

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Power	Docket Nos.	ER96-110-016 ER05-1272-000 ER05-1272-001
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ORDER ACCEPTING AND SUSPENDING PROPOSED RATES AND TARIFF
REVISIONS, ESTABLISHING HEARING AND SETTLEMENT JUDGE
PROCEDURES, AND CONSOLIDATING DOCKETS

(Issued November 21, 2005)

1. In this order, the Commission accepts for filing Duke Power's¹ (Duke Power) proposed cost-based rate tariff in Docket No. ER96-110-016 providing for "up to" cost-based rates applicable to sales of electric power at wholesale that sink within the Duke Power control area, suspends it for a nominal period to become effective February 27, 2005, as requested, subject to refund, and establishes hearing and settlement judge procedures. The Commission also accepts for filing Duke Power's proposed cost-based rate tariff revisions in Docket Nos. ER05-1272-000 and ER05-1272-001, suspends them for a nominal period to become effective September 28, 2005, subject to refund, and establishes hearing and settlement judge procedures. The Commission also accepts the revised market-based rate tariff sheets effective, February 27, 2005.²

¹ Duke Power is a division of Duke Energy Corporation.

² FERC Electric Tariff Second Revised Volume No. 3, First Revised Sheet No. 1 (Supercedes Original Sheet No. 1) and Original Sheet No. 2A; FERC Electric Tariff Original Volume No. 5, Substitute First Revised Sheet No. 4 (Supercedes Original Sheet No. 4). The Commission's change in status reporting requirement is effective, March 21, 2005.

Background

2. On August 11, 2004,³ as amended on November 19, 2004 and November 24, 2004, Duke Power submitted for filing a revised updated market power analysis, pursuant to the Commission's order issued on May 13, 2004⁴ (November 2004 market power analysis). The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004, and clarified on July 8, 2004.⁵ The November 2004 market power analysis indicated that Duke Power passed the pivotal supplier screen, but failed the wholesale market share screen for each of the four seasons considered in the Duke Power control area.⁶ 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)⁷ and establishes a rebuttable presumption of market power in the resulting section 206 proceeding.⁸

3. On December 15, 2004,⁹ the Commission instituted a section 206 proceeding to investigate Duke Power's generation market power in its control area, and to determine whether Duke Power may continue to charge market-based rates within its control area based on its failure of the wholesale market share screen for generation market power. The Commission also established a refund effective date of February 27, 2005, pursuant to the provisions of section 206 of the FPA.

³ On August 17, 2004, Duke Power submitted an errata to its August 11 filing correcting pages to Exhibits DUK-1, DUK-5, DUK-6, DUK-7, DUK-8, DUK-9 and Workpapers (August 17 filing). However, Duke Power states that none of these data changes impact its conclusions in any way.

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

⁵ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 at P 151-55 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

⁶ Duke Power's filing, as amended, shows that it has a market share as high as 72 percent in the Duke Power control area market.

⁷ 16 U.S.C. § 824e (2000).

⁸ April 14 Order, 107 FERC ¶ 61,018 at P 201.

⁹ *Duke Power*, 109 FERC ¶ 61,270 (2004) (December 15 Order).

4. 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 Duke Power control area, Duke Power was directed within 60 days from the date of issuance of the December 15 Order to: (1) file a Delivered Price Test (DPT) analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.¹⁰

5. On February 14, 2005, Duke Power submitted a DPT analysis for the Duke Power control area to rebut the presumption of market power in its control area. On June 30, 2005, the Commission found that Duke Power failed to rebut the presumption of market power in its control area.¹¹ Therefore, the Commission revoked Duke Power's market-based rate authority in the Duke Power control area and directed Duke Power to file, within thirty days of the date of that order, a revised market-based rate tariff prohibiting sales at market-based rates in the Duke Power control area and providing for the default cost-based rates specified in the April 14 Order.¹² The Commission also directed Duke Power to provide cost support, including the methodology utilized to calculate incremental costs, a refund report based on the default cost-based rates,¹³ and to amend its market-based rate tariff to include the Commission's change in status reporting requirement pursuant to Order No. 652.¹⁴

Description of the Filings

6. On July 29, 2005, in Docket No. ER96-110-016, Duke Power submitted a cost-based rate tariff in accordance with the June 30 Order revoking Duke Power's authority to sell at market-based rates in its control area (Interim Tariff); Duke Power requests an effective date of February 27, 2005, the refund effective date in the section 206 proceeding. The proposed cost-based rate tariff provides for voluntary sales of electric

¹⁰ *Id.* at P 201, 207-09.

¹¹ *Duke Power*, 111 FERC ¶ 61,506 (2005) (June 30 Order).

¹² April 14 Order, 107 FERC ¶ 61,018 at P 151.

¹³ *Id.* at P 151-155.

¹⁴ *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).

power at wholesale that sink within the Duke Power control area at “up to” cost-based rates. Specifically, sales of one week or less will be priced at Duke Power’s system incremental cost (SIC) plus 10 percent. Sales of more than one week but less than one year will be priced at “up to” cost-based rates which will reflect the embedded costs of seven units expected to provide the service in addition to the SIC plus 10 percent.

7. Duke Power supports its proposed demand charge for sales of more than one week but less than one year based on the weighted cost of Duke Power’s generating units that are likely to be used to provide the service at issue. To determine these units, Duke Power performed a “stacking analysis” whereby Duke Power’s generating units were stacked in increasing cost order based on their fuel costs and the units were selected by analyzing Duke Power’s minimum and maximum monthly loads. Duke Power states that the fixed costs of these units were calculated using a fixed charge rate for each of Duke Power’s generating resources plus the annual operation and maintenance expenses for each generating resource. Per-kilowatt fixed costs were determined by dividing the fixed costs of the unit by the product of its installed capacity and equivalent availability factor (EAF).

8. Duke Power states that its proposed cost-based rate tariff is similar to AEP Power Marketing’s¹⁵ proposed mitigation, which also included hourly and daily capacity caps. Duke Power states that both rates are calculated in a similar manner.

9. Duke Power also submitted proposed market-based rate tariff revisions which include a prohibition for sales at market-based rates in Duke Power’s control area, and incorporates the Commission’s change in status reporting requirement pursuant to Order No. 652.

10. Also on July 29, 2005, in Docket No. ER05-1272-000, Duke Power submitted a separate section 205 filing which proposes to revise the cost-based rate tariff filed in Docket No. ER96-110-016 to provide that “up to” cost-based rates based on embedded costs will apply to daily and hourly service, as well as weekly and monthly service (Revised Tariff). Duke Power requests an effective date of July 30, 2005.

11. On September 13, 2005, the Director, Division of Tariffs and Market Development-South, acting pursuant to delegated authority, issued a data request seeking additional information relating to both submittals. On September 23, 2005, in Docket No. ER05-1272-001, Duke Power filed its response to the data request. In accordance

¹⁵ *Citing AEP Power Marketing, Inc.*, 112 FERC ¶ 61,047 (2005).

with the data request, Duke Power made a correction to the Commission's market behavior rules.¹⁶

Notices of Filings and Responsive Pleadings

12. Notices of Duke Power's filings were published in the *Federal Register*, 70 Fed. Reg. 41,189 (2005) and 70 Fed. Reg. 46,502 (2005), with interventions and protests due on or before August 29, 2005. On August 19, 2005, North Carolina Municipal Power Agency Number 1 and Piedmont Municipal Power Agency (collectively, Power Agencies) jointly filed a motion to intervene. On August 25, 2005, ConocoPhillips Company (ConocoPhillips) filed a motion to intervene. On August 29, 2005, Morgan Stanley Capital Group Inc. (Morgan Stanley) and ConocoPhillips filed motions to intervene and protest. On August 29, 2005, the Power Agencies, jointly filed a motion to intervene and protest. On September 13, 2005, Duke Power filed an answer to the protests. On October 4, 2005, the Power Agencies filed a reply to Duke Power's answer.

Discussion

A. Procedural Matters

13. 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 the proceeding.

14. 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 and to answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Duke Power's answer and will, therefore reject it. We will also reject the Power Agencies' reply to Duke's answer.

B. Cost-Based Rate Tariff

15. As discussed below, we will dismiss issues related to selective discounting, first call rights and market transparency. We will set all other issues related to Duke Power's cost-based tariff proposals for hearing and settlement judge procedures.

¹⁶ *Investigation of Terms and conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003). The correction is being made to the parenthetical clause in section 2(b), which should state "scheduling non-firm service for products sold as firm".

1. Selective Discounting

16. ConocoPhillips opposes Duke Power's proposed "up to" cost-based rates asserting that there is no provision in the tariff that would prevent Duke Power from unduly discriminating among similarly situated wholesale customers (as is the case with natural gas pipelines).¹⁷ ConocoPhillips states that the Commission's Discounting Policy Statement requires that a natural gas pipeline afford similarly situated customers the same discount, especially when given to an affiliate. Further, it states that the Commission requires the utility to post the discounts so that similarly situated customers can request the same treatment or file a complaint. Because there are no similar requirements in Duke's proposed tariff, ConocoPhillips concludes that Duke Power's proposed tariff fails to protect Duke Power's wholesale customers from undue discrimination.

17. To the extent that ConocoPhillips seeks to require that Duke Power sell power only at its ceiling rates, ConocoPhillips' request is at odds with the longstanding policy of allowing "up to" cost-based rates. We disagree with ConocoPhillips' assertion that there are no protections to prevent Duke Power from unduly discriminating in rates for power sales. First, ConocoPhillips' concern is speculative. Second, as a public utility, Duke is subject to the requirement in section 205 of the FPA that prohibits public utilities, in any power sale subject to the Commission's jurisdiction, from granting any undue preference or advantage to any person.¹⁸ This requirement applies to Duke's discounting practices under its proposed "up to" cost-based rates. Third, the Commission has put in place a reporting requirement that allows the Commission and parties to address any such concerns. The Commission requires entities that make power sales to submit an electronic quarterly report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for all jurisdictional services, including market-based and cost-based power sales and transmission services; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) power sales during the most recent calendar quarter.¹⁹ If ConocoPhillips or another customer believes that Duke Power is engaging in unduly discriminatory

¹⁷ Citing to *Policy for Selective Discounting by Natural Gas Pipelines*, 111 FERC ¶ 61,309 (2005) (Gas Discounting Policy Statement).

¹⁸ 16 U.S.C. § 824d(b) (2000).

¹⁹ *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.

practices in the course of negotiating a short-term purchase, the customer can file a complaint under section 206 of the FPA.

18. In addition, ConocoPhillips' concerns related to discounting and "up to" cost-based rates are more generic and are more appropriately raised in a generic proceeding. The Commission will address issues regarding the use of discounting and "up to" cost-based rates as adequate mitigation for market power in pending Docket No. RM04-7-000,²⁰ where the Commission is re-examining its 4-prong test for the grant of market-based authority.

2. First Call Rights/Market Transparency

19. The Power Agencies argue that by revoking Duke's ability to sell at market-based rates only in its service area, the Commission has provided Duke Power and many other similarly situated Southeastern utilities²¹ that have lost the ability to sell power at market-based rates within their own control areas the incentive to sell excess power outside of their respective control areas where they may be able to do so at prices higher than their cost-based rates. The Power Agencies argue that this would leave load-serving entities (LSEs) within Duke Power's control area at a disadvantage because they would be forced to secure power either from merchant sources within Duke's control area at higher prices or purchase the excess power that Duke has sold to non-affiliated utilities outside of its control area at higher prices, which would include added transmission charges to import the power back into the control area.²² The Power Agencies state that simply prohibiting a utility from making market-based sales in its service area will not remedy the problem of market power, but will impose greater burdens on LSEs.²³

20. To remedy this situation, the Power Agencies request that the Commission require Duke to modify its proposed cost-based rate tariff to require Duke to first offer energy to customers inside its control area at the applicable cost-based rates prior to selling outside at market-based rates. The Power Agencies state that this alternative would deter

²⁰ *Market-Based Rates for Public Utilities*, 107 FERC ¶ 61,019 (2004).

²¹ The Power Agencies identify the Southeastern utilities that have either lost or voluntarily given up their market-based rate authority in their control areas as: Duke Power, Entergy Services, Inc., South Carolina Electric and Gas Company, and Carolina Power & Light Company d.b.a. Progress Energy Carolinas.

²² Power Agencies protest at 5-7, 9.

²³ Power Agencies protest at 6.

merchants in Duke's control area from profiteering in the shortage conditions that would exist if Duke Power were free to export all of its excess power to buyers outside of its control area.²⁴

21. The Power Agencies also recommend that the Commission take steps to further increase market transparency and price discovery in Southeastern markets. According to the Power Agencies, this can be accomplished by directing utilities in the region to pursue formation of one or more electricity trading hubs, with openly reported prices for standardized products, coupled with a requirement that Duke Power conduct a prescribed portion of its wholesale sales and purchases through that hub. The Power Agencies argue that this approach has yielded improved transparency and liquidity in natural gas markets and it believes that this approach would yield similar benefits if implemented here. Moreover, the Power Agencies state that, with increased transparency, there would be a reduction in the ability of an individual supplier to exercise market power because such actions would reveal themselves through aberrational price patterns.

22. We will deny the Power Agencies' protest with respect to its request that we require Duke Power to offer energy to customers inside its control area before selling energy outside its control area. The Commission has determined that the revocation of an entity's ability to sell capacity and energy at market-based rates in a particular control area or geographic area is sufficient to mitigate any market power that may exist in that area.²⁵ Moreover, the Power Agencies' claim that Duke will not sell short-term power under its proposed cost-based rate tariff in its control area or that the Project Agencies will only be able to buy short-term power supplies from other suppliers is speculative at this time. If the Power Agencies or another entity believes that Duke Power is engaging in anti-competitive behavior in the course of negotiating a short-term purchase, that entity can file a complaint with the Commission pursuant to section 206 of the FPA.

23. While the Commission believes that transparency is an important feature in a competitive market, we find that Power Agencies' request to establish trading hubs in Southeastern markets is misplaced here, as it is beyond the scope of this proceeding. The instant proceeding concerns Duke Power's proposed cost-based rate tariff for short-term power sales. Proposals aimed at increasing transparency in the Southeastern markets by essentially restructuring those markets are more appropriately raised in a generic proceeding.

²⁴ *Id.* at 7-8.

²⁵ April 14 Order, 107 FERC ¶ 61,018 at P 151; *Alliant Energy Corporate Services, Inc.*, 112 FERC ¶ 61,288 (2005).

3. Rates, Terms and Conditions

24. In the April 14 Order, the Commission adopted default rates tailored to three distinct products. Sales of power of one week or less must be priced at the applicant's incremental cost plus a 10 percent adder. Sales of power of more than one week but less than one year will be priced at an embedded cost "up to" rate reflecting the costs of the unit(s) expected to provide the service. All long-term sales (one year or more) into any market where the applicant has market power must be priced on an embedded cost of service basis and each such contract will be filed with the Commission for review and approval prior to the commencement of service. The Commission stated that it will set the just and reasonable rate at the default rate unless it approves different cost-based rates for that applicant based on case-specific circumstances.²⁶

Interim Tariff in Docket No. ER96-110-016

25. The Interim Tariff provides for voluntary sales of electric power at wholesale that sink within the Duke Power control area at "up to" cost-based rates. Specifically, sales of one week or less will be priced at Duke Power's system incremental cost (SIC) plus 10 percent. Sales of more than one week but less than one year will be priced at "up to" cost-based rates which will reflect the embedded costs of seven units expected to provide the service in addition to the SIC plus 10 percent. Duke Power states that it has calculated the charges under the Interim Tariff in accordance with the default cost-based rates as prescribed in the Commission's June 30 Order. In addition, Attachment D to this filing provides cost support for the maximum demand charges.²⁷

26. Morgan Stanley and the Power Agencies argue that Duke Power's proposed cost-based rates deviate from the mitigation measures set forth in the April 14 Order.²⁸ Specifically, Morgan Stanley and the Power Agencies assert that Duke Power's proposal to charge a 10 percent adder above its embedded costs for sales of between one week and one year is inconsistent with prior Commission orders.²⁹ Morgan Stanley also argues that Duke Power does not provide sufficient cost support for its "embedded cost" for the cost

²⁶ April 14 Order, 107 FERC ¶ 61,018 at P 148.

²⁷ The cost support filed in Docket Nos. ER96-110-016 and ER05-1272-000 is identical.

²⁸ April 14 Order, 107 FERC ¶ 61,018 at P 151-152.

²⁹ Morgan Stanley protest at 4.

of the unit(s) expected to provide service and that Duke Power's stacking analysis does not demonstrate that the identified units will be the specific units that will provide service for such transactions. Morgan Stanley further argues that the proposed cost-based rate tariff does not indicate the types of services Duke Power intends to offer (e.g., full requirements, partial requirements).

27. The Power Agencies contend that Duke Power's proposed cost-based rates are not sufficiently supported and have not been shown to be just and reasonable and may be excessive. The Power Agencies also state that Duke Power's proposed energy costs in the Interim Tariff are based on SIC rather than the production costs of the generating units likely to provide the service. It is the Power Agencies' contention that Duke Power's stacking analysis has assigned excessive weight to pumped storage plants in developing the demand related portion of its "up to" cost-based rates. That is, the Power Agencies state that the equivalent availability factor (EAF) of 91.88 percent is unrealistic for pumped storage plants because the plants are only available for service after water has been pumped to the plant's upper reservoir.³⁰ The Power Agencies contend that, even based on Duke Power's analysis, it must be assumed that the plants are available for service during the same hours that they are operating in pumping mode. The Power Agencies point to the Bad Creek plant which shows higher unit demand related costs than any other likely-to-serve-unit. The Power Agencies conclude that Duke Power is skewing its results upward for the demand related portion of the "up to" cost-based rates.

28. Finally, the Power Agencies argue that certain aspects of the cost support data cannot be reconciled with the data contained in Duke Power's Form No. 1, and appear to be excessive based on data contained in the Form No. 1. Specifically, the Power Agencies state that Duke Power has included figures for the Jocassee and Bad Creek plants, but as indicated on Duke Power's Form 1, the lines are left blank. The Power Agencies state that Duke Power offers no explanation for this discrepancy or other discrepancies.³¹

29. ConocoPhillips asserts that Duke Power's proposal does not comply with the Commission's regulations and will result in excessive rate caps that Duke Power may selectively discount, on a potentially unduly discriminatory basis, without risk of under-collection to Duke. ConocoPhillips argues that Duke Power's proposed rates represent an unlawful risk free return because there are "no capital costs, no Operations and

³⁰ The Power Agencies state that pumping water to the plant's upper reservoir is typically done during night time hours.

³¹ Power Agencies protest at 18-19.

Maintenance [(O&M)] costs, no Administrative and General, and none of the other costs incurred by Duke Power in providing wholesale service are allocated to Duke Power's wholesale rates."³² ConocoPhillips further argues that Duke Power's proposed return on equity of 11 percent is unsupported.

30. ConocoPhillips contends that Duke Power proposes to recover variable costs which include fuel costs of its most expensive unit and lost opportunity costs. That is, ConocoPhillips asserts that Duke Power's proposed daily rate and its proposed variable costs for weekly and monthly service include costs related to future emissions allowances and future environmental compliance costs. CononoPhillips states that these costs should be classified as O&M costs or fuel expenses when the costs are actually incurred by Duke Power.

31. ConocoPhillips also states that Duke Power's proposed cost-based rate tariff fails to specify rates for non-firm or hourly service or to state the rates (capped or otherwise) for hourly, daily, or weekly service.

32. Additionally, ConocoPhillips states that Duke Power's debt to equity ratio is unsupported and Duke Power's proxy group is more representative of a natural gas pipeline with no distribution assets than an electric utility with regulated distribution assets. ConocoPhillips also states that Duke Power did not provide supporting evidence that is needed to justify its proxy group.

33. ConocoPhillips contends that Duke Power's proposed demand charge for weekly and monthly service is unsupported. ConocoPhillips contends that Duke Power has derived the proposed demand charge based on 51 different generation resources. ConocoPhillips also states that Duke Power has computed the proposed weekly and monthly demand charges using an average and not a weighted average; ConocoPhillips explains that the capacity factor of the generating units should be computed using the average capacity factor of each selected unit based on the historical test period.³³

34. ConocoPhillips requests that the Commission reject Duke Power's proposed cost-based rate tariff, or alternatively, set it for hearing.

³² ConocoPhillips protest at 5.

³³ *Id.* at 8-9.

Revised Tariff in Docket No. ER05-1272-000

35. The Revised Tariff proposes to change the cost-based rate tariff filed in Docket No. ER96-110-016 to provide that “up to” cost-based rates based on embedded costs will apply to daily and hourly service, as well as weekly and monthly service. In Attachment C, Duke Power has provided the same cost support as was filed in Docket No. ER96-110-016. Duke Power states these proposed revisions differ from the “default” mitigation identified in the June 30 order. However, Duke Power states that these hourly and daily rates are consistent with the rulemaking methodologies accepted by the Commission for similar services.

36. With regard to the Revised Tariff, Morgan Stanley and the Power Agencies assert that Duke Power should not be allowed to recover a demand charge for sales of one week or less and that Duke Power’s attempts to justify these deviations (citing Commission precedent that pre-dates the April 14 and June 30 Orders) ignore the facts surrounding this filing.³⁴ They also contend that Duke Power has not justified the level of its cost-based rates, including the proposed demand charge and its proposal to charge a 10 percent adder above its embedded costs for sales of less than one week. In addition, both Morgan Stanley and the Power Agencies state that Duke Power has not supported the level of the demand charge for the same reasons raised above regarding sales of one week but less than one year. We find that the arguments raised by protestors relating to the rates, terms and conditions of Duke Power’s proposed “up to” cost-based rates in the Interim Tariff and the Revised Tariff raise issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the trial-type evidentiary hearing ordered below.

4. Long-Term Sales

37. Duke Power indicates that it will file with the Commission for review and approval, any agreements governing sales in the Duke Power control area for periods of one year or longer.³⁵ We will hold Duke Power to this commitment to file all such agreements on a stand-alone basis and they must be based on Duke Power’s embedded costs.

³⁴ Morgan Stanley protest at 4; Power Agencies protest at 14.

³⁵ Duke Power’s transmittal letter in Docket No. ER96-110-016 at n 5.

5. Hearing and Settlement Judge Procedures

38. Our preliminary analysis indicates that the proposed cost-based rate tariff, as revised, has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, the Commission will accept the proposed cost-based rate tariff and its revisions, suspend them for a nominal period, make them effective on February 27, 2005 as requested (for the Interim Tariff filed in ER96-110-016), *i.e.*, on the refund effective date, and September 28, 2005 (for the Revised Tariff filed in ER05-1272-000 and ER05-1272-001),³⁶ following 60 days from the date of filing, subject to refund, and set them for hearing and settlement judge procedures, with the exceptions of the issues discussed above.

39. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.³⁷ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.³⁸ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

³⁶ *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106 at 61,339 (waiver of prior notice for rate increases denied absent a strong showing of good cause), *reh'g denied*, 61 FERC ¶ 61,089 (1992). Here, we note, Duke Power made no showing of good cause whatsoever to support its request for waiver of the Commission's 60 day prior notice requirement. Accordingly, waiver will be denied.

³⁷ 18 C.F.R. § 385.603 (2005).

³⁸ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

40. We find that common questions of law and fact may be present in Docket Nos. ER96-110-016, ER05-1272-000 and ER05-1272-001, we will consolidate them for purposes of settlement, hearing and decision.

C. Market-Based Tariff Revisions

41. The Commission will accept, effective February 27, 2005, the proposed market-based rate tariff revisions filed in Docket No. ER96-110-016, which prohibit sales at market-based rates in Duke Power's control area. We will also accept the change in status reporting requirement pursuant to Order No. 652, effective March 21, 2005, and the correction to the Commission's market behavior rules, effective December 17, 2003.

42. In addition, Commission policy requires merging utilities to treat one another as affiliates pending the consummation of a merger.³⁹ In light of the announced merger between Duke Energy Corporation and Cinergy Corporation,⁴⁰ Duke Power has committed to treating Cinergy affiliates as affiliates for purposes of the code of conduct.⁴¹ Further, Duke Power and its affiliates have committed that they will not make market-based rate sales to Cinergy affiliates without first receiving Commission approval under section 205 of the FPA.

The Commission orders:

(A) The proposed market-based rate tariff revisions filed in Docket No. ER96-110-016, prohibiting sales at market-based rates in Duke Power's control area are hereby accepted, effective February 27, 2005. The proposed market-based rate tariff revisions

³⁹ *Consolidated Edison Energy, Inc.*, 83 FERC ¶ 61,236 at 62,034 (1998), *Central and South West Services, Inc.*, 82 FERC ¶ 61,101 at 61,103 (1998); *Delmarva Power & Light Company*, 76 FERC ¶ 61,331 at 62,582 (1996) ("[T]he self-interest of two merger partners converge sufficiently, even before they complete the merger, to compromise the market discipline inherent in arm's-length bargaining that serves as the primary protection against reciprocal dealing.")

⁴⁰ On July 12, 2005, Duke Energy Corporation and Cinergy Corporation filed in Docket No. EC05-103-000 an application for authorization of disposition of jurisdictional assets under section 203 of the FPA, 16 U.S.C. § 824b (2000). This proceeding is currently pending before the Commission.

⁴¹ See submittal by Duke Power on May 20, 2005 in Docket Nos. ER96-110-014, *et al.*

filed to incorporate Order No. 652 are hereby accepted, effective March 21, 2005. The correction to the market behavior rules is hereby accepted and made, effective December 17, 2003.

(B) The proposed cost-based rate tariff and tariff revisions filed in Docket Nos. ER96-110-016, ER05-1272-000, and ER05-1272-001 are hereby accepted for filing, suspended for a nominal period, made effective February 27, 2005 in Docket No. ER96-110-016 and September 28, 2005 in Docket Nos. ER05-1272-000 and ER05-1272-001, subject to refund, and set for hearing and settlement judge procedures.

(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 FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of Duke Power's proposed cost-based rates. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(E) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule, including a date for the filing of Duke Power's case-

in-chief prior to the date for the filing of intervenor and trial staff testimony and exhibits. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(G) Docket Nos. ER96-110-016, ER05-1272-000, and ER05-1272-001 are hereby consolidated for purposes of settlement, hearing and decision.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.