UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Carolina Power & Light Company ER05-1076-002

ORDER ACCEPTING MITIGATION PROPOSAL SUBJECT TO MODIFICATION

(Issued March 21, 2006)

1. In this order the Commission accepts Carolina Power & Light Company's (CP&L) mitigation proposal, as modified herein.

Background

2. On May 5, 2005,[1] the Commission 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)[2] to determine whether CP&L may continue to charge market-based rates. The Commission established a refund effective date and directed CP&L to file an updated market power analysis that was consistent with the Commission's April 14 and July 8 Orders.[3] 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.

3. On June 6, 2005, CP&L filed an updated market power analysis in response to the May 5 Order. On November 4, 2005, the Commission accepted CP&L's updated market power analysis and found that CP&L satisfies the Commission's standards for market-based rate authority outside the CP&L home control area.[4] The Commission also

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

[2] 16 U.S.C. § 824e (2000).

[3] *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).

[4] *Florida Power Corp.*, 113 FERC ¶ 61,131 (2005) (November 4 Order).

accepted CP&L's revised market-based rate tariff, which eliminates CP&L's authority to make market-based rate sales in its control area and peninsular Florida. Also, in a separate order, the Commission accepted for filing CP&L's cost-based rate tariff which establishes a cost-based ceiling rate based on the embedded cost of the units most likely to provide the service.[5] The revised market-based rate tariff and the cost-based rate tariff have an August 6, 2005 effective date. Because CP&L complied with the Commission's directive to file an updated market power analysis and the Commission found that CP&L satisfied the Commission's standards for market-based rate authority, the section 206 proceeding instituted in the May 5 Order was terminated.

4. Further, in the November 4 Order, the Commission found that CP&L failed to address the period between the refund effective date and the effective date of its revised market-based rate tariff. As a result, the Commission directed CP&L to make a filing either proposing case-specific mitigation or agreeing to the default cost-based rates for the period between the refund effective date of July 19, 2005 and the August 6, 2005 effective date of its revised market-based rate tariff.[6]

5. On December 5, 2005, CP&L filed a mitigation proposal which addresses the wholesale sales made by CP&L between July 19, 2005 and August 6, 2005 that sunk in CP&L's control area. CP&L requests that the Commission accept the ceiling rate contained in CP&L's cost-based rate tariff as a mitigation proposal for the period between July 19 and August 5, 2005. CP&L states that the Commission has previously found that the ceiling rates contained in the cost-based rate tariff are just and reasonable for sales made on and after August 6, 2005, therefore these rates should be considered just and reasonable for the 16-day period prior to August 6, 2005.

<u>Notice of Filing and Responsive Pleadings</u>

6. Notice of CP&L's mitigation proposal was published in the *Federal Register*, 70 Fed. Reg. 76,802 (2005), with protests and interventions due on or before December 27, 2005. None was filed.

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[5] *Carolina Power & Light Co.*, 113 FERC ¶ 61,130 (2005) (*Carolina Power & Light*). In this order, the Commission accepted CP&L's proposed cost-based tariff for filing upon the condition that it be modified to apply to sales of less than one year instead of sales of one year or less.

[6] November 4 Order, 113 FERC ¶ 61,131 at P 31.

Discussion

7. We will accept CP&L's proposal to apply the ceiling rates contained in its cost-based rate tariff as mitigation for the period between July 19 and August 5, 2005. The Commission accepted that cost-based rate tariff for filing in *Carolina Power & Light,* to be effective on August 6, 2005, finding that the tariff appears to be just and reasonable, has not been shown to be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful, and is consistent with the May 5 Order. We accordingly find that use of the ceiling rate in that cost-based rate tariff for the period between July 19 and August 5, 2005 is an acceptable mitigation proposal. However, as discussed below, we find that the applicability of this mitigation proposal is too narrow in scope.

8. CP&L states that it has provided a spreadsheet which identifies the sales made by CP&L that "sunk" in the CP&L control area between July 19 and August 5, 2005. CP&L states that the spreadsheet lists the actual sales price as well as the ceiling rate authorized for such sales pursuant to CP&L's cost-based rate tariff. CP&L then calculates the excess over the ceiling rate, as well as any interest owed on any refund that might be due to the customer. CP&L proposes to refund to its customers the excess amount plus interest.

9. Our review indicates that CP&L's proposal would improperly limit mitigation to certain sales in the CP&L control area, namely, only those sales that sunk (*i.e.,* served end-use customers) in the CP&L control area during the period at issue. Such a limitation would improperly exclude from the mitigation proposal sales by CP&L within its control area during the period at issue to any entities that do not serve end-use customers in the CP&L control area.[7] We note that in the November Order the Commission described CP&L's market-based rate tariff as prohibiting CP&L from "making market-based rate sales that sink in the CP&L control area."[8] The Commission clarifies herein that, in accepting CP&L's market-based rate tariff, it intended that this prohibition apply to *any* sales made in the CP&L control area. Indeed, CP&L's revised market-based rate tariff, as accepted in the November 4 Order, does not limit the restriction to sales that "sink" in the CP&L control area. Rather, the tariff provides that service under the tariff is only available outside of the CP&L control area. Therefore, the

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[7] *See MidAmerican Energy Co.,* 114 FERC ¶ 61,280 (2006); April 14 Order at P 144, 147 and 150; July 8 Order at P 146 (where the Commission specifically "reject(ed) suggestions that the Commission restrict mitigated applicants to selling power only to buyers serving end-use customers").

[8] November 4 Order, 113 FERC ¶ 61,131 at P 31.

Commission accepts the mitigation proposal on the condition that it applies to *any* sales made by CP&L in its control area between July 19 and August 5, 2005, not just sales that "sunk" in the CP&L control area.

10. Accordingly, the Commission finds that CP&L has complied with the Commission's directive in the November 4 Order to address the refund period between the refund effective date and the effective date of its revised market-based rate tariff. The Commission accepts the mitigation proposal, as modified above, and directs CP&L to make refunds with interest to its customers for all market-based rate sales in the CP&L control area between July 19 and August 5, 2005. The Commission directs CP&L to make such refunds within 30 days of the date of issuance of this order and to file a refund report with the Commission within 15 days of the date refunds are made.

<u>The Commission orders</u>:

(A) The mitigation proposal, as modified, is hereby accepted, as discussed in the body of this order.

(B) CP&L is directed to make refunds within 30 days of the date of this order, and to file a refund report with the Commission within 15 days of the date refunds are made.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.