

113 FERC ¶ 61,131
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Florida Power Corporation	Docket Nos. ER97-2846-005 ER97-2846-006
Carolina Power & Light Company	ER05-1076-000 ER05-1076-001 ER99-2311-006
Progress Energy Inc.	EL05-77-000
DeSoto County Generating Co, LLC	ER05-1453-000
Effingham County Power, LLC	ER05-1454-000
MPC Generating, LLC	ER05-1455-000
Progress Ventures, Inc.	ER05-1456-000
Rowan County Power, LLC	ER05-1457-000
Walton County Power, LLC	ER05-1458-000
Washington County Power, LLC.	ER05-1459-000

ORDER ON UPDATED MARKET POWER ANALYSIS AND ACCEPTING
MARKET-BASED RATE TARIFF AND REVISED TARIFF SHEETS

(Issued November 4, 2005)

1. In this order, we accept an updated market power analysis filed by Progress Energy, Inc. (Progress Energy) on behalf of its public utility affiliates, Carolina Power & Light Company (CP&L), also known as Progress Energy Carolinas, Inc., and Florida Power Corporation (FPC), also known as Progress Energy Florida, Inc., as discussed below. In this order, the Commission finds that FPC and CP&L satisfy the

Commission's standards for market-based rate authority outside the CP&L home control area and outside peninsular Florida. CP&L's and FPC's next updated market power analysis is due three years from the date of this order. Also, in this order we accept CP&L's proposed market-based rate tariff and tariff revisions and the Progress Energy Affiliates' proposed tariff revisions (including FPC).¹

Background

2. Progress Energy is a public utility holding company. CP&L and FPC are public utilities with franchised service territories that are wholly-owned subsidiaries of Progress Energy. CP&L is an investor-owned, vertically-integrated public utility located in North Carolina. It provides electric generation, transmission and distribution services to wholesale and retail customers. The Commission accepted CP&L's initial petition for market-based rate authority in Docket No. ER98-651-000.²

3. FPC is an investor-owned, vertically-integrated public utility located in Florida. FPC provides electric generation, transmission and distribution services to retail and wholesale customers. The Commission accepted FPC's initial petition for market-based rate authority in Docket No. ER97-2846-000.³

4. In a May 13, 2004 Order,⁴ the Commission directed all applicants with pending three-year market-based rate reviews to revise their generation market power analyses to address the indicative screens adopted in the April 14, 2004 Order. The May 13 Order also directed applicants to address the other three parts of our four part market-based rate analysis (*i.e.*, transmission market power, barriers to entry, and affiliate abuse and/or reciprocal dealing) if factual circumstances had changed from those described in the applicants' pending filing.

5. On August 12, 2004, CP&L submitted a letter in response to the May 13 Order and the July 8, 2004 Order in which it informed the Commission that, for the sale of electricity at wholesale within its control area, CP&L would either adopt the default cost-

¹ The Progress Energy Affiliates are DeSoto County Generating Co., LLC, Effingham County Power, LLC, MPC Generating, LLC, Progress Ventures, Inc., Rowan County Power, LLC, Walton County Power, LLC, and Washington County Power, LLC.

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

³ *Florida Power Corporation*, 79 FERC ¶ 61,385 (1997).

⁴ *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order); *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).

based rates described in the Commission's July 8 Order or propose alternative cost-based rates. CP&L stated that, within 60 days, it would file its proposed cost-based rates and a revised market-based rate tariff to reflect that its market-based rate authority is limited to those areas outside of its control area. However, no such filing was made.

6. On December 23, 2004, Progress Energy, on behalf of FPC, filed a letter requesting that the Commission recognize that the market power analysis filed on October 21, 2003 is still valid and that the analysis demonstrates that FPC does not possess market power in the Southern Company control area, which is the only control area outside of peninsular Florida to which FPC is interconnected.

7. In a May 5, 2005 Order,⁵ the Commission found that Progress Energy's filing, which asserted that there have been no material changes in circumstances for FPC, failed to include the required analysis. The Commission also found that CP&L had failed to timely file an updated market power analysis. Therefore, the Commission instituted a proceeding under section 206 of the Federal Power Act (FPA)⁶ to determine whether FPC and CP&L may continue to charge market-based rates. The Commission established a refund effective date and directed that Progress Energy file an updated market power analysis for FPC and CP&L that is consistent with the Commission's April 14 and July 8 Orders. The Commission noted that, if CP&L wishes to relinquish its market-based rate authority in its home control area, it should submit a separate filing under section 205 of the FPA, including appropriate revisions to its market-based rate tariff, and propose adequately supported cost-based rates. Additionally, in the May 5 Order, the Commission directed FPC and CP&L to revise their market-based rate tariffs to include the change in status reporting requirement adopted in Order No. 652.⁷ The Commission also directed FPC to revise its market-based rate tariff to include the Commission's market behavior rules.⁸

8. On June 6, 2005, Progress Energy made a number of filings in response to the May 5, 2005 Order, including: (1) a new market-based rate tariff that prohibits CP&L from making market-based rate sales that sink in the CP&L control area and incorporates

⁵ *Florida Power Corp.*, 111 FERC ¶ 61,154 (2005) (May 5 Order).

⁶ 16 U.S.C. § 824e (2000).

⁷ *Reporting Requirement for Changes in Status for Public Utilities with Market-based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

⁸ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004) (Market Behavior Rules Order).

the change in status reporting requirement adopted by the Commission in Order No. 652;⁹ (2) an updated market power analysis for CP&L's and FPC's first-tier control areas;¹⁰ and (3) revised market-based rate tariffs for FPC that include the market behavior rules and the change in status reporting requirement.¹¹

9. On August 5, 2005, the Commission issued a request for additional information. Specifically, the Commission asked CP&L to explain why CP&L's market-based rate tariff does not include a provision prohibiting sales within peninsular Florida. The Commission also asked if all CP&L affiliates with market-based rate authority (including FPC) intend to revise their existing market-based rate tariffs to include a provision prohibiting sales into the CP&L control area. In addition, the Commission directed CP&L and FPC to revise their market-based rate tariffs to be consistent with the Commission's market behavior rules order.

10. On September 6, 2005, CP&L submitted a revised market-based rate tariff incorporating a provision prohibiting sales within peninsula Florida without first receiving Commission approval under section 205 of the FPA and revising the market behavior rules language in its tariff. Also on September 6, 2005, in a separate filing, FPC submitted a revised market-based rate tariff incorporating a provision which prohibits sales that sink within the CP&L control area. On September 7, 2005, the Progress Energy Affiliates submitted revisions to their respective market-based rate tariffs eliminating the authority to make market-based rate sales that sink in the CP&L control area. Additionally, the Progress Energy Affiliates, FPC and CP&L revised the market behavior rules language in their market-based rate tariffs.

⁹ Docket No. ER05-1076-000.

¹⁰ Docket Nos. EL05-77-000, ER97-2846-005 and ER99-2311-006. We note that FPC and its affiliates do not have market-based rate authority in peninsular Florida, but they do have market-based rate authority for wholesale sales in all other markets, including the Southern Company control area.

¹¹ On June 6, 2005 in Docket No. ER05-1082-000, CP&L submitted a cost-based rate tariff that, according to CP&L, establishes a ceiling rate for sales of capacity and energy for transactions of one year or less that sink in the CP&L control area. On September 6, 2005, CP&L filed a revised cost-based rate tariff to replace the June 6 filing. In an order being issued concurrently with this one, the Commission is accepting the cost-based rate tariff.

Notice and Responsive Pleadings

11. Notice of the June 6 filings was published in the *Federal Register*, 70 Fed. Reg. 35,420 (2005), with interventions or protests due on or before June 27, 2005. ElectriCities of North Carolina filed a motion to intervene in Docket Nos. ER05-1076-000, EL05-77-000, and the CP&L updated triennial review. North Carolina Electric Membership Corporation and the Public Works Commission of the City of Fayetteville, North Carolina (Fayetteville Public Works) filed motions to intervene in Docket No. ER05-1076-000. White Springs Agricultural Chemicals, Inc. filed a motion to intervene in Docket Nos. EL05-77-000, ER99-2311-006 and ER97-2846-005. Florida Municipal Power Agency filed a motion to intervene in Docket Nos. EL05-77-000 and ER97-2846-006. On July 12, 2005, Progress Energy filed an answer.
12. Notice of the September 6 filings was published in the *Federal Register*, 70 Fed. Reg. 55,366 (2005), with interventions or protests due on or before September 27, 2005. Fayetteville Public Works filed a motion to intervene and protest. On September 12, 2005, Progress Energy, on behalf of CP&L, submitted an answer to the Fayetteville Public Works motion to intervene and protest.
13. Notice of the Progress Affiliates' September 7, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 56,673 (2005), with comments, interventions, and protests due on or before September 28, 2005. The North Carolina Electric Membership Corporation filed a motion to intervene.

Discussion

Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept CP&L's answer filed on October 12, 2005.

FPC's and CP&L's Updated Market Power Analysis

Market-Based Rate Authorization

15. 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.¹²

16. In Docket Nos. ER97-2846-005, ER99-2311-006, EL05-77-000, Progress Energy submitted an updated market power analysis on behalf of FPC and CP&L. As discussed below, the Commission concludes that the applicants satisfy the Commission's standards for market-based rate authority outside peninsular Florida and the CP&L control area.

Generation Market Power

17. Progress Energy states that it has applied both the pivotal supplier and the wholesale market share screens for all of CP&L's first-tier control areas (PJM Interconnection, L.L.C., Tennessee Valley Authority, Duke Energy Corporation, Santee Cooper, and South Carolina Electric and Gas Company) and for FPC's only first-tier control area that is outside of peninsular Florida – Southern Company. Progress Energy states that it did not analyze whether Progress Energy possesses generation market power in the CP&L control area nor in peninsular Florida because: (1) CP&L is not seeking to maintain market-based rate authority for its own control area; and (2) FPC does not have, and is not currently seeking, market-based rate authority for peninsular Florida. The Commission has reviewed Progress Energy's generation market power analysis and has determined that CP&L and FPC pass the generation market power screens in the first-tier markets listed above. Accordingly, the Commission finds that CP&L and FPC satisfy the Commission's generation market power standard for the grant of market-based rate authority outside of the CP&L home control area and peninsular Florida.

Transmission Market Power

18. When a transmission-owning public utility seeks market-based rate authority, the Commission has required it to have an open access transmission tariff (OATT) on file before granting such authorization. Progress Energy states that both FPC and CP&L provide transmission service through Commission-approved OATTs.¹³ Further, no intervenor has raised transmission market power concerns. Based on Progress Energy's representations, we find that both CP&L and FPC satisfy the Commission's transmission market power standard for the grant of market-based rate authority.

¹² See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); *accord, Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

¹³ *Carolina Power & Light Company*, Docket No. OA96-198-000 (November 22, 2000) (unpublished letter order); *Florida Power Corporation*, Docket No. OA97-362-000 (January 19, 2001) (unpublished letter order).

Barriers To Entry

19. Progress Energy states that neither it nor its affiliates has dominant control over sites or other scarce inputs into generation, as demonstrated by the fact that a substantial amount of new generation capacity has been developed or is under development in the relevant markets and in the larger geographic area. Based on Progress Energy's representations, we find that CP&L and FPC cannot erect barriers to entry.

Affiliate Abuse

20. Progress Energy states that CP&L, FPC and its affiliates have on file with the Commission codes of conduct that govern the relationship among the affiliates of Progress Energy. Additionally, the CP&L, FPC, and the Progress Energy Affiliates' market-based rate tariffs prohibit sales to affiliates within the FPC and CP&L markets without first receiving Commission approval under a separate filing under section 205 of the FPA. Finally, no intervenor has raised concerns regarding affiliate abuse. Based on Progress Energy's representations, the Commission finds that CP&L and FPC satisfy the Commission's concerns with regard to affiliate abuse.

CP&L's New Market-Based Rate Tariff

21. CP&L requests that the Commission accept a new market-based rate tariff that: (1) eliminates CP&L's authority to make market-based rate sales in its control area and peninsular Florida; and (2) incorporates the change in status reporting requirement adopted by the Commission in Order No. 652. CP&L states that acceptance of this new tariff will add further protection for CP&L wholesale customers and obviate the need to determine whether CP&L has generation market power in its own control area. Since we find that CP&L satisfies the standards for market-based rate authority as proposed, we accept CP&L's tariff for filing, effective August 6, 2005, as requested.

22. CP&L states that it has on file with the Commission two market-based rate tariffs: the short-form EEI Tariff and its original market-based rate tariff. CP&L has revised both of these tariffs to include the change in status reporting requirement issued in Order No. 652.¹⁴ CP&L states that it wishes to leave these two tariffs in effect because it has currently existing long-term agreements under these tariffs. CP&L states that it will not use either of these tariffs to make new market-based rate sales.

¹⁴ Original Sheet No. 13A under FERC Electric Tariff, Sixth Revised Volume No. 4 and First Revised Sheet No. 4 under FERC Electric Tariff, Third Revised Volume No. 5.

23. In its protest, Fayetteville Public Works argues that it would be unjust and unreasonable for CP&L to sell power at cost-based rates in its control area while maintaining market-based rate authority in markets outside the CP&L control area. Fayetteville Public Works states that it is concerned that once its current contract with CP&L expires in June 2012, CP&L may choose not to sell short-term energy in the CP&L control area or CP&L may choose to sell at higher prices to its captive customers inside the CP&L control area.¹⁵ Fayetteville Public Works states that CP&L can subsidize transactions outside its control area with profits from sales to captive transmission dependent utilities inside its control area, or CP&L can choose to sell power only outside of its control area at higher rates (market-based) than it is permitted to charge inside the CP&L control area. Fayetteville Public Works notes that these concerns do not immediately affect it because of the existing agreements with CP&L. However, Fayetteville Public Works seeks assurances that CP&L will not try to take advantage of its position, and that the Commission will protect Fayetteville Public Works from such exploitation should it occur. According to Fayetteville Public Works, the Commission can assure that CP&L will not exercise market power over wholesale transmission dependent utilities by either eliminating CP&L's market-based rate authority in all markets or requiring CP&L to offer power to customers inside the CP&L control area before selling at market-based rates outside of the CP&L control area.

24. We will deny Fayetteville Public Works' request that the Commission either eliminate CP&L's market-based rate authority in all markets or impose upon CP&L an obligation to offer power to customers inside the CP&L control area before selling at market-based rates outside of the CP&L control area. Fayetteville Public Works has not provided any factual information that demonstrates that CP&L does not meet the Commission's requirements for market-based rate authority outside of the CP&L control area. Further, we find that Fayetteville Public Works' concern that it may not be able to buy short-term power supplies after the contract with CP&L expires in June 2012 is speculative. If Fayetteville Public Works or another customer believes that CP&L is engaging in unduly discriminatory behavior in the course of negotiating a short-term purchase or that CP&L is not fulfilling an obligation to serve it under an existing contract, the customer can file a complaint under section 206 of the FPA.

FPC and Progress Energy Affiliates' Revised Market-Based Rate Tariffs

25. On September 7, 2005, Progress Energy, on behalf of the Progress Energy Affiliates, submitted a request that the Commission accept revisions to the respective market-based rate tariffs of the Progress Affiliates. The Progress Energy Affiliates are revising their respective tariffs to: (1) eliminate the authority to make market-based rate sales that sink in the CP&L control area; and (2) correct the Market Behavior Rules

¹⁵ Fayetteville Public Work's September 27, 2005 Protest at 4.

attached to those tariffs. The Progress Affiliates' revised market-based rate tariffs are accepted for filing. Likewise, FPC's revised tariff sheets removing FPC's market-based rate authority in transactions that sink in the CP&L control area are accepted for filing.

Market Behavior Rules

26. In the Market Behavior Rules Order, the Commission directed market-based rate sellers to include, as amendments to their market-based rate tariffs, the market behavior rules when they seek continued authorization to sell at market-based rates. FPC has filed revised market-based rate tariffs to include the market behavior rules and CP&L's proposed new tariff includes the market behavior rules. FPC's and CP&L's corrections to the tariff sheets incorporating the market behavior rules are hereby accepted for filing.

Reporting Requirements

27. In Order No. 664, the Commission stated that it no longer grants waiver of the full requirements of Part 45 in its orders granting market-based rate authority. Rather, persons seeking to hold interlocking positions are required henceforth to comply with the full requirements of Part 45. With respect to an individual who currently is authorized to hold interlocking positions, that individual will not need to refile under the full requirements of Part 45 to continue to hold such interlocking positions (unless and until that individual assumes different or additional interlocking positions). Thus, consistent with Order No. 664, any affiliates of Progress Energy who previously sought and were granted waiver of the full requirements of Part 45 will be required henceforth to comply with the full requirements of Part 45.

28. 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.¹⁶ Electric

¹⁶ *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/docs-filing/eqr.asp>.

Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.¹⁷ CP&L and FPC must timely report to the Commission any change in status that reflects a departure from the characteristics the Commission relied upon in granting market-based rate authority.¹⁸

29. CP&L and FPC are directed to file an updated market power analysis within three years of the date of this order. The Commission also reserves the right to require such an analysis at any intervening time.

CP&L's Market-Based Rate Authority

30. In the May 5 Order, as discussed above, the Commission instituted a proceeding under section 206 of the FPA to determine whether FPC and CP&L may continue to charge market-based rates. The Commission established a refund effective date and directed that Progress Energy file an updated market power analysis for FPC and CP&L that is consistent with the Commission's April 14 and July 8 Orders.¹⁹ The Commission noted that, if CP&L wishes to relinquish its market-based rate authority in its home control area, it should submit a separate filing under section 205 of the FPA, including appropriate revisions to its market-based rate tariff, and adequately supported cost-based rates.

31. In the instant proceeding, among other things, CP&L proposed a new market-based rate tariff that prohibits CP&L from making market-based rate sales that sink in the CP&L control area and requested an effective date of August 6, 2005. We note, however, that the refund effective date established in Docket No. EL05-77-000 pursuant to section 206 of the FPA is July 19, 2005. CP&L has failed to address the period between the refund effective date and the effective date of its new market-based rate tariff. Consistent with the April 14 Order, the Commission directs CP&L to make a filing, within 30 days of the date of issuance of this order, proposing case-specific

¹⁷ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2005). 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.

¹⁸ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005); FERC Stats. & Regs. ¶ 31,175 (2005) (Order No. 652), *order on reh'g*, 111 FERC ¶ 61,413 (2005).

¹⁹ May 5 Order at P 16.

mitigation or agreeing to the default cost-based rates for the period between the refund effective date and the effective date of its new market-based rate tariff.²⁰

The Commission orders:

(A) FPC's and CP&L's updated market power analysis is hereby accepted for filing, as discussed in the body of this order.

(B) CP&L's market-based rate tariff is accepted for filing, effective August 6, 2005.

(C) FPC's and the Progress Energy Affiliates' revised market-based rate tariffs which eliminate the authority to make market-based rate sales that sink in the CP&L control area are hereby accepted for filing, effective August 6, 2005 (for FPC) and November 7, 2005 (for the Progress Energy Affiliates), as requested.

(D) The Progress Energy Affiliates', CP&L's and FPC's revised tariff sheets incorporating the Market Behavior Rules are accepted for filing.

(E) FPC's and CP&L's revised tariff sheets incorporating the Order No. 652 language are hereby accepted for filing.

(F) CP&L is directed, within 30 days of the date of issuance of this order, for the period between July 19, 2005 and August 6, 2005 to: (1) file a mitigation proposal tailored to its particular circumstances; or (2) 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.

(G) FPC and CP&L are hereby directed to file an updated market analysis within three years of the date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²⁰ April 14 Order, 107 FERC ¶ 61,018 at P 39.