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RECIP.NAME RECIPIENT AFFILIATION
MURLEY,T.E. Office of Nuclear Reactor Regulation, Director (Post 870411

SUBJECT: Discusses CP&Ls position re arbitration proceeding between CP&L & NC Eastern Municipal Power Agency.

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August 4, 1989

Dr. Thomas E. Murley
Director, Office of Nuclear Reactor
Regulation
U.S. Nuclear Regulatory Commission
11555 Rockville Pike, 12th Floor
Rockville, Maryland 20852

Dear Dr. Murley:

Carolina Power & Light Company ("CP&L") has received a copy of a letter to you, dated June 22, 1989, from Gary J. Newell, counsel for North Carolina Eastern Municipal Power Agency ("Power Agency"). CP&L believes that Power Agency's letter mischaracterizes CP&L's letter of June 15, 1989. CP&L wishes to clarify two matters: (1) the effect of the Federal Energy Regulatory Commission's ("FERC's") acceptance of the 1981 Power Coordination Agreement ("1981 PCA") between CP&L and Power Agency, and (2) CP&L's position regarding an arbitration proceeding between CP&L and Power Agency.

In its June 15, 1989 letter to you, CP&L responded to Power Agency's Request for Commencement of Informal Complaint Procedure under Section 5.3.2, NUREG-0970 (the "Complaint"). Power Agency's Complaint argued that CP&L's interpretation of the 1981 PCA violated the antitrust conditions contained in the facility operating license for CP&L's Shearon Harris Nuclear Power Plant. CP&L responded that Commitment 6 of the operating license required that the implementation of the antitrust commitments be "on reasonable terms and conditions as consistent with the Federal Power Act and all other lawful regulation and authority. . . ." CP&L affirmed that its actions have been entirely consistent with FERC's regulation under the Federal Power Act (FPA). In so doing, CP&L explained that FERC's acceptance of the 1981 PCA for filing and its dismissal of a Power Agency complaint pending arbitration proceedings

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FPA. CP&L was careful to state that the FERC had accepted the 1981 PCA, not that it had approved it.

Power Agency now argues that "FERC's acceptance of the 1981 PCA was expressly not a finding that the agreement comports with the statutory standards under the Federal Power Act."[1] Contrary to Power Agency's implication, initial rate schedules -- such as the 1981 PCA -- are presumed to be just and reasonable upon acceptance at FERC even though the structure of the FPA generally prevents FERC from making formal findings in that regard. In at least two cases, federal courts have stated that under the FPA initial rates are "presumed just and reasonable until the Commission determines otherwise." Boston Edison Co. v. FERC, 856 F.2d 361, 369 (1st Cir. 1988); Otter Tail Power Co. v. FERC, 583 F.2d 399, 405 (8th Cir. 1978), cert. denied, 440 U.S. 950 (1979) .

As the court recognized in Boston Edison, the conclusion that an initial rate is "presumed just and reasonable until the Commission determines otherwise" derives from the filed rate doctrine.[2] See 856 F.2d at 368-69. As the court noted, a regulated electric utility must file all rates with FERC. Id. at 368, citing 16 U.S.C. § 824d(c). From that requirement flows the basic tenet of the filed rate doctrine: a utility "can claim no rate as a legal right other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251-252 (1951), cited by Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 106 S. Ct. 2349, 2355 (1986) (emphasis added). Moreover, as Boston Edison also recognized, all filed rates must be just and reasonable. 856 F.2d at 368, citing 16 U.S.C. § 824d(a). The Federal Power Act provides in this regard that any rate or charge made, demanded or received by any public utility for electric energy "that is not just and reasonable is hereby declared to be unlawful." 16 U.S.C. 824d(a).

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[1] CP&L tendered the 1981 PCA for filing at FERC on October 7, 1981. The transmittal letter described the 1981 PCA as "an initial rate schedule [tendered] pursuant to Section 35.12 of the Commission's regulations." FERC accepted the 1981 PCA for filing in a letter order dated October 30, 1981.

[2] In Otter Tail, the court did not discuss the basis for its conclusion that initial rates are presumed to be just and reasonable. The issue in Otter Tail was whether a particular transmission rate schedule constituted an initial rate or a change in rate.

Accordingly, once a rate is accepted for filing, it must be presumed to be just and reasonable. Again, as the Boston Edison opinion noted:

> [t]he legality of rates so filed is not conditioned upon the Commission's approval. Unless they are challenged, either by an interested party or upon the Commission's initiative, the filed rates become legal rates.

Id., citing Montana-Dakota, 341 U.S. at 255-56 (Frankfurter, J. dissenting); see also Montana-Dakota, 341 U.S. at 251-252 (majority holding that the right to a reasonable rate is the right to a rate which the Commission files or fixes). Here, FERC accepted the 1981 PCA for filing.

CP&L recognizes that Otter Tail noted that notwithstanding its presumption that initial rates are presumed to be just and reasonable, it did not mean to imply that merely because a rate schedule is in effect that an evidentiary presumption of reasonableness attaches. See Otter Tail, 533 F.2d at 405 n.27. In this case, however, nothing has been done to undo the presumption of consistency with the FPA that is the necessary result of the filed rate doctrine. Under the FPA, FERC may hold a hearing, either upon complaint or sua sponte, to determine an initial rate's lawfulness. Boston Edison, 869 F.2d at 369. If FERC finds the rate or any charge therein to be "unjust, unreasonable, unduly discriminatory, or preferential," it shall proceed to determine the rate or charge to be thereafter observed or enforced and shall fix the same by order. Id., citing 16 U.S.C. § 824e(a), (FPA § 206 (a)).

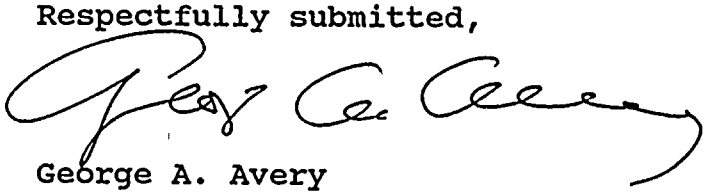
FERC has not modified the filed rate schedule in this case. On June 7, 1988, Power Agency filed a complaint with FERC asking that it require CP&L to accommodate Power Agency's proposed use of power from the South Carolina Public Service Authority. On December 22, 1988, FERC dismissed the complaint "because the dispute has not yet been subject to arbitration as required by the 1981 [PCA]." In its December 22, 1988 Order, FERC found that Power Agency had an obligation under the terms of the 1981 PCA to submit its dispute with CP&L to arbitration. Thus, not only does the filed rate doctrine create a presumption that the 1981 PCA conforms with the FPA, FERC has specifically found the 1981 PCA's arbitration provision to be enforceable.

Power Agency also complains that CP&L's June 15, 1989 letter failed to advise you that "on June 14, 1989, CP&L filed with the arbitrator a motion to stay the arbitration proceeding

pending a decision by the U.S Court of Appeals for the District of Columbia Circuit on Power Agency's petition for review of FERC's dismissal orders." CP&L wishes to make clear that it does not object to Power Agency's exercising its right to arbitration under the 1981 PCA. Nor does CP&L object to Power Agency seeking review of FERC's order dismissing Power Agency's complaint pending arbitration. CP&L's objection was to Power Agency's attempt to pursue simultaneously its claim in multiple forums. CP&L believed that course of action to be wasteful of both public and private resources and was concerned that it might lead to inconsistent determinations. If the court finds that FERC erred in deferring to the arbitrator and remands the matter to FERC for decision, the arbitration could be rendered nugatory. Accordingly, it was CP&L's position that the arbitration should proceed only once the Power Agency accepts the arbitrator's jurisdiction or once the court finds that he has jurisdiction. Judge Sidney Smith, the arbitrator, met with the parties to discuss this issue on July 19, 1989, and, after hearing argument from CP&L & Power Agency, determined to proceed with the arbitration. In the course of discussing the issue during this meeting, the arbitrator observed that it was his belief that the D.C. Circuit would uphold the FERC order requiring arbitration to proceed.

For the foregoing reasons and for the reasons stated in CP&L's letter of June 15, 1989, the Commission should dismiss Power Agency's complaint.

Respectfully submitted,



George A. Avery

Counsel for Carolina Power
& Light Company

cc: Gary J. Newell