

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Carolina Power & Light Company and
Florida Power Corporation

Docket No. ER03-540-007

ORDER DENYING REHEARING

(Issued February 17, 2004)

1. On June 9, 2003, AES Odyssey filed a request for rehearing and clarification of the Commission's May 9, 2003 Order in the above-referenced docket.¹ In that order the Commission accepted Carolina Power & Light Company's (CP&L) and Florida Power Corporation's (together, the Companies) revisions to the Credit Review and Creditworthiness sections of their Open Access Transmission Tariffs (OATT), as modified, and rejected the proposed Suspension of Service section without prejudice to refiling. As explained below, the Commission will deny the request for rehearing.

Background

2. On February 14, 2003, the Companies filed to revise the creditworthiness provisions of their respective OATTs to decrease the Companies' potential financial exposure to transmission customers with poor credit ratings. The Companies proposed to adopt more stringent creditworthy standards in their OATT. The Companies proposed amending section 11.1, which imposed an annual credit review for each transmission customer. The Companies also proposed to amend section 11.2, requiring transmission customers to meet the following requirements: (a) the transmission customer is not in default of its payment obligations under the OATT; and (b) the transmission customer must meet one of the following criteria: 1) the transmission customer has been in business at least one year and has a credit rating of at least Baa2 (Moody's) or BBB (Standard & Poor's); or 2) the transmission customer has been in business at least one

¹ Carolina Power & Light Company, 103 FERC ¶ 61,159 (2003) (May 9 Order).

year and provides financial statements which demonstrate the transmission customer meets equivalent standards underlying the credit ratings of Baa2 (Moody's) or BBB (Standard & Poor's); or 3) the transmission customer is a borrower of the Rural Utilities Service (RUS) and has a Times Interest Earned Ratio of 1.05 or better and a Debt Service Coverage Ratio of 1.00 or better in the most recent calendar year, or is maintaining the Times Interest Earned Ratio and Debt Service Coverage Ratio as established in the transmission customer's RUS Mortgage; or 4) the transmission customer is a municipality that has taken transmission service for at least one year; or 5) the transmission customer's parent company meets the criteria set out in the previous (a) and (b)1, (b)2, (b)3, or (b)4 above, and the parent company provides a written guarantee that the parent company will be unconditionally responsible for all financial obligations associated with the transmission customer's receipt of transmission service.

3. In order to remedy a transmission customer's failure to meet the creditworthiness standards, the Companies proposed in section 11.2(ii) that the transmission customer must comply with one of the following: (a) not less than five days prior to the commencement of transmission service, transmission customers shall provide an unconditional and irrevocable letter of credit or an alternative form of security proposed by the transmission customer and acceptable to the Companies and consistent with commercial practices established by the Uniform Commercial Code, that is equal to the lesser of the total charge for service or the charge for 90 days of service; or (b) for service for one month or less, shall pay the total charge for service not less than five business days prior to the commencement of service; or (c) for service of greater than one month, shall pay for each month's service not less than five business days prior to the beginning of the month. The Companies also proposed that the deposits previously provided for in their OATT sections 17.3, 29.2 and 37.4 shall not be required.

4. The Companies further proposed that, if during the annual creditworthiness review a transmission customer is found to meet the standards in section 11.2 and then subsequently fails to meet those requirements at any time after it requests transmission service but before the termination of that service, the transmission customer shall, within five business days of notification by the Companies, provide an unconditional and irrevocable letter of credit or alternative form of security acceptable to the Companies in an amount equal to the charge for the next thirty days of transmission service, and within thirty days of such notification shall meet the requirements of section 11.2(ii), which are described above.

5. In the May 9 Order, the Commission accepted the Companies' proposed sections 11.1 and 11.2, subject to the Companies' refileing those sections with certain modifications. The Commission agreed with the Companies that the risk of non-payment on non-firm service is a valid concern, and agreed that the nature of service is immaterial in determining when a transmission customer must comply with creditworthiness

standards. In the order, we also determined that a 90-day time limit for the letter of credit is an appropriate time frame for the Companies to protect their interests.²

Request for Rehearing

6. AES Odyssey raises a number of concerns on rehearing. First, AES Odyssey argues that the May 9 Order fails to recognize that the Companies, as vertically-integrated utilities that own generation and transmission, and function as load-serving entities, have the incentive to thwart competition from independent power producers (IPPs) and other alternative energy suppliers by applying their creditworthiness requirements in a discriminatory manner. AES Odyssey explains that, due to the financial and market volatility currently being experienced within the industry, many IPPs do not enjoy investment grade credit ratings and are unlikely to obtain investment grade status until such time that the volatility subsides. AES Odyssey concludes that the May 9 Order's approval of the revised creditworthiness provisions allows the Companies to lock in an economic advantage and effectively freeze IPPs and other non-investment grade entities out of competing in the Companies' local service areas.

7. AES Odyssey contends that, in this respect, the May 9 Order conflicts with the later May 23, 2003 Order in Duquesne Light Company.³ It asserts that, in Duquesne, the Commission rejected a similar attempt to revise OATT creditworthiness requirements because of the potential for Duquesne to discriminate against its competitors when applying such credit requirements.

8. AES Odyssey further argues that the Duquesne Order establishes certain general criteria that a transmission provider that is not a Regional Transmission Organization or an Independent System Operator must meet in order to demonstrate that its proposed creditworthiness requirements are just and reasonable. AES Odyssey adds that the Duquesne Order specifically states, among other things, that a transmission provider seeking revision of the pro forma tariff's creditworthiness provisions must, at a minimum, show a direct correlation between a risk of default and the level of security required. AES Odyssey contends that the Companies failed to demonstrate that there is a significant correlation between a Standard & Poor's or Moody's rating and risk of default. The creditworthiness provisions approved in the May 9 Order, therefore, do not meet the first prong of the two-prong test AES Odyssey states was adopted in Duquesne. In addition, AES Odyssey argues that the Companies' creditworthiness requirements have a discriminatory impact on IPPs, which often have lower credit ratings overall than

² Id. at P 32-24.

³ Duquesne Light Company, 103 FERC ¶ 61,227 (2003) (Duquesne).

traditional utilities. Therefore, AES Odyssey states, the creditworthiness provisions in the May 9 Order also fail the second prong of the two-prong test set forth in Duquesne.⁴

9. AES Odyssey argues that the Commission erred by approving standards that do not accurately reflect IPPs' true credit positions, and that provide an inadequate benchmark for measuring creditworthiness and that thus place an unjustified burden on IPPs and other entities competing against traditional vertically-integrated utilities in competitive energy markets. According to AES Odyssey, over reliance on ratings such as Standard & Poor's or Moody's will have a discriminatory impact on IPPs as compared to generation owned by traditional utilities. Moreover, the ability to rely on parent guarantees is unavailing when, as is now the case for many IPPs, the parents likewise cannot meet the Companies' creditworthiness requirements. Furthermore, IPP projects tend to be project-financed more often than traditional vertically-integrated utility projects and such financing often limits the ability to obtain letters of credit.

10. AES Odyssey further requests that the Commission institute a generic rulemaking to consider measures that more accurately reflect a competitive generation company's creditworthiness and balance the need to protect customers without thwarting competition.

11. In addition to its request for rehearing, AES Odyssey seeks clarification of the Commission's action in the May 9 Order concerning service of one month or less. While the Commission accepted the revised language,⁵ AES Odyssey submits that a letter of credit cannot be placed into effect within 24 hours, and therefore meeting a requirement that it have a letter of credit in place at least 5 days prior to the transaction for a next-day transaction would require an entity to have a standing letter of credit available, and to pay for that assurance. For this reason, AES Odyssey requests that the Commission clarify that, in such cases, the transmission customer should be allowed a commercially reasonable time to secure a letter of credit, and that it should not be denied transmission so long as it is not already in default of its payment obligations under the OATTs.

⁴ AES Odyssey acknowledges, however, that the creditworthiness standards at issue here are more specific than those rejected in Duquesne, as they specify particular ratings as a basis for determining creditworthiness, and are limited to transmission service rather than both transmission service and so-called retail access service as was the case for those rejected in Duquesne.

⁵ See May 9 Order, 103 FERC ¶ 61,159 at P 14, 23, 32.

The Companies' Response

12. On June 16, 2003, the Companies filed a response to AES Odyssey's request for rehearing. They argue that AES Odyssey has raised a new issue for the first time on rehearing; the issue of whether the Companies should be required to adopt creditworthiness criteria other than the ratings by Standard & Poor's and Moody's. The Companies argue that the Commission should reject AES Odyssey's rehearing request to the extent it raises issues that should have been raised earlier. They note that, on rehearing, AES Odyssey proposes a fundamental modification of the Companies' previously accepted tariff provisions, a proposal to reject commercial credit ratings as a basis for determining creditworthiness.

13. Next, the Companies argue that AES Odyssey's proposed creditworthiness criteria are less reliable and more subject to discretionary action than the criteria the Companies proposed; that is, the Companies explain that AES Odyssey proposes that the Companies abandon evaluations that are done by companies that are independent of market participants and replace them with an evaluation that the Companies do themselves, and the Companies assert that this would increase the possibility that the credit review would be performed in a discriminatory manner.

14. The Companies argue that the Commission should reject AES Odyssey's assertion that the Companies have not demonstrated a correlation between the risk of default and commercial credit ratings. Finally, the Companies state that AES Odyssey's remaining argument that provisions are discriminatory simply because a significant number of IPPs cannot meet the rating agencies' credit requirements is patently without merit.

Discussion

15. The issue of whether the Companies should be required to adopt creditworthiness criteria other than the ratings by Standard & Poor's and Moody's has been belatedly raised by AES Odyssey on rehearing; in fact, AES Odyssey never protested the original filings (the Companies' February 14, 2003 and March 12, 2003 filings) in this case, but only filed a motion to intervene out of time.⁶ We typically do not consider arguments

⁶ See May 9 Order, 103 FERC ¶ 61,159 at P 6. Indeed, in its intervention, AES Odyssey expressly stated that "it does not raise any substantive issues at this time." AES Odyssey Intervention at 3.

raised for the first time on rehearing.⁷ Accordingly, we need not address the arguments untimely raised in AES Odyssey's request for rehearing.

16. While we need not consider AES Odyssey's arguments, we nevertheless find that, even if they were properly before us, they are unpersuasive. The creditworthiness proposals submitted by the Companies, and accepted as modified in our May 9 Order, reduced the potential financial risk to the Companies without unduly burdening customers. To the extent that customers believe that the Companies discriminate in the application of the creditworthiness requirements, they may file a complaint with the Commission; the kind of speculation that AES Odyssey indulges in as to the Company's possible future conduct is just that, speculation. Furthermore, the creditworthiness proposals rejected in Duquesne, and to which AES Odyssey points, differed significantly from those at issue here.⁸ For example, as even AES Odyssey concedes,⁹ the creditworthiness standards at issue here are more specific than those rejected in Duquesne, and thus remove much of the discretion (and, as a consequence, much of the ability to discriminate) that is at the heart of AES Odyssey's request for rehearing.¹⁰

17. Moreover, the Commission recently addressed the issue of creditworthiness in New York Independent System Operator, Inc., 104 FERC ¶ 61,311 (2003). In that order, the Commission accepted for filing proposed amendments to creditworthiness requirements contained in those tariffs. There, tracking the approach we used in the May 9 Order, we explained that we must balance the goals of allowing the transmission providers to reduce their risk while at the same time ensuring that credit requirements are not so stringent that they unnecessarily inhibit access to the marketplace. While AES

⁷ E.g., Constellation Power Source, Inc., 100 FERC ¶ 61,380 at P 18 (2002); Nevada Power Co., 100 FERC ¶ 61,273 at P 25 (2002); Southwestern Electric Cooperative, Inc., Opinion No. 450-A, 97 FERC ¶ 61,001 at 61,028 & n. 45 (2001), order on reh'g, Opinion No. 450-B, 99 FERC ¶ 61,008 (2002), aff'd, 347 F.3d 975 (D.C. Cir. 2003); Niagara Mohawk Power Corp., 96 FERC ¶ 61,011 at 61,044 (2001); accord Baltimore Gas and Electric Company, et al., 91 FERC ¶ 61,270 at 61,921-22 (2000) and Baltimore Gas and Electric Company, et al., 92 FERC ¶ 61,043 at 61,114 (2000).

⁸ Compare Duquesne, 103 FERC ¶ 61,227 at P 3-7 with May 9 Order, 103 FERC ¶ 61,159 at P 3-4, 9-10, 13-15, 22-25, 28.

⁹ See supra note 4.

¹⁰ Compare May 9 Order, 103 FERC ¶ 61,159 at P 9 (identifying specific credit ratings that a customer must meet) with Duquesne, 103 FERC ¶ 61,227 at P 4-6 (providing simply for review of credit reports).

Odyssey suggests that, in this case, we leaned too far in favor of the former, it would have us tilt well in the other direction and require the Companies to do business with entities that are very risky. In this regard, AES Odyssey concedes that many entities do not now and are unlikely in the future to have investment grade credit ratings.¹¹

18. Moreover, inconsistent with AES Odyssey's argument above that the Companies may discriminate in the application of their creditworthiness requirements, what AES Odyssey at the same time seems to be proposing is that the Companies should not rely on evaluations done by companies that are independent of market participants (*i.e.*, Standard & Poor's and Moody's) and should instead replace them with a more subjective evaluation that the Companies would do themselves.¹²

19. We find that AES Odyssey's argument that the Companies' creditworthiness requirements, as accepted as modified by the Commission, are discriminatory because a significant number of IPPs at present cannot meet the criteria is also without merit; objective creditworthiness criteria that equally affect all companies do not, standing alone, constitute undue discrimination.

20. AES Odyssey is concerned that a non-creditworthy customer might be requested to provide a letter of credit (or alternate security) at least five days before service commences. However, sections 11.2(ii)(b) and (c) provide that, for service of a month or less, the customer may either prepay for service by the later of (1) five days before the service commences or (2) when service is requested.¹³ We find that this latter alternative, allowing prepayment when service is requested, adequately addresses the needs of those transmission customers who do not wish to maintain a standing letter of credit.

21. With regard to AES Odyssey's request that we institute a generic rulemaking, we believe that there may be some merit to that approach. However, we will not delay resolution of this case pending consideration of whether to institute such a rulemaking.

¹¹ See Request for Rehearing at 4; accord id. at 8-9.

¹² See id. at 9-10.

¹³ See May 9 Order, 103 FERC ¶ 61,159 at P 14, 23.

The Commission orders:

AES' request for rehearing is hereby denied, as discussed in the body of the order.

By the Commission. Commissioner Brownell concurring with a separate statement attached.

(S E A L)

Linda Mitry,
Acting Secretary.

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BROWNELL, Commissioner, concurring:

In its rehearing request, AES Odyssey requests that the Commission institute a generic rulemaking to consider measures that more accurately reflect a competitive generation company's creditworthiness and balance the need to protect customers without thwarting competition. I believe it is time that we ask stakeholders whether it is appropriate to standardize the creditworthiness procedures in the electric industry.

In this case, we approve tariff provisions that, inter alia, establish criteria to demonstrate creditworthiness; specify collateral requirements, and provide timelines for the suspension and termination of service. We are also applying our decisions in this case to the modifications proposed by Entergy Services, Inc. to its creditworthiness provisions in Docket No. ER03-1140. We also recently addressed the issue of creditworthiness in an ISO. See New York Independent System Operator, Inc., 104 FERC 61,311 (2003).

Standardized creditworthiness provisions will promote consistent practices across markets and utilities and provide customers with an objective and transparent creditworthiness evaluation. Standard provisions will lessen the opportunity for applying these provisions in an unduly discriminatory manner. Today, we issue a Notice of Proposed Rulemaking to standardize the creditworthiness provisions in the natural gas industry. The genesis of this rulemaking was also individual filings due to increased concerns about creditworthiness. I recommend that we seek comment on whether the Commission should consider a similar course for the electric industry.

Nora Mead Brownell
Commissioner