would not be considered in the market share calculations, because it would not be counted as economic capacity in the DPT. Applicants must also present an analysis using available economic capacity (the DPT's analog to uncommitted capacity) and explain which measure more accurately captures conditions in the relevant market.

18. Under the DPT, applicants must also calculate the market concentration using the Hirschman-Herfindahl Index (HHI) based on market shares.¹⁴ HHIs are usually used in the context of assessing the impact of a merger or acquisition on competition. However,

¹⁴ The HHI is the sum of the squared market shares. For example, in a market with five equal size firms, each would have a 20 percent market share. For that market, $HHI = (20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2,000$.

as noted by the U.S. Department of Justice in the context of designing an analysis for granting market-based pricing for oil pipelines, concentration measures can also be informative in assessing whether a supplier has market power in the relevant market.¹⁵

19. A showing of an HHI less than 2,500 in the relevant market for all season/load periods for applicants that have also shown that they are not pivotal and do not possess more than a 20 percent market share in any of the season/load periods would constitute a showing of a lack of market power, absent compelling contrary evidence from intervenors. Concentration statistics can indicate the likelihood of coordinated interaction in a market. All else being equal, the higher the HHI, the more firms can extract excess profits from the market. Likewise, a low HHI can indicate a lower likelihood of coordinated interaction among suppliers and could be used to support a claim of a lack of market power by an applicant that is pivotal or does have a 20 percent or greater market share in some or all season/load periods. For example, an applicant with a market share greater than 20 percent could argue that that it would be unlikely to possess market power in an unconcentrated market (HHI less than 1,000).¹⁶

20. As with our initial screens, applicants and intervenors may present evidence such as historical wholesale sales data, which can be used to calculate market shares and market concentration and to refute or support the results of the DPT. We encouraged applicants to present the most complete analysis of competitive conditions in the market as the data allow. We have used actual data in our analysis of mergers and other section 203 jurisdictional transactions to supplement or support the analysis of the effect of such transactions on competition. As we stated in Order No. 642:

If sales data indicate that certain participants actually have been able to reach the market in the past, it is appropriate to consider whether they are likely candidates to be included in the market in the future. It is for this reason that we will require a “trade data check” as part of the competitive analysis test.¹⁷

¹⁵ See Comments of the United States Department of Justice in Response to Notice of Inquiry Regarding Market-Based Ratemaking for Oil Pipelines, Docket No. RM94-1-000 (January 18, 1994) (“The Department and the Commission staff have previously advocated an HHI threshold of 2,500, and it would be reasonable for the Commission to consider concentration in the relevant market below this level as sufficient to create a rebuttable presumption that a pipeline does not possess market power.”)

¹⁶ April 14 Order, 107 FERC ¶ 61,018 at P 111.

¹⁷ Order No. 642 at n. 41.

b. Delivered Price Test for the Reedy Creek Control Area

21. Tampa Electric's DPT analysis for the Reedy Creek control area indicates that Tampa Electric is not a pivotal supplier in any of the fifteen season/load periods studied using the economic capacity measure.¹⁸ Tampa Electric's market share using economic capacity is below the 20 percent threshold for all of the season/load periods under study (the highest being 11.3 percent). Additionally, using the economic capacity measure, Tampa Electric's market concentration analysis for the Reedy Creek control area illustrates that the HHIs are all below 2,500 (the threshold set forth in the April 14 Order) for fifteen season/load periods¹⁹ under Tampa's study (the lowest being 1,419 in shoulder night and the highest being 2,140 in summer peak).²⁰ Tampa Electric's DPT analysis for the Reedy Creek control area indicates that when the available economic capacity measure is used, Tampa Electric is not a pivotal supplier in any season/load period and the HHIs are all below 2,500. However, Tampa Electric's market shares exceed the 20 percent threshold in two out of the fifteen seasons/load periods (a summer night period and a winter peak period with market shares of 22.9 and 21.2 percent, respectively).

22. Tampa Electric argues that even though its market shares are slightly higher than 20 percent in these time periods, the market concentration measured by the HHI is no higher than 1,170, which Tampa Electric claims indicates that on average there are eight competitors other than Tampa Electric in the Reedy Creek control area during the periods studied. As a result, Tampa Electric concludes that based on the results of its DPT there is more than enough rival capacity held by Tampa Electric's competitors in the Reedy Creek control area to serve load and thus, Tampa Electric does not have generation market power in the Reedy Creek control area.

¹⁸ Tampa Electric explains that it has performed its analysis based on fifteen representative seasons/load conditions, five for each of the seasons (spring/summer, summer, and winter). Tampa Electric offers that each season's hours are divided into the: (1) top five percent of peak hours; (2) next ten percent of peak hours; (3) remaining peak hours; (4) weekend days; and (5) nights. Tampa's use of fifteen seasons/load conditions includes the ten season/load periods identified in the April 14 Order.

¹⁹ The April 14 Order specifies the use of ten season/load periods. *See* April 14 Order, 107 FERC ¶ 61,018 at P 106 n.94.

²⁰ April 14 Order, 107 FERC ¶ 61,018 at P 111.

c. Commission Determination

23. After weighing all of the relevant factors, the Commission finds that, on balance, based on Tampa Electric's DPT analysis in the Reedy Creek control area, Tampa Electric has rebutted the presumption of generation market power and satisfies the Commission's generation market power standard for the grant of market-based rate authority.²¹

24. Tampa Electric's DPT analysis for the Reedy Creek control area varies depending on whether the economic capacity or available economic capacity measure is used. As the Commission has stated, the DPT does not function like the initial screens – *i.e.*, failure of either the economic capacity or available economic capacity analyses does not result in an automatic failure of the test as a whole. Neither measure is definitive; the Commission weighs the results of both the economic capacity and the available economic capacity analyses and considers the arguments of the parties.²²

25. Tampa Electric's DPT indicates that the market shares using the economic capacity measure are below 20 percent for all of the season/load periods under study; the HHIs are all below 2,500; and Tampa Electric is not a pivotal supplier in any season/load period.

26. Tampa Electric's DPT analysis indicates that the market shares using the available economic capacity measure are below 20 percent in 13 of 15 season/load periods and are slightly above 20 percent during two periods, with the highest market share of 22.9 percent. The HHIs are all below 2,500 and Tampa Electric is not a pivotal supplier in any of the season/load periods studied. Tampa Electric's analysis indicates that these results are robust even when the available economic capacity measure is increased. For example, a 20 percent increase in Tampa Electric's available economic capacity in all season/load periods yields similar results with market shares below 20 percent in 12 of 15 season/load periods, with the highest market share reaching 27.4 percent in the summer night period. In addition, Tampa Electric is not a pivotal supplier, and the HHIs are all below 2,500.

27. Accordingly, after weighing all of the relevant factors, the Commission concludes that, based on Tampa Electric's DPT analysis of the Reedy Creek control area, Tampa Electric has rebutted the presumption of generation market power and satisfies the Commission's generation market power standard for the grant of market-based rate authority.

²¹ *Id.*

²² July 8 Order, 108 FERC ¶ 61,026 at P 26.

2. Transmission Market Power

28. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an open access transmission tariff (OATT) on file before granting such authorization. Tampa Electric submits that it does have an OATT on file with the Commission.²³ Further no intervenors have raised transmission market power concerns. Based on Tampa Electric's representations, the Commission finds that Tampa Electric satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

3. Barriers to Entry

29. Tampa Electric submits that it does not own sites for new generating facilities or own interstate natural gas pipelines, so it cannot erect barriers to entry to the market by competitors. However, Tampa Electric explains that its affiliate, Peoples Gas System, Inc., is a local distribution company in Florida that it is regulated by the Florida Public Service Commission. No intervenors have raised concerns regarding barriers to entry. Based on Tampa Electric's representations, the Commission is satisfied that Tampa Electric cannot erect barriers to entry. However, should Tampa Electric 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, then that electric competitor may file a complaint with the Commission that could result in the suspension of Tampa Electric's authority to sell power at market-based rates.²⁴

4. Affiliate Abuse

30. Tampa Electric states that it does not have affiliates that sell or buy wholesale power, so affiliate abuse is not a concern. In addition, Tampa Electric's market-based rate tariff contains restrictions on transaction with affiliates. No intervenors have raised concerns regarding affiliate abuse. Based on Tampa Electric's representation, the Commission finds that Tampa Electric satisfies the Commission's concerns with regard to affiliate abuse.

²³ Tampa Electric's OATT was accepted by the Commission in *Allegheny Power System Inc.*, 80 FERC ¶ 61,143 (1997).

²⁴ See, e.g., *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

The Commission orders:

Tampa Electric's revised tariff sheet is hereby accepted for filing, effective January 2, 2007, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.