

113 FERC ¶ 61,130
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

Docket Nos. ER05-1082-000
and ER05-1082-001

ORDER ACCEPTING PROPOSED COST-BASED POWER SALES TARIFF
SUBJECT TO CONDITION

(Issued November 4, 2005)

1. In this order, we accept for filing Carolina Power & Light's (CP&L)¹ proposed cost-based power sales tariff, providing for up-to cost-based rates applicable to sales of electric energy and capacity at wholesale for transactions of one year or less that sink in the CP&L control area, to be effective August 6, 2005, as requested, subject to condition.

Background

2. The Commission adopted, in an April 14, 2004 Order, as clarified on July 8, 2004,² two new screens for assessing generation market power: a pivotal supplier screen and a market share screen.

3. On May 13, 2004, the Commission issued an order implementing the new generation market power screens and directed applicants with three-year market-based rate reviews pending before the Commission to file revised generation market power analyses in accordance with the schedule contained in Appendix A of that order.³ The

¹ CP&L is a wholly-owned subsidiary of Progress Energy, Inc. (Progress Energy).

² *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (2004), (April 14 Order), *order on reh'g*, *AEP Power Marketing, Inc.*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

³ *Acadia Power Partners, Inc.*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

May 13 Order also directed applicants to address the other three parts of the four part market-based rate analysis (i.e., transmission market power, barriers to entry, and affiliate abuse and/or reciprocal dealing) to the extent that factual circumstances had changed from those described in their pending filings.

4. On August 12, 2004, CP&L submitted a letter pursuant to the May 13 Order and the July 8 Order, in which it informed the Commission that CP&L would either adopt the default cost-based rates described in the Commission's July 8 Order or propose alternative cost-based rates for the sale of electric energy at wholesale within its control area. On May 5, 2005, the Commission issued an order directing Progress Energy, CP&L's parent corporation, to submit a revised market power analysis for CP&L and to make certain revisions to CP&L's market-based rate tariff.⁴ In *Florida Power*, the Commission stated:

In the event that CP&L wishes to relinquish its market-based rate authority in its home control area, it should submit a separate filing pursuant to section 205 of the FPA including appropriate revisions to its market-based rate tariff and propose adequately supported cost-based rates.⁵

5. On June 6, 2005, CP&L submitted for filing a statement that it is relinquishing its market-based rate authority in its home control area, together with a Cost-Based Wholesale Power Sales Tariff, containing a cost-based ceiling rate for sales of electric energy and capacity for transactions of one year or less that sink in the CP&L control area.⁶ CP&L states that the cost-based tariff allows the parties to negotiate rates for short-term transactions up to a cost-based ceiling rate for capacity and energy. In developing the capacity and energy ceiling rates for the cost-based tariff, CP&L states that it used the most current data for the CP&L Wayne County Plant. In making this up-

⁴ *Florida Power Corp.*, 111 FERC ¶ 61,154 at P 13-19 (2005) (*Florida Power*).

⁵ *Id.* at P 16.

⁶ In three related filings on the same date, and as supplemented on September 6, 2005 and September 7, 2005: (a) CP&L filed a new market-based rate tariff that eliminates CP&L's authority to make capacity and energy sales in its own control area; (b) Progress Energy filed an updated market power analysis for CP&L and its affiliate, Florida Power Corporation (FPC); and (c) FPC and other affiliates filed revisions to their market-based rate tariffs. The Commission is addressing these filings in an order being issued concurrently with this order. *Florida Power Corp.*, 113 ¶ 61,131 (2005) (*Florida Power*).

to cost-based rate proposal, CP&L states that it does not concede that it has generation market power in its control area, but that it is filing the cost-based tariff “to avoid the burdens of determining whether CP&L had generation market power within its control area.”⁷ CP&L further states that it “reserves the right to seek at a later date market-based rate authority for sales in its control area.”⁸

6. On August 5, 2005, the Commission Staff issued a deficiency letter by delegated authority which, among other things, requested information regarding CP&L’s use of the Wayne County Plant to derive the cost-based ceiling rates. (August 5 Deficiency Letter).

7. On September 6, 2005, CP&L submitted its response to the August 5 Deficiency Letter. In its response, CP&L submitted a revised Cost-Based Wholesale Power Sales Tariff (Cost-Based Tariff) to replace in its entirety the cost-based tariff that CP&L submitted June 6, 2005. CP&L states that the Cost-Based Tariff establishes a cost-based ceiling rate based on the embedded cost of the units most likely to provide the service, rather than the embedded costs of the Wayne County Plant.⁹

8. CP&L explains that it developed the ceiling rate in the Cost-Based Tariff as the sum of a capacity charge and an energy charge. CP&L supports its proposed capacity charge based on the weighted cost of the CP&L generating units within the CP&L control area that it is likely to use to provide the service at issue.¹⁰ To determine these units, CP&L performed a “stacking analysis” under which it stacked its generating units in increasing order based on their fuel costs. CP&L then selected units by analyzing their minimum and maximum monthly peak demands.¹¹ CP&L calculated the annual cost (in \$/kW) of each unit using a fixed charge rate for non-operation and maintenance costs, plus the actual operation and maintenance expenses for each unit. CP&L weighted the annual cost of each resource based on its available capacity compared to the total

⁷ CP&L June 6, 2005, cover letter at 2 n.2.

⁸ *Id.* We note that if CP&L seeks to reinstate its market-based rate authority for sales that sink in its home control area in the future pursuant to section 205 of the Federal Power Act (FPA), it will have the burden of demonstrating that it has no market power in relevant markets or has sufficiently mitigated its market power.

⁹ CP&L September 6, 2005, cover letter at 7-9.

¹⁰ *Id.* at 4 and 5.

¹¹ *Id.*

capacity of all the resources used in the calculation.¹² CP&L determined the weighted annual cost of each participating unit by multiplying its total annual cost per installed kW by the unit's expected output, and dividing by the unit's equivalent availability factor. CP&L added together these weighted annual costs to derive the overall annual cost.¹³

9. CP&L states that the proposed energy charge is equal to the anticipated out-of-pocket cost of energy that it expects to purchase or produce, plus ten percent. CP&L capped the amount recoverable in connection with power purchased specifically for resale at the anticipated out-of-pocket costs plus \$1 per MWh.

10. CP&L states that it based the non-rate terms and conditions in the Cost-Based Tariff on those in: (a) CP&L's EEI tariff; and (b) the EEI Master Power Purchase and Sale Agreement. CP&L further states that it revised the credit and collateral provisions to incorporate the qualitative and quantitative factors that the Commission listed in footnotes 13 and 14 of the Policy Statement on Electric Creditworthiness issued on October 19, 2004.¹⁴

11. The Cost-Based Tariff requires the parties to transactions under the Tariff to execute a Service Agreement. A *pro forma* Service Agreement is attached to the Tariff.

12. CP&L states that, for sales in the CP&L control area that have a duration of one year or longer, CP&L will file individual agreements with the Commission for review and approval under section 205 of the Federal Power Act (FPA).¹⁵ CP&L requests an effective date of August 6, 2005.¹⁶

Notice of Filing and Responsive Pleadings

13. Notice of CP&L's June 6, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 35,421 (2005), with interventions and protests due on or before June 27, 2005. On June 27, 2005, The Public Works Commission of the City of Fayetteville,

¹² *Id.* at 5. *See also* Attachment C.

¹³ *Id.*

¹⁴ *Policy Statement on Electric Creditworthiness*, 109 FERC ¶ 61,186 at P 13 nn. 13-14 (2004).

¹⁵ 16 U.S.C. § 824d (2000). *See* CP&L September 6, 2005 Cover Letter at 4.

¹⁶ *Id.* at 2.

North Carolina (Fayetteville), ElectriCities of North Carolina (ElectriCities),¹⁷ and NC Towns¹⁸ each filed a motion to intervene and a protest, and Morgan Stanley Capital Group, Inc. and North Carolina Electric Membership Corporation filed motions to intervene. On July 12, 2005, CP&L filed an answer to the protests.

14. Notice of CP&L's September 6, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 55,366 (2005), with interventions and protests due on or before September 27, 2005. On September 27, 2005, the Public Works Commission of the City of Fayetteville, North Carolina (Fayetteville) filed a motion to intervene and a protest. On October 12, 2005, CP&L filed an answer to the protest.

15. Fayetteville protests CP&L's filing because it fears that the filing would substitute different terms and conditions than the existing agreements between CP&L and Fayetteville, and would adversely affect Fayetteville's service under existing agreements, without any finding that the existing agreements are unjust and unreasonable.¹⁹ Fayetteville is also concerned that there is no tariff in place for transactions of longer than one year in the CP&L control area. Fayetteville notes that, if the new filing does not supersede its existing agreements with CP&L, Fayetteville will not be affected before the expiration of its existing agreements with CP&L on June 30, 2012. But Fayetteville submits that a tariff for transactions of longer than one year should be in place before its existing agreements with CP&L expire.²⁰

16. Fayetteville also protests CP&L's September 6, 2005 filing, expressing concern that once its current contract expires it may no longer be able to purchase short-term energy in the marketplace because CP&L could choose not to sell to customers captive to its system.²¹ Fayetteville notes that these concerns do not immediately affect it because

¹⁷ ElectriCities is a joint municipal assistance agency created under the statutes of North Carolina. Its members are 99 cities, towns and universities of North Carolina, South Carolina, and Virginia.

¹⁸ NC Towns are the Towns of Black Creek, Lucama, Sharpsberg, Stantonsburg, and Waynesville, North Carolina.

¹⁹ Fayetteville's June 27, 2005 Protest at 3. Fayetteville states that it is not sure that the instant filing applies to transactions under its existing agreements with CP&L.

²⁰ *Id.* at 4.

²¹ Fayetteville's September 27, 2005 Protest at 4. Fayetteville states that CP&L can subsidize transactions outside of its control area with profits from sales to

of its existing agreements with CP&L; however, Fayetteville seeks assurances that CP&L will not try to take advantage of its dominant position and that the Commission will protect Fayetteville from such exploitation should it occur. According to Fayetteville, the Commission can ensure that CP&L will not exercise its market power over wholesale, transmission dependent utility customers in short-term markets, by either eliminating CP&L's market-based rate authority in all markets or by requiring CP&L to offer to sell to customers within its control area before selling outside the control area. Further, Fayetteville argues that CP&L may refuse to negotiate any long-term arrangements with customers in its control area and requests that CP&L should state in its tariff its willingness to negotiate long-term, cost-based contracts with customers that cannot access meaningful power supply alternatives.²²

17. ElectriCities asks the Commission to direct CP&L to include in its tariff an obligation to provide wholesale electric energy and capacity on a long-term basis (*i.e.*, longer than one year), priced on an embedded cost-of-service basis, so that load serving entities have an assurance of obtaining a reliable, economic power supply.²³ ElectriCities argues that a commitment to make sales on a long-term basis is consistent with the Commission's cost-based default remedy and is appropriate, given that, due to transmission limitations, wholesale customers in CP&L's control area currently lack practical power supply alternatives.²⁴

18. NC Towns notes that CP&L has announced that after 2010 it will have no more transmission import capacity.²⁵ NC Towns asks the Commission not to accept CP&L's

transmission dependent utilities inside its control area, which have no or few other options; or it can sell only outside its control area at higher market-based prices rather than selling at the possibly lower, cost-based prices it is permitted to charge within its control area, leaving transmission dependent utilities without access to power supplies.

²² *Id.* at 11.

²³ ElectriCities Protest at 3-4. ElectriCities notes that CP&L states in its Transmittal Letter that it will file transactions of one-year or longer with the Commission for its review and approval under section 205 of the FPA. ElectriCities asks the Commission to direct CP&L to put this commitment in its proposed tariff.

²⁴ *Id.* at 4.

²⁵ NC Towns Protest at 3.

filing until CP&L commits to a ratemaking formula that will satisfy all long-term wholesale load-serving entities located in CP&L's service territory.²⁶

Discussion

Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), Fayetteville's, Electricities', NC Towns', and Morgan Stanley's timely, unopposed motions to intervene serve to make them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385(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 answers and will, therefore, reject them.

Cost-Based Tariff

20. 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 approved 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.²⁷

21. In addition, an applicant may forego submitting a generation market power analysis and accept a presumption of market power and go directly to mitigation by proposing case-specific mitigation that eliminates the ability to exercise market power, or agreeing to the default rates discussed below. Under such circumstances there will be a presumption of market power in all of the default relevant markets.

22. CP&L's proposed rates primarily differ from the default cost-based rates in that they do not differentiate sales for less than a year between those that are less than one week and those that are between one week and one year. Also, CPL has proposed

²⁶ *Id.* at 5.

²⁷ April 14 Order, 107 FERC ¶ 61,018 at P 148.

monthly, weekly, daily, and hourly rates based on CP&L's actual system out of pocket capacity and energy costs.

23. CP&L's Cost-Based 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 Commission's directive in *Florida Power*,²⁸ with the exception discussed below. CP&L's proposal to base its capacity ceiling rates for short-term power sales, including sales of one week or less, on the embedded costs of the CP&L units that are most likely to be used to provide the service is sufficiently supported and is consistent with Commission precedent.²⁹

24. The Cost-Based Tariff as filed applies to sales of one year or less,³⁰ rather than less than one year, as the April 14 order requires.³¹ Accordingly, we will accept CP&L's proposed Cost-Based Tariff, to be effective August 6, 2005 (which is after 60-days notice), as requested, subject to CP&L's making a compliance filing within 30 days from the date of this order to limit sales under its proposed Cost-Based Tariff to sales of less than one year.

Currently Effective Agreements

25. We will deny Fayetteville's protest with respect to its contention that the Cost-Based Tariff may apply to short-term transactions under its existing agreements with CP&L. Section 16.03 of the Cost-Based Tariff states:

²⁸ See 111 FERC ¶ 61,154 at P 16 (directing CP&L to propose adequately-supported cost-based rates if it elected to relinquish market-based rates in its home control area).

²⁹ See, e.g., *Detroit Edison Co.*, 78 FERC ¶ 61,149 (1997) (approving a demand charge for power sales for periods of an hour up to one year); *Illinois Power Co.*, 57 FERC ¶ 61,213, at 61,699-700 (1991) (permitting utilities to include in their rates an amount above incremental costs to provide a contribution to fixed costs).

³⁰ See Cost-Based Tariff, section 4.01.

³¹ April 14 Order, 107 FERC ¶ 61,018 at P 40 (requiring sales of power of more than one week but less than one year to be priced at embedded cost up to a rate reflecting the cost of the unit or units expected to provide the service).

Existing Tariffs or Agreements: This Tariff, upon becoming effective, neither supersedes nor cancels any other tariff or agreement effective prior to the date of this Tariff.

Thus, we find that the Cost-Based Tariff clearly provides that it does not apply to existing agreements between CP&L and Fayetteville, and thus Fayetteville's concerns that the proposed Cost-Based Tariff will adversely affect its existing agreements with CP&L are misplaced.

Long-Term Sales

26. We will deny the Electricities, NC Towns, and Fayetteville protests with respect to their assertions that the Commission should accept CP&L's filing only on the condition that CP&L modify its Cost-Based Tariff to include an obligation by CP&L to make long-term sales at embedded cost rates or a statement of its willingness to negotiate long-term agreements. The protesters have provided no justification for imposing such obligations on CP&L. The Cost-Based Tariff at issue is for sales of one year or less, and CP&L has not sought any authority to make long-term sales under that tariff.

27. CP&L indicates that it will file with the Commission, under section 205 of the FPA, any agreements governing sales in the CP&L control area that are for periods of one year or longer.³² We will hold CP&L to this commitment to file all such agreements on a stand-alone basis and they must be based on CP&L's embedded costs. If a particular customer believes that CP&L has an obligation to serve it and is not fulfilling that obligation, the customer can file a complaint under section 206 of the FPA.³³

Short-Term Sales – Elimination of Market-Based Rate Authority/First Call Rights

28. We will deny Fayetteville's protest with respect to its request that we eliminate CP&L's market-base rate authority in all markets or require CP&L to offer power to customers in its control area before selling to customers outside its control area. Fayetteville has provided no justification for imposing such requirements in this case. First, Fayetteville's request to eliminate CP&L's market-based rate authority in all markets is directly at odds with the Commission's finding that CP&L may retain its

³² CP&L September 6, 2005 Cover Letter at 4.

³³ 18 U.S.C. § 824d (2000).

market-based rate authority for sales it makes outside of its home control area.³⁴ Second, Fayetteville admits that it will not be adversely affected by CP&L's cost-based rate proposal at least through June 30, 2012, the expiration date of the current grandfathered market-based rate agreements, so its concern is premature. Finally, Fayetteville's concern that CP&L will not sell short-term power in its control area or that it will not be able to buy short-term power supplies from other suppliers is speculative. If Fayetteville 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.

29. As a public utility, CP&L 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.³⁵ This requirement applies to CP&L's proposed rates discussed herein.

30. 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. RM04-7-000,³⁶ where the Commission is re-examining its 4-prong test for the grant of market-based authority.

The Commission orders:

(A) CP&L's proposed Cost-Based Tariff is hereby accepted for filing to become effective August 6, 2005, as requested, subject to condition, as discussed in the body of this order.

³⁴ See *Florida Power*, 113 FERC ¶ 61,131 at P16.

³⁵ 16 U.S.C. § 824d(b).

³⁶ *Market-Based Rates for Public Utilities*, 107 FERC ¶ 61,019 (2004).

(B) CP&L is hereby directed to make 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)

Magalie R. Salas,
Secretary.