

135 FERC ¶ 61,173
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Carolina Power & Light Company
Duke Energy Carolinas, LLC

Docket No. ER11-3061-000

ORDER GRANTING LIMITED WAIVER
OF MARKET-BASED RATE TARIFF RESTRICTIONS

(Issued May 23, 2011)

1. In this order, we grant Carolina Power & Light Company's, d/b/a Progress Energy Carolinas, Inc. (Progress), and Duke Energy Carolinas, LLC's (Duke) (collectively, the Applicants) request for limited waiver of the prohibition against market-based rate sales into Progress' balancing authority area to permit Duke to make market-based rate sales to Progress pursuant to an agency marketing arrangement between Progress and the Public Works Commission of the City of Fayetteville, North Carolina (Fayetteville). This authorization will be effective as of the date of issuance of this order and end no later than June 30, 2012, as requested.

I. Background

2. On March 10, 2011, Progress filed a request for limited waiver of the restriction in its market-based rate tariff prohibiting sales at market-based rates in Progress' balancing authority area (Waiver Request).¹ While Progress has been granted market-based rate authority by the Commission,² it and its affiliates are precluded from making market-

¹ Section VII of Progress' market-based rate tariff, entitled Limitations and Exemptions Regarding Market-Based Rate Authority, states that "Seller limits its sales at market-based rates to customers located outside of the CP&L [Progress] balancing authority areas and outside of Peninsular Florida." Carolina Power & Light Co., Market-Based Rates Tariff (0.0.0).

² *Carolina Power & Light Co.*, 82 FERC ¶ 61,004 (1998).

based rate sales in the Progress balancing authority area.³ Progress states that under the Commission's affiliate rules, "companies proposing to merge will be treated as affiliates under their market-based rate tariffs while their proposed merger is pending."⁴ As a result of the proposed merger between the Applicants' parent companies Progress Energy, Inc. and Duke Energy Corporation announced on January 10, 2011, Progress states that Duke has been precluded from selling wholesale power at market-based rates in the Progress balancing authority area. Prior to the announcement of the Progress-Duke merger, Duke was not subject to any prohibition on market-based rate sales in Progress' balancing authority area.

3. On April 14, 2011, the Applicants filed a joint motion to add Duke as a co-applicant on Progress' limited waiver request and clarified that Duke seeks waiver on its own behalf (Joint Motion).

4. Progress explains that Fayetteville owns and operates a municipal electric system serving retail customers in the City of Fayetteville, North Carolina. Fayetteville is interconnected with Progress and is located in the Progress balancing authority area. Progress states that Fayetteville currently purchases its base load requirements from Progress under a sales agreement and obtains the remaining peaking energy requirements pursuant to an agency marketing arrangement between Progress and Fayetteville. Progress represents that under the terms of the agency marketing arrangement, Progress: (a) procures power for Fayetteville when purchasing energy is less expensive than running Fayetteville's own generation; and (b) markets Fayetteville's energy when running Fayetteville's generation is the less expensive alternative. According to Progress, it has historically purchased, on Fayetteville's behalf, significant amounts of peaking energy from Duke under Duke's market-based rate tariff. Progress represents that it purchases this energy from Duke for the sole benefit of Fayetteville and Progress directly passes through to Fayetteville the costs of all such energy purchased pursuant to the agency marketing arrangement. According to Progress, the agency marketing arrangement expires on June 30, 2012, after which Fayetteville will be obtaining its full

³ *Florida Power Corp.*, 113 FERC ¶ 61,131 (2005).

⁴ Progress March 10, 2011 Waiver Request at 4 (quoting *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 501, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010)).

requirements from Progress pursuant to a cost-based arrangement on file with and approved by the Commission.⁵

5. The Waiver Request seeks to exempt Duke from the prohibition on market-based rate sales in Progress' balancing authority area until the agency marketing arrangement expires on June 30, 2012, and solely with respect to power purchased by Progress as agent for the benefit of Fayetteville under the terms of that arrangement. Progress represents that application to Duke of the restriction on market-based rate sales will adversely interfere with and cause harm to Fayetteville's power procurement efforts on behalf of its customers, and that granting the requested waiver is in the best interest of Fayetteville and its customers. The ultimate beneficiaries of the waiver, Progress argues, would be the customers of Fayetteville, who would continue to enjoy the efficiencies of the agency marketing arrangement until the expiration of the agreement.⁶

II. Notice of Filing and Responsive Pleadings

6. Notice of Progress' request for a limited waiver was published in the *Federal Register*, 76 Fed. Reg. 16,400 (2011), with interventions and protests due on or before March 31, 2011. Fayetteville filed a timely motion to intervene and comments in support of Progress' request. Notice of the Joint Motion was published in the *Federal Register*, 76 Fed. Reg. 22,686 (2011), with interventions and protests due on or before April 28, 2011. None was filed.

7. Fayetteville urges the Commission to grant the limited waiver requested by Progress and states that the waiver would allow Progress to resume making wholesale energy purchases at market-based rates from Duke for resale to Fayetteville under the agency marketing arrangement in the wake of the proposed merger of Progress' and Duke's parent companies.⁷

III. Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motion to intervene by Fayetteville serves to make it a party to this proceeding.

⁵ Progress March 10, 2011 Waiver Request at 4.

⁶ *Id.* at 5-6.

⁷ Fayetteville March 31, 2011 Comments at 3.

B. Substantive Matters

9. The Commission required in Order No. 697 that “companies proposing to merge will be treated as affiliates under their market-based rate tariffs while their proposed merger is pending.”⁸ Thus, Progress and Duke are treated as affiliates and Duke is subject to the tariff limitation prohibiting Progress and its affiliates from making market-based rate sales in the Progress balancing authority area, which includes Fayetteville. Therefore, absent waiver, Duke may no longer sell power to Progress at market-based rates for resale to Fayetteville.

10. Based on the facts and circumstances, we will grant the Applicants’ request for limited waiver of the tariff restriction against market-based rates sales in the Progress balancing authority area to permit market-based sales by Duke to Progress as asset manager for Fayetteville pursuant to the agency marketing arrangement, effective as of the date of this order and ending no later than June 30, 2012 when the agency marketing arrangement expires. This waiver will permit Duke to resume selling power to Progress at market-based rates for resale to Fayetteville, and solely with respect to power purchased by Progress as agent for the benefit of Fayetteville under the terms of that arrangement. This will provide Fayetteville with an opportunity to receive the full benefits and efficiencies of the agency marketing arrangement it has with Progress. As explained by Progress, and supported by Fayetteville and Duke, allowing the Applicants to maintain the status quo will afford Fayetteville the continued ability to access the least-cost generation in the market.

11. We direct the Applicants to submit a compliance filing, within 30 days of the date of this order, revising the limitations and exemptions sections of their respective market-based tariffs to list the specific, limited waiver granted herein and include a citation to this order.⁹

⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 501.

⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 385 n.517. For clarification purposes, in addition to Duke filing revisions to its market-based tariff, Progress also is expected to file revisions to the limitations and exemptions section of its market-based tariff to reflect the specific, limited waiver granted herein to its presumed affiliate, Duke, and include a citation to this order.

The Commission orders:

(A) The Applicants' request for limited waiver of the restriction against market-based rate sales into Progress' balancing authority area by Duke is hereby granted, effective as of the date of issuance of this order and ending no later than June 30, 2012, as requested, as discussed in the body of this order.

(B) The Applicants are hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.