

131 FERC ¶ 61,241
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Duke Energy Carolinas, LLC

Docket No. ER09-1717-001

ORDER DENYING MOTION TO VACATE PRIOR ORDER AND DENYING
REQUEST FOR REHEARING

(Issued June 17, 2010)

1. The Commission issued an order on January 29, 2010 accepting revised 2009 depreciation accrual rates submitted by Duke Energy Carolinas, LLC (Duke) for use in certain formula rates.¹ On March 1, 2010, Duke and North Carolina Electric Membership Corporation (North Carolina EMC) jointly requested rehearing of the Initial Order and asked that the Commission vacate a portion of its prior ruling. We deny the motion for vacatur and the request for rehearing.

I. Background

2. Duke provides long-term power service to wholesale customers in North Carolina and South Carolina through power sales agreements.² These sales agreements contain

¹ *Duke Energy Carolinas, LLC*, 130 FERC ¶ 61,079 (2010) (Initial Order).

² Duke asked the Commission for permission to use revised depreciation rates for the following formula rate power sales agreements: North Carolina Electric Membership Corporation, Rate Schedule Nos. 273 and 326; Blue Ridge Electric Membership Corporation, Rate Schedule No. 315; Piedmont Electric Membership Corporation, Rate Schedule No. 316; Rutherford Electric Membership Corporation, Rate Schedule No. 317; North Carolina Municipal Power Agency Number 1, Rate Schedule No. 325; City of Concord, NC, Rate Schedule No. 327; Town of Dallas, NC, Rate Schedule No. 328; Town of Due West, SC, Rate Schedule No. 329; Town of Forest City, NC, Rate Schedule No. 330; City of Kings Mountain, NC, Rate Schedule No. 331; Lockhart Power Company, Rate Schedule No. 332; Town of Prosperity, SC, Rate Schedule No. 333; City of Greenwood, SC, Rate Schedule No. 334; and Haywood Electric Membership Corporation, Rate Schedule No. 335. Initial Order, 130 FERC ¶ 61,079 at P 2 n.2.

formula rates that require Duke to render bills during the year based on estimated costs, and to true-up estimated to actual costs (including depreciation) in the following year based on Duke's FERC Form No. 1 data and company records.

3. In the Initial Order, the Commission accepted Duke's 2009 revised depreciation accrual rates effective January 1, 2009 for use in these power sales agreements. The Commission noted, however, that under the terms of North Carolina EMC's formula rate agreement with Duke, Rate Schedule No. 273, the Catawba Interconnection Agreement (Catawba Agreement), Duke's 2009 true-up would differ from that of Duke's other formula rate agreements because the Catawba Agreement does not allow the use of the 2009 FERC Form No. 1 depreciation.³ According to the Catawba Agreement, Duke must use the FERC Form No. 1 data from 2008 rather than for 2009. Specifically, the Initial Order determined that:

[W]hen Duke calculates the true-up for actual amounts due for calendar year 2009 (which would be done by February 15, 2010), according to the terms of Rate Schedule No. 273 [Catawba Agreement], Duke must reflect in the final rates for 2009 the depreciation expense from the 2008 FERC Form No. 1; the most recent FERC Form No. 1 published as of that date.⁴

4. Duke and North Carolina EMC seek rehearing of this finding. They state that after the issuance of the Initial Order, they came to an agreement that allows Duke to use its actual 2009 depreciation expense, instead of the 2008 depreciation expense, in calculating the final rates under the Catawba Agreement. According to Duke and North Carolina EMC, this result is consistent with the longstanding course of performance under the Catawba Agreement. Further, they assert that this result is consistent with the calculation of other elements of the cost of service used to calculate Duke's true-up rates for each year, which are drawn from Duke's costs for the year

³ The critical difference between the Catawba Agreement and the others is the date that the true-up is to be performed. The terms of the Catawba Agreement provide that the annual true-up takes place on February 15 of each year, which is prior to the April 1 date that the FERC Form 1 for the true-up year is filed with the Commission. Thus, on February 15, the most recent FERC Form No. 1 data is from the year prior to the true-up year. The remaining agreements have a true-up date of June 30, which falls after FERC Form No. 1 data for the true-up year is filed. Duke therefore can use 2009 depreciation from the 2009 FERC Form No. 1 in its true-ups under those agreements.

⁴ Initial Order, 130 FERC ¶ 61,079 at P 22.

being trued-up and not from the prior year's costs. They add that they recently have agreed to perform the true-up calculation for the Catawba Agreement on June 30, concurrently with the true-up calculations for Duke's other formula rates and after the FERC Form No. 1 is published. In light of their agreement, and for the reasons stated above, Duke asks for, and North Carolina EMC consents to, the vacatur of the Initial Order regarding the Catawba Agreement.

II. Discussion

5. The Commission normally does not vacate its orders and the determination to vacate an order is an equitable remedy that requires exceptional circumstances.⁵ Duke and North Carolina EMC have not persuaded us that exceptional circumstances exist here. As such, we deny the motion to vacate.

6. We also deny the request for rehearing. The Commission did not err in finding that according to the terms of the Catawba Agreement, Duke "must reflect in the final rates for 2009 the depreciation expense from the 2008 FERC Form No. 1; the most recent FERC Form No. 1 published as of that date."⁶ Duke and North Carolina EMC state that in their past course of performance under the Catawba Agreement, the final rates for each year have been based on Duke's actual depreciation expense for that year. This, however, is inconsistent with the terms of the Catawba Agreement. The perceived error exists in the terms of the Catawba Agreement, and not in the Commission's findings in the Initial Order.

7. Duke and North Carolina EMC state that they intend to use Duke's actual 2009 depreciation expense, instead of the 2008 depreciation expense, in calculating the final rates under this agreement for 2009. Further, they state their intent to file an amendment to the Catawba Agreement in order to perform the true-up calculation simultaneously with its other power sales agreements on June 30, rather than by February 15, as required by the terms of the Catawba Agreement. In light of these statements, we find that prior to using Duke's 2009 depreciation expense in the true-up calculations for 2009, and performing the true-up calculations on June 30, 2010 rather than February 15, 2010, Duke must obtain Commission acceptance of amendments to the Catawba Agreement that designate the use of the FERC Form No. 1 data for the same year being trued-up and that specify June 30 as the date on which true-up will be performed.

⁵ *E.g., East Kentucky Power Cooperative, Inc.*, 121 FERC ¶ 61,255, at P 10 (2007); *Exelon Corp.*, 130 FERC ¶ 61,095, at P 4 (2010).

⁶ Initial Order, 130 FERC ¶ 61,079 at P 22.

The Commission orders:

- (A) The motion for vacatur is hereby denied.
- (B) The request for rehearing is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.