

143 FERC ¶ 61,237
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Carolina Power & Light Company

Docket No. ER13-1313-000

ORDER ACCEPTING PROPOSED DEPRECIATION RATES AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued June 18, 2013)

1. This order accepts for filing the proposed changes in the depreciation rates of Carolina Power & Light Company's (CP&L) Power Supply and Coordination Agreement (Agreement) with the Public Works Commission of the City of Fayetteville, North Carolina (Fayetteville),¹ and suspends them for a nominal period, to become effective July 1, 2012, subject to refund. We also establish hearing and settlement judge procedures.

I. Background

2. On April 19, 2013, as amended on April 25, 2013, CP&L, a subsidiary of Duke Energy Corporation doing business as Progress Energy Carolinas, Inc., filed the proposed changes in depreciation, designated as Rate Schedule No. 184, pursuant to section 205 of the Federal Power Act (FPA)² and Part 35 of the Commission's regulations.³ The proposed depreciation rate changes will result in an increase in the total production depreciation expense of 34.79 percent and a total general depreciation expense decrease of 0.89 percent, for a net increase of 3.9 percent in Fayetteville's charges on an annual basis.⁴ CP&L requests an effective date of July 1, 2012 so that, pursuant to the

¹ The Fayetteville Public Works Commission was created in 1905 through an act of the North Carolina State Legislature to manage, operate, and supervise the city's electric, water and sanitary sewer utilities. Fayetteville Protest at 3.

² 16 U.S.C. § 824d (2006).

³ 18 C.F.R. Part 35 (2012).

⁴ April 25, 2013 Transmittal Letter at 1.

Agreement, the depreciation rates will be reflected in Fayetteville's charges beginning on June 1, 2013, when the charges under its formula rate are updated based on the FERC Form No. 1 data for 2012.

3. CP&L states that its formula rate in the Agreement reflects the depreciation expenses reported in its FERC Form No. 1 and recorded in its books of accounts.⁵ According to CP&L, its FERC Form No. 1 and its books of accounts will reflect the Commission-approved depreciation rates in this proceeding for the period July 1, 2012 through December 31, 2012. CP&L explains that, because the formula rate flows through per book depreciation expense, implementation of the changes to CP&L's proposed depreciation rates does not require modification of the rate formulas in the Agreement. CP&L states that Order No. 618,⁶ however, necessitates this filing since the revised depreciation rates do affect recoveries under the formula rate in the Agreement.⁷

4. CP&L proposes to change its depreciation rates used to calculate the monthly production capacity formula rate in the Agreement.⁸ According to CP&L, in response to state requirements, it filed a new depreciation study with the North Carolina Utilities Commission (North Carolina Commission) for informational purposes on September 28, 2012, subsequently corrected on January 18, 2013. CP&L states that it is submitting that depreciation study in support of the revised depreciation rates.

5. CP&L explains that it has calculated the revenue impact of the proposed change in depreciation rates by comparing the charges to Fayetteville using the proposed depreciation rates to the charges using the currently effective depreciation rates.⁹ According to CP&L, revenue data comparing the annualized revenues under the proposed and present rates for calendar year 2012 using actual billing determinants for that year shows a \$2.6 million increase to Fayetteville under the Agreement.

6. CP&L requests that it be permitted to use the revised depreciation rates in its Agreement effective as of July 1, 2012.¹⁰ To the extent necessary, CP&L also requests a waiver of the Commission's 60-day prior notice requirement to permit this effective date. CP&L notes that the Commission ordinarily finds good cause to grant waiver of the prior

⁵ April 19, 2013 Transmittal Letter at 2.

⁶ *Depreciation Accounting*, Order No. 618, FERC Stats. & Regs. ¶ 31,104 (2000).

⁷ April 19, 2013 Transmittal Letter at 2.

⁸ *Id.*

⁹ *Id.* at 3.

¹⁰ *Id.*

notice requirement if the effective date of the rate change is prescribed by contract.¹¹ CP&L states that, in this case, the Agreement requires CP&L to use depreciation rates reflected in its FERC Form No. 1 annual report and that CP&L filed its FERC Form No. 1 annual report, including the updates to the depreciation rates, on April 16, 2013. Therefore, CP&L states that it is implementing the change in depreciation rates consistent with the terms of the Agreement's formula rate.

II. Notice of Filing and Responsive Pleadings

7. Notice of CP&L's filing was published in the *Federal Register*, 78 Fed. Reg. 25,070 (2013), with protests and interventions due on or before May 10, 2013. A timely motion to intervene and protest and a motion to reject the filing as patently deficient was filed by Fayetteville.

8. Fayetteville argues that CP&L's filing should be rejected as patently deficient.¹² Alternatively, Fayetteville requests that the proposed rates be suspended for the maximum five-month period, subject to refund.

9. According to Fayetteville, CP&L's filing reflects the early retirement of approximately 1,500 MW of coal-fired generation facilities, 177 MW of generation equipment at the Robinson nuclear plant, and 100 MW of generation equipment related to six combustion turbine units, for a total of over 1,700 MW, amounting to approximately one-third of CP&L's coal-fired generation in North Carolina.¹³

10. Fayetteville maintains that CP&L's filing lacks the explanation, verification, and evidentiary support necessary for the Commission to determine whether the proposed depreciation schedules produce rates that are just and reasonable¹⁴ and further, the depreciation filing is devoid of the data and information necessary to determine whether the filings satisfies the standards found in the Uniform System of Accounts General Instruction No. 22.¹⁵ According to Fayetteville, rate increase filings must contain the documentation required by 18 C.F.R. § 35.13 (2012), which include a rate impact study, attestation as to the truth of the documents submitted, certain financial statements, rate impact assessments, and pre-filed testimony, explaining the statements and any

¹¹ *Id.*

¹² Fayetteville Protest at 1.

¹³ *Id.* at 4.

¹⁴ *Id.*

¹⁵ *Id.* at 5-6.

adjustments. Fayetteville notes that CP&L filed the rate impact on Fayetteville, but ignored the rest of the requirements.

11. Fayetteville maintains that the depreciation study filed by CP&L does not justify the useful lives of the early retired plant, but simply calculates the results related to CP&L's unilateral decision to retire the plants.¹⁶ Fayetteville further notes that there is no statement indicating whether the state commission approved the announced retirement as prudent and there is no support for the 10-year recovery period CP&L proposes for determining the depreciation rates.¹⁷ Additionally, Fayetteville maintains that CP&L offers no support for how the negative salvage value was estimated, whether the estimate is reasonable, how the contingencies were estimated and whether they are reasonable, and why the 10-year amortization period for the early retired plant is reasonable.¹⁸

12. Fayetteville requests that, if the Commission does not reject CP&L's filing as patently deficient, then the Commission should order CP&L to comply with the filing requirements of 18 C.F.R. § 35.13 (2012).¹⁹ According to Fayetteville, CP&L's filing raises troubling questions about the propriety of CP&L's depreciation accounting as manifested throughout the formula rate, especially with regard to its potential double recovery of nuclear decommissioning expense and Harris accelerated depreciation.²⁰ In particular, according to Fayetteville, the information upon which CP&L based its depreciation study comes not from FERC Form No. 1 data, but from information that is not publicly available.

13. Fayetteville maintains that CP&L is trying to shoehorn an important policy question - the proper rate treatment for early retired coal fired plants - into the narrow confines of a depreciation rate filing, and with no evidentiary foundation.²¹ According to Fayetteville, the rate treatment that CP&L proposes for the early-retired plant is complete recovery of the unamortized remaining plant balances, even though such plant will not be used and useful to Fayetteville.²²

¹⁶ *Id.* at 7.

¹⁷ *Id.*

¹⁸ *Id.* at 8.

¹⁹ *Id.*

²⁰ *Id.* at 8-9.

²¹ *Id.* at 14.

²² *Id.* at 17.

14. Fayetteville notes that, without the early plant retirement, the depreciation expense would decrease by \$16 million annually, rather than increase by \$26 million, for a net impact associated with the requested rate treatment of \$42 million.²³ Fayetteville argues that the Commission should undertake a review to determine whether CP&L's rate of return on equity more than adequately compensated CP&L for the risk associated with the early-retired plant. Furthermore, Fayetteville argues that CP&L's strategy to shift 100 percent of the costs of early retirement to ratepayers should at least be examined to determine whether its rate of return should be adjusted for reduction in risk.

15. Fayetteville protests the proposed rate treatment because Fayetteville believes CP&L violates the Agreement, the filed rate doctrine, and the rule against retroactive ratemaking by filing the depreciation study after CP&L filed the FERC Form No. 1 rates.²⁴

16. On May 28, 2013, CP&L filed an answer. CP&L argues that its depreciation submission is sufficient as filed.²⁵ According to CP&L, the Commission has approved numerous depreciation rate filings without requiring the submission of supporting testimony where the depreciation rates were adequately supported by the depreciation study itself.

17. CP&L maintains that its proposed depreciation rate does not provide for double recovery of nuclear decommissioning expense,²⁶ and does not provide for double recovery of Harris accelerated depreciation.²⁷ Additionally, CP&L asserts that its proposed rate treatment for its early plant retirement is consistent with Commission policy,²⁸ that its contingency allowances and negative salvage amounts are reasonable,²⁹ and that the prudence of its decision to retire 1700 MW of generation is not at issue in this proceeding.³⁰ CP&L asserts that its return on equity is an issue beyond the scope of

²³ *Id.* at 16, citing to Attachment 1, Depreciation Study, at 2.

²⁴ *Id.* at 23.

²⁵ CP&L Answer at 2.

²⁶ *Id.* at 5.

²⁷ *Id.* at 6.

²⁸ *Id.* at 8.

²⁹ *Id.* at 12.

³⁰ *Id.* at 14.

this proceeding because it seeks no changes to its existing rate of return.³¹ CP&L also maintains that its proposed retroactive date is consistent with Commission precedent.³²

18. CP&L also included two affidavits. Dane A. Watson testifies that the included depreciation study was prepared in accordance with generally accepted industry standards for such studies.³³ David B. Pistole states that Fayetteville's contention that it lacked the information necessary to evaluate CP&L's depreciation rate is without merit because Fayetteville intervened in North Carolina Commission Docket E-2 Sub 1023 and received data which directly support the calculation of contingency allowances and negative salvage values in CP&L's proposed depreciation rates.³⁴ In response to Fayetteville's contention about the lack of support for CP&L's decision to retire its older, less efficient and unscrubbed coal generation, Mr. Pistole states that the North Carolina Commission required the retirement and that CP&L's current filing before the North Carolina Commission, pending approval, describes the environmental and economic factors that resulted in these decisions.³⁵ He also maintains that the 10-year amortization of the unrecovered investment in these facilities is consistent with North Carolina Commission precedent,³⁶ and that the retail recognition of Harris accelerated depreciation was provided for in orders issued in North Carolina Commission dockets.³⁷ Finally, he states that Fayetteville's concern about CP&L's nuclear decommissioning costs is unfounded.³⁸

III. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motion to intervene serves to make Fayetteville a party to this proceeding.

³¹ *Id.* at 13.

³² *Id.* at 15.

³³ *Id.*, Attachment A at 3-4.

³⁴ *Id.*, Attachment B at 2.

³⁵ *Id.* Attachment B at 3-4.

³⁶ *Id.*, Attachment B at 4.

³⁷ *Id.*, Attachment B at 5.

³⁸ *Id.*, Attachment B at 6, Attachment B-3.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept CP&L's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

21. CP&L's proposed changes in depreciation rates raise issues of material fact that cannot be resolved based on the record before us and are more appropriately addressed in the hearing and settlement judge procedures ordered below. Therefore, we will accept CP&L's proposed rates for filing, suspend them for a nominal period, make them effective July 1, 2012, as requested, subject to refund, and set them for hearing and settlement judge procedures.

22. We disagree with Fayetteville and find that CP&L's filing met the threshold filing requirements under Part 35 of the Commission's regulations. As noted by CP&L, the Commission generally grants waiver of the 60-day prior notice requirement for good cause shown, e.g. for filings that increase rates when the rate change and the effective date are prescribed by contract in order to implement a contract requirement.³⁹ In this case, the Agreement requires that depreciation will be based on 2012 FERC Form No. 1. Therefore, consistent with *Central Hudson*,⁴⁰ we will grant waiver of the prior notice requirement to allow the revised depreciation expenses to be included in the formula rate schedule, effective July 1, 2012 as requested. All other issues raised by Fayetteville may be included in the settlement and hearing process.

23. While CP&L's Agreement provides a monthly capacity rate for charges properly recorded in CP&L's FERC Form No. 1, it is unclear whether the unrecovered costs are just and reasonable for recovery and whether the costs should be recovered over a 10-year period because CP&L has not adequately justified the inclusion of the unamortized investments. It is also unclear how CP&L derived the costs for recovery and determined the 10-year recovery period for its unrecovered investment and associated dismantling costs. While we are setting these matters 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.⁴¹ If the

³⁹ See *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,974 (1993); *Central Hudson Gas & Electric Corp., et al.*, 60 FERC ¶ 61,106, at 61,338, *reh'g denied*, 61 FERC ¶ 61,089 (1992) (*Central Hudson*).

⁴⁰ *Central Hudson*, 60 FERC ¶ 61,106 at 61,338.

⁴¹ 18 C.F.R. § 385.603 (2012).

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.⁴² The settlement judge shall report to the Chief Judge and the Commission within thirty (30) days of the date of the appointment of the settlement judge, 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.

The Commission orders:

(A) CP&L's filing is hereby accepted for filing, and suspended for a nominal period, to become effective July 1, 2012, as requested, subject to refund.

(B) 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 FPA (18 C.F.R., Chapter I), a public hearing shall be held concerning CP&L's depreciation filing. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2012), 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.

(D) Within thirty (30) days of the appointment of the settlement judge, 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

⁴² 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 (5) days 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).

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 towards settlement.

(E) 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 these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. 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.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.