

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Florida Power Corporation  
(aka Progress Energy Florida)

Docket Nos. ER97-2846-003  
ER97-2846-004

Carolina Power & Light Company (aka Progress Energy Carolina)

ER99-2311-005  
ER98-651-000

Florida Power Corporation  
Carolina Power & Light Company

EL05-77-000

ORDER ON UPDATED MARKET POWER ANALYSIS, INSTITUTING SECTION  
206 PROCEEDING AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued May 5, 2005)

1. In this order, the Commission directs Progress Energy, Inc. (Progress Energy), which submitted an updated market power analysis for the market-based rate authority of its affiliate, Florida Power Corporation (FPC), also known as Progress Energy Florida, Inc., to file a revised market power analysis within 30 days of the date of this order. In this regard, as discussed below, we direct Progress Energy to also include a revised market power analysis for its affiliate, Carolina Power & Light Company (CP&L). As discussed below, in this order, the Commission institutes a proceeding pursuant to section 206 of the Federal Power Act (FPA) to determine whether FPC and CP&L may continue to charge market-based rates and establishes a refund effective date pursuant to the provisions of section 206. This order benefits customers by ensuring that wholesale sales at market-based rates remain just and reasonable.

2. In addition, although CP&L has amended its market-based rate tariff to include the market behavior rules as directed in *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004) (Market Behavior Rules Order), our records indicate that FPC has not. Therefore, within 30 days of the date of this order FPC is directed to revise its market-based rate tariff to include the market behavior rules.

## **Background**

3. On October 21, 2003, Progress Energy, on behalf of FPC, submitted an updated market power analysis based on the Supply Margin Assessment (SMA), addressing FPC's market-based rate authority (October 2003 filing). It stated that the filing demonstrated that FPC's authority to engage in market-based rate sales outside of peninsular Florida<sup>1</sup> does not raise any market power concerns. FPC and its affiliates do not have market-based rate authority in peninsular Florida, but they do currently have market-based rate authority to make wholesale sales in all other markets including the Southern Company Control area.

4. The Commission adopted, in an April 14, 2004 Order, as clarified by an order issued July 8, 2004,<sup>2</sup> two new indicative screens for assessing generation market power: a pivotal supplier screen and a market share screen.

5. On May 13, 2004, the Commission issued an order implementing the new generation market power screens announced in the April 14 Order and directed applicants with three-year market-based reviews pending before the Commission to file a revised generation market power analysis in accordance with the schedule contained in Appendix A of that order.<sup>3</sup> FPC was in the group of companies directed to submit a compliance filing by December 23, 2004.<sup>4</sup> The May 13 Order also directed applicants to address the

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<sup>1</sup> In the October 21, 2003 filing, FPC stated that "peninsular Florida" means all of that portion of the State of Florida lying east of FPC's points of interconnection with Gulf Power Company, and to the south of the points of interconnection of those transmission lines jointly owned by Florida Power & Light Company and Jacksonville Electric Authority with Georgia Power Company and south of the points of interconnection of the City of Tallahassee and FPC with Georgia Power Company.

<sup>2</sup> *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).

<sup>3</sup> *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

<sup>4</sup> We note that on January 11, 2001, Progress Energy's affiliate, CP&L, requested that the Commission accept the market study submitted in its merger proceedings and require CP&L's next market analysis update to be due by no later than July 12, 2003. The Commission accepted this commitment in a delegated letter order (see February 7, 2001 letter from the Director, Division of Corporate Applications, in Docket No. ER99-2311-003). However no such filing was made. CP&L was not in the group of companies included in the May 13 Order because it did not have a market analysis pending before the Commission.

other three parts of our four part market-based rate analysis (i.e., transmission market power, barriers to entry, and affiliate abuse and/or reciprocal dealing) to the extent factual circumstances have changed from those described in the applicant's pending filing.

6. On August 12, 2004, Progress Energy's affiliate, 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 electricity at wholesale within its control area. CP&L stated that, within 60 days, it would file its proposed cost-based rates and a revised market-based rate tariff to reflect that its market-based rate authority is limited to those areas outside of its control area. However, no such filing was made.

7. On December 23, 2004, Progress Energy, on behalf of FPC, submitted its compliance filing (December 2004 filing). Progress Energy requests that the Commission recognize that the market power analysis filed on October 21, 2003 is still valid and that it demonstrates that FPC does not possess market power in the Southern Company control area.

#### **Description of Progress Energy's Filing**

8. Progress Energy stated in its October 2003 filing that, with regard to generation market power, it conducted a SMA test for the Southern Company control area and that the results of the SMA test demonstrate that FPC and its affiliates cannot be viewed as a pivotal supplier in the Southern Company control area. With regard to transmission market power, Progress Energy stated that its regulated affiliates FPC and CP&L operate under open access transmission tariffs and that its other affiliates do not own transmission facilities other than those necessary to interconnect their facilities to the relevant transmission grids. On this basis, Progress Energy asserted that neither it nor its affiliates can exert transmission market power. Progress Energy further stated that its affiliates lack ownership or control over key inputs which could create barriers to entry and that its affiliates operate under codes of conduct which prevent any potential for affiliate abuse or reciprocal dealing. Based on these representations, Progress Energy concluded in its October 2003 filing that the facts presented justify continued authority for FPC to make market-based rate sales outside of peninsular Florida.

9. In its December 2004 filing, Progress Energy informs the Commission that there has been no material change in FPC's market power in the Southern Company control area outside of peninsular Florida to which FPC is interconnected and requests that the Commission recognize the SMA market power analysis filed October 21, 2003.

### **Procedural Matters**

10. Notice of Progress Energy's October 2003 filing was published in the *Federal Register*, 68 Fed. Reg. 62,060 (2003), with comments, protests, and interventions due on or before November 12, 2003. On November 11, 2003, Florida Municipal Power Agency filed a motion to intervene and Seminole Electric Cooperative, Inc., and Florida Municipal Power Agency filed comments.

11. Notice of Progress Energy's December 2004 filing was published in the *Federal Register*, 70 Fed. Reg. 4834 (2005), with comments, protests, and interventions due on or before February 3, 2005. None was filed.

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

### **Discussion**

13. In the May 13 Order, the Commission directed all applicants with three-year market based reviews pending, including FPC, to revise their generation market power analysis to address the indicative screens adopted in the April 14 Order. However, Progress Energy's December 2004 filing fails to include any such analysis. Instead, Progress Energy submitted a three-paragraph letter that merely asserts that there have been no material changes in FPC's market power in the Southern Company control area and asks the Commission to continue to recognize that the market power study submitted in the October 2003 filing is still valid, even though that study is based on the Commission's previous SMA test adopted in *AEP Power Marketing, Inc.*, 97 FERC ¶ 61,219 (2001) instead of the revised market power analyses set forth in the April 14 and July 8 Orders. Accordingly, the Commission finds that the December 2004 filing submitted by Progress Energy patently fails to comply with the applicable requirements set forth in the April 14 and July 8 Orders.

14. Further, as noted above, on August 12, 2004, CP&L committed to file within 60 days proposed cost-based rates and a revised market-based rate tariff to reflect that its market-based rate authority is limited to those areas outside of its control area. However, no such filing was ever made. Also, as noted above, CP&L failed to timely submit its revised market power update.

15. Progress Energy's submittal on behalf of FPC fails to comply with the April 14 and July 8 Orders and CP&L's failure to timely file an updated market power analysis provides the basis for the Commission to institute the instant section 206 proceeding to establish a refund effective date to protect customers and to determine whether FPC and CP&L may continue to charge market-based rates. This order establishes a refund

effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is required. Our decision to establish a refund effective date does not constitute a determination that a refund will be ordered.

16. Within 30 days of the date of this order, Progress Energy is directed to file updated market power analyses for FPC and CP&L. Such analyses shall be consistent with the April 14 and July 8 Orders. 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.

17. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with Commission precedent,<sup>5</sup> the Commission will establish a refund effective date, at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the proceeding in Docket No. EL05-77-000, is published in the *Federal Register*. In addition, section 206 requires that, if no final decision has been rendered by that date the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by September 30, 2005.

18. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (i) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (ii) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter. Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.

19. FPC and CP&L must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting

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<sup>5</sup> See, e.g., *Canal Electric Company*, 46 FERC ¶ 61,153 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

market-based rate authority.<sup>6</sup> Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. Accordingly, FPC and CP&L are directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to incorporate the following provision:

[insert market-based rate seller name] must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

The Commission orders:

(A) Progress Energy is hereby ordered, within 30 days of the date of this order, to file updated market power analyses for FPC and CP&L as discussed in the body of this order.

(B) FPC is hereby ordered, within 30 days of the date of this order, to revise its market-based rate tariff to include the Commission's market behavior rules, as discussed in the body of this order.

(C) FPC and CP&L are directed, within 30 days of the date of issuance of this order, to revise their market-based rate tariffs to include the change in status reporting requirement adopted in Order No. 652.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 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), the Commission hereby institutes a

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<sup>6</sup> *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).

proceeding in these dockets concerning the justness and reasonableness of FPC's and CP&L's market-based rates, as discussed in the body of this order.

(E) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL05-77-000.

(F) The refund effective date established pursuant to section 206(b) of the FPA shall be 60 days following publication in the Federal Register of the notice discussed in Ordering Paragraph (E) above.

By the Commission. Commissioner Kelly not participating.

( S E A L )

Magalie R. Salas,  
Secretary.