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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Fuel and Purchased Power Cost)
Recovery Clause and Generating)
Performance Incentive Factor)

DOCKET NO. 040001-EL COMMISSION
CLERK

NOTICE OF SUPPLEMENTAL AUTHORITY

Thomas K. Churbuck ("Churbuck") hereby files this notice of supplemental authority in the above-referenced matter. On November 8-10, 2004, this matter was heard before the Florida Public Service Commission. The parties filed post-hearing briefs related to Issue 14(C), namely "Should the Commission approve the three UPS Agreements between FPL and Southern Company for cost recovery purposes?" Mr. Churbuck argued in his post-hearing brief that the Agreements should not be approved at this time and raised a number of matters that could have a future impact on the Agreements, such as the Federal Energy Regulatory Commission's market power investigation of Southern Company Services, Inc. ("Southern") and the future prospects of three Bahamas-based liquefied natural gas ("LNG") projects that would supply natural gas to South Florida. (See Churbuck Brief pages 10-11 regarding market power investigation; pages 6-7 regarding impact of LNG projects.)

Since that time Churbuck has learned that the FERC issued on December 17, 2004 an Order on Updated Market Power Analysis, Instituting Section 206 Proceeding and Establishing Refund Effective Date. A copy of this order, which indicates in paragraphs 2, 5, and 34 of the Order that a rebuttable presumption that Southern indeed has market power in its control area, is attached hereto as Exhibit 1. The Order also establishes in paragraph 34 "a refund effective date in order to put in place the necessary framework to promptly impose an effective remedy, in the event FERC determines such a remedy is required".

Additionally, FPL last week announced a deal with El Paso Corporation and

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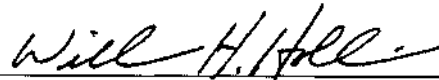
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FPSC-COMMISSION CLERK

Tractebel Electricity and Gas International to work jointly "to aggressively pursue" permits and approvals associated with two pipelines, the Seafarer pipeline and the Calypso pipeline. This announcement will impact positively the availability and reliability of natural gas flowing into FPL's service territory. Copies of the FERC Order and Press Release are attached hereto as Exhibit 2.

This supplemental authority is relevant to Issue 13(C) and, accordingly, this Notice of Supplemental Authority has been provided by Mr. Churbuck.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 20th day of December, 2004.

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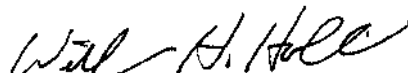
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109 FERC ¶ 61,275
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

Southern Company Energy Marketing, Inc. and
Southern Company Services, Inc.

Docket Nos. ER97-4166-015
ER97-4166-016
ER96-780-005
ER96-780-006
EL04-124-000

ORDER ON UPDATED MARKET POWER ANALYSIS, INSTITUTING SECTION
206 PROCEEDING AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued December 17, 2004)

1. On August 9, 2004, as amended on August 27, 2004 and November 19, 2004, Southern Company Services, Inc. (SCS), acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company, and Southern Power Company (collectively, Southern Companies), submitted for filing (compliance filing) revised generation market power screens in compliance with the Commission's orders issued on April 14, 2004 and July 8, 2004.¹ The filing, as amended, indicates that Southern Companies passes the pivotal supplier screen but fails the wholesale market share screen for each of the four seasons considered in Southern's control area.² The filing further indicates that Southern

¹ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g, AEP Power Marketing, Inc.*, 108 FERC ¶ 61,026 (2004) (July 8 Order). As discussed below, Southern Companies filed its regularly scheduled updated market power analysis in Docket No. ER96-780-005 on April 30, 2002. On August 27, 2004, Southern Companies filed an errata to the compliance filing, which Southern Companies states is ministerial in nature. On December 9, 2004, Southern Companies filed a second errata to the compliance filing.

² Southern Companies' filing, as amended, shows that it has a market share as high as 49 percent in the Southern control area. Southern Companies' filing identifies the Southern control area as the control area operated by SCS.



Companies passes the pivotal supplier screen and the wholesale market share screens in each of the directly interconnected first-tier control areas examined with market shares of zero to 14 percent in each of the four seasons considered. In addition, intervenors have filed protests alleging that Southern Companies has market power and requesting customer protection.

2. As we 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 under section 206 of the Federal Power Act (FPA)³ and establishes a rebuttable presumption of market power in the section 206 proceeding.⁴ Accordingly, as discussed below, in this order, the Commission institutes a proceeding pursuant to section 206 of the FPA to determine whether Southern Companies may continue to charge market-based rates. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to Southern's control area because the compliance filing indicates that this is the geographic market for which Southern Companies fails the wholesale market share screen.

3. This order, including the refund effective date, will protect customers from excessive rates and charges that may result from the exercise of market power.

Background

4. On April 30, 2002, Southern Companies filed in Docket No. ER96-780-005 an updated market analysis utilizing a modified Supply Margin Assessment and a hub-and-spoke analysis (April 30 filing).

5. In the April 14 Order, as clarified by the July 8 Order, the Commission adopted two indicative screens for assessing generation market power: a pivotal supplier screen and a wholesale market share screen. The Commission stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power. The Commission further stated that applicants and intervenors may, however, rebut the presumption established by the results of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant may accept the presumption of market power or forego the generation market power

³ 16 U.S.C. § 824e (2000).

⁴ April 14 Order, 107 FERC ¶ 61,018, at P 201.

analysis altogether and go directly to mitigation.⁵ The July 8 Order directed Southern Companies to file within thirty days of the issuance of that order, generation market power analyses pursuant to these two indicative screens.⁶ As discussed above, Southern Companies submitted its compliance filing pursuant to the July 8 Order on August 9, 2004.

6. On October 29, 2004, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request seeking additional information relating to Southern Companies’ submittal.

7. On November 19, 2004, Southern Companies filed a response to the data request. In its response, Southern Companies provided additional information regarding the pivotal supplier and market share screens for its first-tier control areas, the simultaneous transmission import capability study, the transmission market power, barriers to entry and affiliate abuse/reciprocal dealing prongs of the Commission’s four-part test for granting market-based rate authority, and a revision to its market-based rate tariff adding the market behavior rules.⁷

Description of Southern Companies’ Filing

8. In its filing, Southern Companies submits the results of the two generation market power screens. Southern Companies states that it passes the pivotal supplier screen in Southern’s control area and in each directly interconnected control area. Southern Companies further states that it passes the wholesale market share screen in each directly interconnected control area, but that it fails the wholesale market share screen in Southern’s control area for each of the four seasons considered. In response to this failure, Southern Companies argues that the Commission’s pivotal supplier and

⁵ In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power. April 14 Order, 107 FERC ¶ 61,018 at P 37.

⁶ July 8 Order, 108 FERC ¶ 61,029 at Ordering Paragraph (B).

⁷ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at Ordering Paragraph (A) (2003), *order on reh’g*, 107 FERC ¶ 61,175 (2004) (Market Behavior Rules Order).

wholesale market share screens are flawed and do not represent legitimate tools for making meaningful determinations in this regard.⁸

9. In an effort to rebut the presumption of market power as indicated by the failure of the market share screen, Southern Companies states that it developed a modified version of the Commission's pivotal supplier screen. According to Southern Companies, the modified pivotal supplier screen determines the actual amount of wholesale load in the market rather than relying on a proxy for that wholesale load and applies this modified pivotal supplier screen on a monthly basis.⁹ Southern Companies states that it passes the modified pivotal supplier screen not only at peak demand times, but also for each month of the year. According to Southern Companies, the month-by-month application of its modified pivotal supplier screen is a superior alternative to the wholesale market share screen for addressing the potential to exercise market power during non-peak times.

10. Finally, based upon the application of the modified pivotal supplier screen, Southern Companies contends that there is a substantial surplus of capacity available from suppliers other than Southern Companies in Southern's control area. According to Southern Companies, this further diminishes any legitimate concern that Southern Companies may be able to exercise market power for wholesale sales in Southern's control area.

11. The November 19, 2004 response to the data request provides additional information that supports Southern Companies' conclusion that it lacks market power in the first-tier markets.

Notice of Filings and Responsive Pleadings

12. Notice of Southern Companies' April 30 filing of an updated market power analysis in Docket No. ER96-780-005 was published in the *Federal Register*, 67 Fed. Reg. 34,444 (2002), with interventions or protests due on or before May 21, 2002. On

⁸ We find no merit to Southern Companies' argument that the screens are flawed. Our July 8 Order considered, and rejected, Southern Companies' arguments regarding potential flaws in the Commission's pivotal supplier and wholesale market share screens. In particular, we rejected suggestions to broaden the pivotal supplier analysis to include monthly assessments and alternative proxies for the market share screen. July 8 Order, 108 FERC ¶ 61,026 at P 77, 89-91.

⁹ On December 9, 2004, SCS filed a second errata to the August 9 filing and a supplement to this modified pivotal supplier screen, using nameplate instead of seasonal capacity for the relevant inputs.

May 21, 2002, Calpine Construction Finance Company, L.P. (Calpine Construction Finance), filed a motion to intervene and protest Southern Companies' April 30 filing.

13. On June 5, 2002, Southern Companies filed an answer to Calpine Construction Finance's protest (June 5 response).

14. Notice of the August 9, 2004 compliance filing in Docket No. ER97-4166-015 was published in the *Federal Register*, 69 Fed. Reg. 51,658 (2004), with interventions or protests due on or before August 30, 2004. Timely motions to intervene were filed by Southeast Electricity Consumer Association and North Carolina Electric Membership Corporation, and motions to intervene out-of-time were filed by Longleaf Energy Associates (Longleaf) and PSEG Companies. On August 23, 2004, the Alabama Electric Cooperative, Inc. (AEC) filed with the Commission a request for an extension of time in which to file a protest,¹⁰ for an expedited ruling and a summary rejection of the compliance filing. On August 30, 2004, Electricity Consumers Resource Council (ELCON) filed a motion to intervene and comments supporting AEC's motion. On August 30, 2004, Calpine Corporation (Calpine) and Shell Trading Gas and Power Company (Shell) filed motions to intervene, protest, and comments, and Electric Power Supply Association (EPSA) filed comments. On September 3, 2004, Tenaska, Inc. (Tenaska) filed a motion to intervene out-of-time and comments.

15. On September 13, 2004, Southern Companies filed an answer to the motions and comments filed by EPSA, Calpine, Shell and Tenaska (September 13 answer). On October 19, 2004, Calpine filed an answer and response to Southern Companies' answer. On November 3, 2004, Southern Companies filed a motion to strike Calpine's motion and response (November 3 motion). On November 15, 2004, Calpine filed an answer to Southern Companies' motion to strike.

16. Notice of Southern Companies' November 19, 2004 filing in Docket No. ER97-4166-015 and ER96-780-005 was published in the *Federal Register*, 69 Fed. Reg. 69,596 (2004), with interventions or protests due on or before December 7, 2004. On December 7, 2004, Calpine and Shell filed comments and a protest regarding Southern Companies' response to the data request.

¹⁰ AEC's request for an extension of time is dismissed as moot, given the Commission's determination in this order to initiate a section 206 proceeding.

Summary of Pleadings

17. Calpine Construction Finance's protest of Southern Companies' April 30 filing argues that Southern Companies exercises transmission market power, erects barriers to entry and engages in affiliate abuse. In support of these assertions, Calpine Construction Finance cites the following advantages enjoyed by Southern Companies that its competitors lack: (1) real-time economic dispatch to manage its own energy imbalances; (2) a pooling and reserve-sharing arrangement between its regulated and unregulated generation assets;¹¹ (3) the ability to withhold transmission capability from customers seeking delivery from competing generators, which allows Southern Companies to hoard the best generation sites, and together with associated transmission capacity, transfer those sites to its unregulated affiliate, Southern Power; (4) granting preferential reservation to network capability to affiliated generating units in advance of construction, allowing affiliated generators to win requests for proposals (RFPs) and thereby avoid the costs incurred by generators that do not have the advantage of network service; (5) the ability to arrange transmission for power purchased for ultimate resale before it identifies a purchaser by designating its "sink" as the Southern control area, and preventing similarly-situated competitors from using network service to "park" their purchases; and (6) the ability to avoid delays by Southern Companies in responding to transmission service requests. Calpine Construction Finance further urges the Commission to impose a range of mitigation measures.

18. In its June 5 response, Southern Companies argues that Calpine Construction Finance's protest references allegations dealt with in other proceedings and constitute a collateral attack on Commission orders, such as Order No. 888. Southern Companies further argues that the Commission has approved a number of the practices challenged by Calpine, including its use of network service, its pooling arrangement and its native load reservations. Southern Companies also contends that Calpine neglected to mention the obligations and limitations that membership in the IIC entails.

19. AEC's protest argues that the bulk of Southern Companies' compliance filing constitutes arguments against the use of the analyses required by the Commission's April 14 and July 8 Orders. According to AEC, most of the matters raised in the compliance filing were not required by the Commission's July 8 Order and, accordingly, must be rejected as beyond the scope of a compliance filing.

¹¹ Calpine Construction Finance's protest refers to the Intercompany Interchange Contract (IIC) among the five Commission-regulated Southern Operating Companies and the unregulated operating company Southern Power Company (Southern Power).

20. EPSA, Calpine, Shell and Tenaska argue that, as a result of Southern Companies' failure of the wholesale market share screen, the Commission must initiate a section 206 proceeding to determine whether Southern Companies has generation market power in Southern's control area. Calpine, Shell and Tenaska also urge the Commission to establish refund protection. Calpine also contends that the Commission should reject Southern Companies' modified screens because they constitute a collateral attack on the April 14 and July 8 Orders.

21. EPSA, Calpine, Shell and Tenaska further request that the Commission examine all four prongs of the market power test in the section 206 proceeding, arguing that Southern Companies' exercises transmission market power, erects barriers to entry, and/or engages in affiliate abuse. First, Calpine and Shell argue that Southern Companies' operation of the Southern control area pursuant to the IIC allows it to exercise transmission market power and to engage in affiliate abuse by granting its unregulated affiliate, Southern Power, preferential access to transmission and to ancillary services, in violation of Order No. 888. Second, Calpine contends that Southern Companies exercises transmission market power and engages in affiliate abuse through its membership in the Southern power pool and through its use of transmission rights associated with Southern power pool transactions to favor its unregulated affiliate, Southern Power. Third, Calpine argues that Southern Companies' code of conduct does not establish adequate protections against affiliate abuse because it does not treat affiliates such as Southern Power that engage in power marketing activities as "marketing affiliates". Fifth, EPSA and Calpine argue that Southern Companies has engaged in affiliate abuse, citing previous Commission proceedings examining allegations of affiliate abuse. Finally, Calpine and Shell contend that Southern Companies can erect barriers to entry by reserving, or "hoarding", transmission capacity in the name of serving future native load growth to deter merchants from siting plants in their territory.

22. Southern Companies' September 13 answer argues that the motions to intervene out-of-time should be denied for failure to satisfy the Commission's requirements, that EPSA's comments should be rejected for failure to intervene, and that the arguments made by EPSA, Calpine, Shell and Tenaska to initiate a section 206 proceeding addressing all four prongs of the Commission's market power test are inappropriate. Southern Companies' answer contends that a section 206 proceeding is not warranted for any of the four prongs under the factual circumstances. Furthermore, Southern Companies argues that, even if it were, it would be a violation of Southern Companies' due process rights to expand the instant section 206 proceeding to cover any of the other prongs besides generation market power. Finally, Southern Companies rejects the contention by Calpine, EPSA and Shell that Southern Companies' inclusion of additional screens is impermissible, maintaining that it had properly exercised the flexibility invited by the April 14 and July 8 Order to provide historical data.

23. Southern Companies' November 3 motion argues that Calpine's answer does not satisfy the Commission's standard for allowing unauthorized responses, that Calpine submitted duplicative motions and that Calpine improperly attempted to introduce materials from a separate proceeding involving different parties and different issues.

24. Calpine's answer to Southern Companies' November 3 motion argues that good cause exists for Calpine to respond to Southern Companies' September 13 answer, which had not been authorized by the Commission, and that Southern Companies itself had opened the door for Calpine to submit materials from a separate docket when Southern Companies claimed that Calpine's market power concerns were based on nothing more than unsupported belief.

25. In their answer to Southern Companies' response to the date request, Calpine and Shell submitted additional evidence to support their allegations that Southern Companies exercises market power, erects barriers to entry and engages in affiliate abuse and urge the Commission to set this issue for hearing for further fact-finding and to devise appropriate mitigation for any remaining transmission market power.

Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given the early stage of this proceeding and the absence of undue delay or prejudice, we find good cause to grant the motions to intervene out-of-time of Longleaf, Tenaska and the PSEG Companies, notwithstanding Southern Companies' opposition.

27. We also reject as without merit Southern Companies' motion to reject EPSA's comments for failure to intervene. EPSA correctly notes that its motion to intervene out-of-time in Docket No. ER97-4166-013 was accepted by the Commission in the April 14 Order.¹² Once an entity has been made a party to a proceeding it need not separately file a motion to intervene in each subsequent sub-docket to maintain its status as a party.

28. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Calpine's and Southern Companies' answers and responses because they have provided information that assisted us in our decision-making process.

¹² April 14 Order, 107 FERC ¶ 61,018 at P 28 and Appendix A.

Discussion

29. 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. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.¹³

Generation Market Power

30. In the April 14 Order, the Commission adopted two indicative screens for assessing generation market power. Southern Companies performed the generation market power screens for the Southern control area and twelve first-tier markets. The Commission has reviewed Southern Companies' generation market power screens, as amended, for the first-tier control areas, which indicate that Southern Companies passes both the pivotal supplier and wholesale market share screens in these geographic markets. Further, the Commission finds that Southern Companies has complied with the directives in the April 14 Order, as clarified by the July 8 Order, regarding performing a simultaneous transmission import capability study and relies on the results of that study herein. Accordingly, the Commission finds that Southern Companies satisfies the Commission's generation market power standard for the grant of market-based rate authority in the first-tier control areas.

31. Southern Companies states in its compliance filing, as amended, that Southern Companies' share of uncommitted capacity in the Southern control area exceeds 20 percent for each of the four seasons during the time period considered.¹⁴ Consequently, Southern Companies' compliance filing indicates that it fails the wholesale market share screen in Southern's control area.

32. In its submission, Southern Companies presents alternative evidence - the modified pivotal supplier screen using monthly wholesale data - to rebut the presumption of market power established by its failure of the wholesale market share screen. Southern Companies states that the modified pivotal supplier analysis uses actual wholesale load data rather than the proxy for wholesale load specified by the Commission in the April 14 Order to reflect native load obligations in the pivotal supplier screen.¹⁵ Southern

¹³ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,921-22 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899-900 (1996); accord *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

¹⁴ See Footnote 2.

¹⁵ April 14 Order, 107 FERC ¶ 61,018 at P 98.

Companies argues that this alternative evidence demonstrates that Southern Companies does not have the potential or the ability to exercise market power in the markets in which they participate. The Commission stated in the April 14 and July 8 Orders that applicants may present historical evidence to show that the applicant satisfies the generation market power concerns, however, the evidence that will be considered is historical sales and/or access to transmission to move supplies within, out of, and into a control area.¹⁶

33. Southern Companies' modified pivotal supplier screen data is under review. We will further examine this information in conjunction with other evidence submitted in the section 206 proceeding we institute herein.

34. As outlined in the April 14 Order, Southern Companies' failure of the wholesale market share screen provides the basis for the Commission to institute the instant section 206 proceeding, which is limited to Southern's control area, to determine whether Southern Companies may continue to charge market-based rates in that market, and establishes a rebuttable presumption of market power. This order establishes a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is required. Our decision to establish a refund effective date does not constitute a determination that refunds will be ordered.

35. Our decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that Southern Companies has market power in Southern's control area. As discussed in the April 14 and July 8 Orders, the screens are conservatively designed to identify the subset of applicants who require closer scrutiny. Accordingly, for the Southern control area, Southern Companies will have 60 days from the date of issuance of this order finding a screen failure to: (1) file a Delivered Price Test 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 will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.¹⁷ In addition, as the Commission stated in the April 14 Order,¹⁸ the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power.

¹⁶ April 14 Order, 107 FERC ¶ 61,018 at P 102.

¹⁷ *Id.* at P 201, 207-209.

¹⁸ *Id.* at P 37 n.11.

36. In cases where, as here, the Commission institutes a section 206 proceeding 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 initiation of the Commission's 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,¹⁹ 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 proceeding in Docket No. EL04-124-000 is published in the *Federal Register*. In addition, section 206 requires that, if no final decision has been rendered by that date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by April 29, 2005.

Transmission Market Power

37. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an OATT on file before granting such authorization. In its response to the data request, Southern Companies states that it has an OATT on file with the Commission. We note that Southern Companies' OATT was accepted by Commission order.²⁰ Based on Southern Companies' representation, the Commission finds that Southern Companies satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

38. We recognize that protesters have expressed concern that Southern Companies may have the ability to exercise market power. However, we believe that such arguments would be more appropriately raised in a separate complaint proceeding.

Barriers to Entry

39. In its response to the data request, Southern Companies states that it does not own or control fuel supplies, delivery services to electric facilities, engineering or construction firms participating in the energy industry, or natural gas pipeline facilities; that it does not exercise control over sites for generating plants that could restrict entry of suppliers into competitive electricity markets due to the unavailability of other sites; and that it does not

¹⁹ See, e.g., *Canal Electric Company*, 46 FERC ¶ 61,153 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

²⁰ *Southern Company Services, Inc.*, 82 FERC ¶ 61,130 (1998), *order on reh'g*, 85 FERC ¶ 61,235 (1998).

otherwise possess the ability to raise other barriers to entry. Based on Southern Companies' representations, the Commission is satisfied that Southern Companies cannot erect barriers to entry.²¹

40. We recognize that protesters have expressed concerns that Southern Companies may have the ability to erect barriers to entry. However, we believe that such arguments would be more appropriately raised in a separate complaint proceeding.

Affiliate Abuse/Reciprocal Dealing

41. The Commission is also concerned with the potential for affiliate abuse. In its response to the data request, Southern Companies states that, in accordance with the Public Utility Holding Company Act (PUHCA),²² it functions as an integrated public utility system, which means that it does not have an affiliated wholesale power marketer that operates outside its system. Furthermore, Southern Companies points out that PUHCA imposes a number of restrictions and limitation on its activities that fall under the jurisdiction of the Securities and Exchange Commission and that its relationships and dealings with affiliates are subject to state regulation. Finally, Southern Companies notes that its market-based rate tariff and code of conduct contain the Commission's standard restrictions on affiliate transactions and that it complies with the Commission's standards of conduct set out in Order No. 2004.²³ Based on Southern Companies' representations, Southern Companies satisfies the Commission's concerns with regard to affiliate abuse.

42. We recognize protesters have expressed concerns regarding affiliate abuse. However, we believe that such arguments would be more appropriately raised in a separate complaint proceeding.

²¹ See, e.g., *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

²² 15 U.S.C. § 79 *et seq.* (2000).

²³ *Standards of Conduct for Transmission Providers*, Order No. 2004, 68 Fed. Reg. 69,134 (2003), FERC Stats. & Regs. ¶ 31,155 (2003), *order on re'g.*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161 (2004), *order on reh'g.*, Order No. 2004-B, 108 FERC ¶ 61,118 (2004).

Market Behavior Rules

43. In the Market Behavior Rules Order, the Commission directed market-based rate sellers to include as an amendment to their market-based rate tariff the market behavior rules at such time as they seek continued authorization to sell at market-based rates.²⁴ On November 19, 2004, Southern Companies amended its tariff to include the market behavior rules set forth in Appendix A to the Market Behavior Rules Order. However, Southern Companies did not include the entire Appendix A as required. Accordingly, Southern Companies is directed to revise proposed Original Sheet No. 7 to include the following paragraph in accordance with Appendix A:

Any violation of these Market Behavior Rules will constitute a tariff violation. Seller will be subject to disgorgement of unjust profits associated with the tariff violation, from the date on which the tariff violation occurred. Seller may also be subject to suspension or revocation of its authority to sell at market-based rates or other appropriate non-monetary remedies.

Reporting Requirements

44. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.²⁵ Electric

²⁴ Market Behavior Rules Order, 105 FERC ¶ 61,218 (2003), at Ordering Paragraph (A).

²⁵ *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/Electric/eqr/eqr.htm>.

Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.²⁶

45. With regard to reporting changes in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing, in a Notice of Proposed Rulemaking in Docket No. RM04-14-000, the Commission is proposing to amend its regulations and to modify the market-based rate authority of current market-based rate sellers to establish a reporting obligation for changes in status that apply to public utilities authorized to make wholesale power sales in interstate commerce at market-based rates.²⁷ Accordingly, the change in status reporting obligation for Southern Companies is subject to the outcome of the rulemaking.

The Commission orders:

(A) Southern Companies' updated market power analysis for all relevant markets not subject to the section 206 proceeding is hereby accepted for filing as discussed in the body of this order.

(B) Southern Companies' is directed to file, within 15 days from the date of issuance of this order, the revision to its market behavior rules, 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 Organization Act and by the Federal Power Act, particularly section 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 I), the Commission hereby institutes a proceeding in Docket No. EL04-124-000 concerning the justness and reasonableness of Southern Companies' market-based rates, as discussed in the body of this order.

²⁶ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

²⁷ Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority, 69 Fed. Reg. 61,180 (Oct. 15, 2004), FERC Stats. & Regs. ¶ 32,576 (2004).

(D) The Secretary shall promptly publish in the Federal Register a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL04-124-000.

(E) The refund effective date established pursuant to section 206(b) of the FPA will be 60 days following publication in the Federal Register of the notice discussed in Ordering Paragraph (D) above.

(F) For the Southern control area, Southern Companies is directed, within 60 days from the date of issuance of this order, to: (1) file a Delivered Price Test 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 will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.



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December 14, 2004 09:01 AM US Eastern Timezone

FPL Group Resources, Tractebel North America and El Paso Corporation Combine Efforts to Bring a New Source of Natural Gas to Florida

JUNO BEACH, Fla. & HOUSTON--(BUSINESS WIRE)--Dec. 14, 2004--FPL Group Resources LLC, a subsidiary of FPL Group, Inc. (NYSE:FPL), affiliates of Tractebel North America, Inc., a business unit of Tractebel Electricity & Gas International, one of the business divisions of SUEZ (NYSE:SZE), and subsidiaries of El Paso Corporation (NYSE:EP), today announced that they have agreed to combine development efforts and resources in order to bring a new supply of natural gas to South Florida. These efforts will help meet Florida's growing demand for clean natural gas and will deliver a new reliable source of production that will provide added supply security.

Affiliates of FPL Group Resources and Tractebel North America, Inc. have executed definitive agreements to combine their development efforts. FPL Group Resources currently has an option with subsidiaries of El Paso Corporation to purchase 100 percent of the development rights of El Paso's proposed liquefied natural gas (LNG) terminal at South Riding Point on Grand Bahama Island and 50 percent of the proposed Seafarer pipeline to Palm Beach County, Florida. An affiliate of FPL Group Resources has also signed a definitive Heads of Agreement with Ras Laffan Liquefied Natural Gas Company Limited (ll) ("RasGas") for 800,000 million British Thermal units per day of LNG from Qatar. A Tractebel North America, Inc. ("TNA") subsidiary is currently developing the Calypso pipeline project, which proposes to transport natural gas via a pipeline to Broward County, Florida, from a planned LNG terminal in Freeport, Grand Bahama, being developed by another TNA affiliate.

Upon completion of a series of new agreements, all three parties will have the ability to come together to create the most efficient project. Under terms of the new agreements, FPL Group Resources, affiliates of Tractebel North America, Inc., and El Paso will be equity owners of both the Seafarer and Calypso pipeline projects, and ultimately plan to construct one of these pipelines from the Bahamas to Florida. FPL Group Resources and affiliates of Tractebel North America, Inc. will be equal owners of an LNG receiving terminal in the Bahamas and a marketing company based in Florida called Sailfish Natural Gas Company, Ltd. ("Sailfish").

"By combining the talents and resources of our three companies, we will be able to deliver a more efficient project to bring a new supply of natural gas to South Florida," said Brad Williams, vice president, Gas Projects, for FPL Group Resources.

William P. Utt, president and CEO for Tractebel North America said, "TNA is excited to be expanding SUEZ's trans-Atlantic LNG position through these agreements. Our enormous experience in the LNG, natural gas and electricity generation value chains will contribute to ensuring that the most efficient project is built to serve the Florida market and we look forward to moving ahead with the proposed terminal and pipeline projects in the coming months."

"El Paso will bring over 75 years of expertise in pipeline development, construction and operations to these efforts," said John W. Somerhalder II, president of El Paso's Pipeline Group. "We look forward to working with the other owners to ensure safe and reliable delivery of natural gas to south Florida while continuing to provide superior customer service."

FPL Group Resources and TNA said the new Sailfish marketing company plans to furnish a joint proposal in connection with the Florida Power & Light Company outstanding request for proposals for LNG supplies. The companies said their marketing company's proposal will offer the potential customers greater flexibility and supply security. The Heads of Agreement with RasGas is subject to Sailfish successfully competing to provide regasified LNG to Florida Power & Light Company and other Florida customers and obtaining certain regulatory approvals.

The new combined pipeline enterprise plans to continue to aggressively pursue the Seafarer FERC certificate and all other permits and approvals associated with that project as well as the remaining permits and approvals related to the Calypso Pipeline, which already has received its FERC certificate and State of Florida and Broward County environmental

approvals. The newly combined LNG terminal enterprise is working to permit two sites in the Bahamas. By combining efforts and evaluating and optimizing every option, the companies intend to be positioned to best serve the Florida marketplace.

FPL Group, with annual revenues of more than \$9 billion, is nationally known as a high-quality, efficient, and customer-driven organization focused on energy-related products and services. With a growing presence in 26 states, it is widely recognized as one of the country's premier power companies. Its principal subsidiary, Florida Power & Light Company, serves more than 4.2 million customer accounts in Florida. FPL Energy, LLC, an FPL Group wholesale energy-generating subsidiary, is a leader in producing electricity from clean and renewable fuels. Additional information is available on the Internet at <http://www.FPLGroup.com>, <http://www.FPL.com> and <http://www.FPLEnergy.com>.

Based in Houston, Tractebel North America, Inc. ("TNA") is a business unit of Tractebel Electricity & Gas International ("EGI") and is responsible for managing EGI's positions within the energy value chain in the US, Mexico, and Canada, including electricity generation and cogeneration, natural gas and LNG, asset-based trading and origination, and energy sales and related services.

TNA subsidiaries own and/or operate a total of 59 power, cogeneration, steam, and chilled-water facilities, including those in construction or development, representing a capacity of more than 5,717 MW of electricity generation, 12 million pounds per hour of steam, and 147,000 tons per hour of chilled water. TNA's wholly owned subsidiary, Distrigas of Massachusetts LLC ("DOMAC"), owns and operates an LNG receiving terminal in Everett, Massachusetts. The DOMAC terminal commenced operations in 1971 and currently serves most of the gas utilities in New England and key power producers, meeting approximately 20% of New England's annual gas demand.

In Mexico, TNA affiliates operate three natural gas distribution networks in Guadalajara, Queretaro and Tampico, and two cogeneration plants in Tampico and Monterrey. These companies serve more than 90,000 natural gas customers and produce 280 MW of power.

For more information about SUEZ, Tractebel Electricity & Gas International, or Tractebel North America, visit <http://www.egi.tractebel.com>. For more information about Calypso U.S. Pipeline LLC (formerly Tractebel Calypso Pipeline LLC) visit <http://www.tractebelcalypso.com>.

El Paso Corporation provides natural gas and related energy products in a safe, efficient, dependable manner. The company owns North America's largest natural gas pipeline system and one of North America's largest independent natural gas producers. For more information, visit <http://www.elpaso.com>. For more information about the Seafarer pipeline project visit <http://www.seafarer.us>.

CAUTIONARY STATEMENTS AND RISK FACTORS THAT MAY AFFECT FUTURE RESULTS FOR FPL GROUP

In connection with the safe harbor provisions of the Private Securities Litigation Reform Act of 1995 (Reform Act), FPL Group, Inc. (FPL Group) and Florida Power & Light Company (FPL) are hereby filing cautionary statements identifying important factors that could cause FPL Group's or FPL's actual results to differ materially from those projected in forward-looking statements (as such term is defined in the Reform Act) made by or on behalf of FPL Group and FPL in this press release, in response to questions or otherwise. Any statements that express, or involve discussions as to expectations, beliefs, plans, objectives, assumptions or future events or performance (often, but not always, through the use of words or phrases such as will likely result, are expected to, will continue, is anticipated, believe, could, estimated, may, plan, potential, projection, target, outlook) are not statements of historical facts and may be forward-looking. Forward-looking statements involve estimates, assumptions and uncertainties. Accordingly, any such statements are qualified in their entirety by reference to, and are accompanied by, the following important factors (in addition to any assumptions and other factors referred to specifically in connection with such forward-looking statements) that could cause FPL Group's or FPL's actual results to differ materially from those contained in forward-looking statements made by or on behalf of FPL Group and FPL.

Any forward-looking statement speaks only as of the date on which such statement is made, and FPL Group and FPL undertake no obligation to update any forward-looking statement to reflect events or circumstances after the date on which such statement is made or to reflect the occurrence of unanticipated events. New factors emerge from time to time and it is not possible for management to predict all of such factors, nor can it assess the impact of each such factor on the business or the extent to which any factor, or combination of factors, may cause actual results to differ materially from those contained in any forward-looking statement.

The following are some important factors that could have a significant impact on FPL Group's and FPL's operations and financial results, and could cause FPL Group's and FPL's actual results or outcomes to differ materially from those discussed in the forward-looking statements:

-- FPL Group and FPL are subject to changes in laws or regulations, including the Public Utility Regulatory Policies Act of 1978, as amended (PURPA), and the Public Utility Holding Company Act of 1935, as amended (Holding Company Act), changing governmental policies and regulatory actions, including those of the Federal Energy Regulatory Commission (FERC), the Florida Public Service Commission (FPSC) and the utility commissions of other states in which FPL Group has operations, and the U.S. Nuclear Regulatory Commission (NRC), with respect to, among other things, allowed rates of return, industry and rate structure, operation of nuclear power facilities, operation and construction of plant facilities, operation and construction of transmission facilities, acquisition, disposal, depreciation and amortization of assets and facilities, recovery of fuel and purchased power costs, decommissioning costs, return on common equity and equity ratio limits, and present or prospective wholesale and retail competition (including but not limited to retail wheeling and transmission costs). The FPSC has the authority to disallow recovery by FPL of costs that it considers excessive or imprudently incurred.

-- The regulatory process generally restricts FPL's ability to grow earnings and does not provide any assurance as to achievement of earnings levels.

-- FPL Group and FPL are subject to extensive federal, state and local environmental statutes, rules and regulations relating to air quality, water quality, waste management, wildlife mortality, natural resources and health and safety that could, among other things, restrict or limit the output of certain facilities or the use of certain fuels required for the production of electricity and/or increase costs. There are significant capital, operating and other costs associated with compliance with these environmental statutes, rules and regulations, and those costs could be even more significant in the future.

-- FPL Group and FPL operate in a changing market environment influenced by various legislative and regulatory initiatives regarding deregulation, regulation or restructuring of the energy industry, including deregulation of the production and sale of electricity. FPL Group and its subsidiaries will need to adapt to these changes and may face increasing competitive pressure.

-- FPL Group's and FPL's results of operations could be affected by their ability to renegotiate franchise agreements with municipalities and counties in Florida.

-- The operation of power generation facilities involves many risks, including start up risks, breakdown or failure of equipment, transmission lines or pipelines, use of new technology, the dependence on a specific fuel source or the impact of unusual or adverse weather conditions (including natural disasters such as hurricanes), as well as the risk of performance below expected levels of output or efficiency. This could result in lost revenues and/or increased expenses. Insurance, warranties or performance guarantees may not cover any or all of the lost revenues or increased expenses, including the cost of replacement power. In addition to these risks, FPL Group's and FPL's nuclear units face certain risks that are unique to the nuclear industry including the ability to dispose of spent nuclear fuel, as well as additional regulatory actions up to and including shutdown of the units stemming from public safety concerns, whether at FPL Group's and FPL's plants, or at the plants of other nuclear operators. Breakdown or failure of an FPL Energy, LLC (FPL Energy) operating facility may prevent the facility from performing under applicable power sales agreements which, in certain situations, could result in termination of the agreement or incurring a liability for liquidated damages.

-- FPL Group's and FPL's ability to successfully and timely complete their power generation facilities currently under construction, those projects yet to begin construction or capital improvements to existing facilities is contingent upon many variables and subject to substantial risks. Should any such efforts be unsuccessful, FPL Group and FPL could be subject to additional costs, termination payments under committed contracts, and/or the write-off of their investment in the project or improvement.

-- FPL Group and FPL use derivative instruments, such as swaps, options, futures and forwards to manage their commodity and financial market risks, and to a lesser extent, engage in limited trading activities. FPL Group could recognize financial losses as a result of volatility in the market values of these contracts, or if a counterparty fails to perform. In the absence of actively quoted market prices and pricing information from external sources, the valuation of these derivative instruments involves management's judgment or use of estimates. As a result, changes in the underlying assumptions or use of alternative valuation methods could affect the reported fair value of these contracts. In addition, FPL's use of such instruments could be subject to prudence challenges and if found imprudent, cost recovery could be disallowed by the FPSC.

-- There are other risks associated with FPL Group's non-rate regulated businesses, particularly FPL Energy. In addition to risks discussed elsewhere, risk factors specifically affecting FPL Energy's success in competitive wholesale markets include the ability to efficiently develop and operate generating assets, the successful and timely completion of project restructuring activities, maintenance of the qualifying facility status of certain projects, the price and supply of fuel, transmission constraints, competition from new sources of generation, excess generation capacity and demand for power.

There can be significant volatility in market prices for fuel and electricity, and there are other financial, counterparty and market risks that are beyond the control of FPL Energy. FPL Energy's inability or failure to effectively hedge its assets or positions against changes in commodity prices, interest rates, counterparty credit risk or other risk measures could significantly impair its future financial results. In keeping with industry trends, a portion of FPL Energy's power generation facilities operate wholly or partially without long-term power purchase agreements. As a result, power from these facilities is sold on the spot market or on a short-term contractual basis, which may affect the volatility of FPL Group's financial results. In addition, FPL Energy's business depends upon transmission facilities owned and operated by others; if transmission is disrupted or capacity is inadequate or unavailable, FPL Energy's ability to sell and deliver its wholesale power may be limited.

-- FPL Group is likely to encounter significant competition for acquisition opportunities that may become available as a result of the consolidation of the power industry. In addition, FPL Group may be unable to identify attractive acquisition opportunities at favorable prices and to successfully and timely complete and integrate them.

-- FPL Group and FPL rely on access to capital markets as a significant source of liquidity for capital requirements not satisfied by operating cash flows. The inability of FPL Group and FPL to maintain their current credit ratings could affect their ability to raise capital on favorable terms, particularly during times of uncertainty in the capital markets which, in turn, could impact FPL Group's and FPL's ability to grow their businesses and would likely increase interest costs.

-- FPL Group's and FPL's results of operations can be affected by changes in the weather. Weather conditions directly influence the demand for electricity and natural gas and affect the price of energy commodities, and can affect the production of electricity at wind and hydro-powered facilities. In addition, severe weather can be destructive, causing outages and/or property damage, which could require additional costs to be incurred.

-- FPL Group and FPL are subject to costs and other effects of legal and administrative proceedings, settlements, investigations and claims, as well as the effect of new, or changes in, tax rates or policies, rates of inflation, accounting standards, securities laws or corporate governance requirements.

-- FPL Group and FPL are subject to direct and indirect effects of terrorist threats and activities. Generation and transmission facilities, in general, have been identified as potential targets. The effects of terrorist threats and activities include, among other things, terrorist actions or responses to such actions or threats, the inability to generate, purchase or transmit power, the risk of a significant slowdown in growth or a decline in the U.S. economy, delay in economic recovery in the United States, and the increased cost and adequacy of security and insurance.

-- FPL Group's and FPL's ability to obtain insurance, and the cost of and coverage provided by such insurance, could be affected by national events as well as company-specific events.

-- FPL Group and FPL are subject to employee workforce factors, including loss or retirement of key executives, availability of qualified personnel, collective bargaining agreements with union employees or work stoppage.

The issues and associated risks and uncertainties described above are not the only ones FPL Group and FPL may face. Additional issues may arise or become material as the energy industry evolves. The risks and uncertainties associated with these additional issues could impair FPL Group's and FPL's businesses in the future.

CAUTIONARY STATEMENTS AND RISK FACTORS THAT MAY AFFECT FUTURE RESULTS FOR EL PASO CORPORATION

This release includes forward-looking statements and projections, made in reliance on the safe harbor provisions of the Private Securities Litigation Reform Act of 1995. The company has made every reasonable effort to ensure that the information and assumptions on which these statements and projections are based are current, reasonable, and complete. However, a variety of factors could cause actual results to differ materially from the projections, anticipated results or other expectations expressed in this release, including, without limitation, our ability to successfully construct and operate the proposed pipeline facilities described in this release; general economic conditions in geographic regions or markets served by El Paso Corporation and its affiliates, or where operations of the company and its affiliates are located; the uncertainties associated with governmental regulation; competition, and other factors described in the company's (and its affiliates') Securities and Exchange Commission filings. While the company makes these statements and projections in good faith, neither the company nor its management can guarantee that anticipated future results will be achieved. Reference must be made to those filings for additional important factors that may affect actual results. The company assumes no obligation to publicly update or revise any forward-looking statements made herein or any other forward-looking statements made by The company, whether as a result of new information, future events, or otherwise.

CAUTIONARY STATEMENTS AND RISK FACTORS THAT MAY AFFECT FUTURE RESULTS FOR THE SUEZ GROUP

This press release contains certain forward-looking statements, particularly with respect to future events, trends, plans or

objectives. These statements are based on management's current views and assumptions and involve a number of risks and uncertainties which may lead to a significant difference between actual results and those suggested either explicitly or implicitly in these statements (or suggested by past results). Additional information about these risks and uncertainties appears in documents filed by SUEZ with the U.S. Securities and Exchange Commission and the Autorite des Marches Financiers (French securities regulator). The present forward-looking statements are made as of the date of the present release, with no undertaking by SUEZ to update or revise them, whether in connection with new information, future events, or any other factor.

Note to Editors: High-resolution logos and executive head shots are available for download at <http://www.fpl.com/news/contents/logos.shtml>.

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**At A Glance
 FPL Group, Inc.**

Headquarters: Juno Beach, Florida
Website: <http://www.FPLGroup.com>
CEO: Lew Hay
Employees: 11,577
Organization: Utility
Revenues: \$9.7 billion (2003)

*Source: via Business Wire
 Updated 10/24/2003 by company*



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