

137 FERC ¶ 61,058  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

Duke Energy Carolinas, LLC

Docket Nos. ER11-2895-000  
ER11-2895-001  
ER11-3585-000

ORDER CONDITIONALLY ACCEPTING TARIFF REVISIONS

(Issued October 20, 2011)

1. On February 16, 2011, as amended May 6, 2011, Duke Energy Carolinas, LLC (Duke)<sup>1</sup> filed revised tariff sheets for inclusion in its Open Access Transmission Tariff (OATT) and revisions to a Point-to-Point Service Agreement with the Carolina Power and Light Company, pursuant to section 205 of the FPA.<sup>2</sup> In its OATT filing, Duke seeks to implement a cost-of-service formula rate for calculating the charges for Point-to-Point Transmission Service (Point-to-Point Service), Network Integration Transmission Service (Network Service), and Scheduling, System Control, and Dispatch Service (collectively, the formula rate).<sup>3</sup> In addition, Duke seeks to recover costs that it incurred in attempting to form a regional transmission organization (RTO). In this order, the Commission conditionally accepts for filing Duke's proposed OATT revisions to be effective June 1, 2011, as requested, subject to a compliance filing. The

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<sup>1</sup> Duke is a wholly-owned subsidiary of Duke Energy Corporation and provides integrated retail and wholesale electric service in North Carolina and South Carolina. Duke February 16, 2011 Transmittal Letter at 6 (Transmittal Letter).

<sup>2</sup> 16 U.S.C. § 824d (2006).

<sup>3</sup> The OATT Revisions include a new Schedule 10, which contains the Formula Rate Implementation Protocols. The proposed Formula Rate Implementation Protocols describe how Duke will update the formula in future years, what the review procedures are, how customer challenges will be resolved, and how any changes to the annual rate restatements will be implemented. Duke explains that the proposed revisions result in a \$2,805,000 increase in its revenues for Point-to-Point Service and an \$8,086,776 increase in its revenues for Network Service. Transmittal Letter at 17.

Commission also accepts Duke's revisions to the Point-to-Point Service Agreement with the Carolina Power and Light Company, to be effective June 1, 2011.

## **I. Proposed OATT Revisions**

2. As stated in its Transmittal Letter, Duke proposes to implement a formula rate for Point-to-Point Service, Network Service and Scheduling, System Control, and Dispatch Service in order to more accurately reflect the costs that it incurs in providing these services. Duke asserts that the Commission has consistently approved formula rates as an alternative to stated rates. In addition, Duke states that in Order No. 679, the Commission encouraged utilities to file formula rates for transmission service and noted that formula rates can "provide the certainty of recovery that is conducive to large transmission expansion programs."<sup>4</sup> Duke further states that the Commission's recent orders continue to reflect the Commission's support for formula rates for transmission service.<sup>5</sup>

3. Duke states that its proposed formula rate calculates its cost to own, operate, and maintain its transmission facilities using traditional cost components. Consequently, its proposed formula rate produces a transmission revenue requirement that reflects its return and income taxes, operation and maintenance expense, depreciation and amortization expense, amortization of other expenses, and taxes other than income tax expense. Duke also states that it is replacing the stated rate for Scheduling, System Control, and Dispatch Service with the formula rate because this service also involves transmission costs.<sup>6</sup>

4. Duke states that the charges calculated under the formula rate will be based on its cost projections for the upcoming year and will be subject to true-up based on Duke's actual costs for that year. Specifically, Duke states that, on June 1 of each year, it will estimate its costs for the upcoming twelve-month period and will charge customers based upon those estimated costs. On June 1 of the following year, Duke will compare its estimated costs with its actual costs incurred during the preceding calendar year and will determine whether there was a shortfall or an over-collection. Duke will then add any

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<sup>4</sup> Transmittal Letter at 7 (citing *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh'g*, 119 FERC ¶ 61,062, at P 386 (2007)).

<sup>5</sup> *Id.* (citing *PPL Utils. Corp.*, 125 FERC ¶ 61,121, at P 28 (2008); *N.Y. Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,068, at P 91 (2008); *Am. Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306, at P 23 (2008); *Niagara Mohawk Power Corp.*, 124 FERC ¶ 61,106, at P 33 (2008)).

<sup>6</sup> *Id.* at 10.

shortfall or over-collection, plus interest, to the upcoming billing year's revenue requirement beginning June 1.<sup>7</sup>

5. Duke states that prior to submitting its filing, it engaged in negotiations with its Network Service customers concerning the proposed formula rate. This process led to Duke and fifteen of its twenty-three Network Service customers executing an agreement that purports to resolve all disputes and controversies among Duke and the signatories concerning Duke's proposed OATT revisions (the Agreement).<sup>8</sup> Duke states that the eight remaining customers participated in the negotiations and have authorized Duke to represent that they do not oppose the Agreement. Duke states that the effectiveness of the Agreement is subject to the condition that the Commission accepts the formula rate without change or condition. Duke states that, if the Commission does direct changes to the Agreement, the Agreement will not become effective unless the parties agree to the changes or fail to object thereto within fifteen days.<sup>9</sup>

6. Duke also states that it proposes to modify its OATT to conform with five specific provisions in the Agreement, which the signatories have agreed to make subject to a "public interest" standard of review in the Agreement.<sup>10</sup> Specifically, Duke proposes to revise section 3(h) of Schedule 10 of the OATT to read as follows:

[i]n any proceeding seeking to modify any provisions of the Formula Rate which reflect any Specific Settlement Provisions, the initiating party shall bear the burden of proving that the application of such provisions, absent the proposed modification, seriously harms the public interest as set forth in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish, Washington*, 128 S. Ct. 2733, 171 L. Ed. 2d 607 (2008).<sup>11</sup>

The five specific provisions that the signatories to the Agreement have agreed to make subject to the "public interest" standard of review include: (1) a seven-year amortization of Duke's GridSouth expenses without carrying costs after 2003; (2) a three-year moratorium on incentive-based rates; (3) treatment of the cost of radial facilities in rates;

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<sup>7</sup> *Id.* at 10-11.

<sup>8</sup> The Formula Rate Implementation Protocols currently reference Article II of the Agreement, as further discussed below, at footnote 11 under Schedule 10, Exhibit A. Footnote 11 states that, "'Specific Settlement Provisions' shall mean the provisions of Article II of the Settlement Agreement which is filed in this proceeding."

<sup>9</sup> *Id.* at 7-9.

<sup>10</sup> *Id.* at 12.

<sup>11</sup> Duke, OATT, Schedule 10 (0.0.0), Section 3(h).

(4) recovery of the cost of tax protests related to revenue-related taxes; and (5) the effective date of depreciation rate changes.<sup>12</sup>

7. Duke states that it seeks recovery of costs it incurred attempting to form an RTO called GridSouth. Specifically, Duke states that the formula rate includes the amortization of \$44,689,400 of its GridSouth costs over a seven-year period beginning on June 1, 2011. Duke states that these costs are only start-up costs and do not include any carrying costs after 2003. It also states that it has not included the unamortized balance in rate base. Therefore, Duke asserts that the amount included in rates is well below Duke's total costs for attempting to form GridSouth.<sup>13</sup>

8. Duke proposes to include in its formula rate a return on equity (ROE) of 10.2 percent, which, it argues, is the median of the range of reasonableness.<sup>14</sup> Duke asserts that its estimated cost-of-equity is consistent with the guidance provided by the Commission in earlier orders.<sup>15</sup>

9. Duke states that the formula rate rolls in the cost of its transmission network and includes the cost of its existing radial facilities and credits paid to customers for existing customer-owned radial facilities. Duke also explains that the formula rate excludes the cost of new radial lines regardless of whether they are owned by Duke or a customer.

10. Duke proposes to revise the long-term Point-to-Point Service Agreement with Carolina Power and Light Company so that it refers to the applicable OATT rate instead of a stated rate.

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<sup>12</sup> Transmittal Letter at 12 (referencing Article II of the Agreement).

<sup>13</sup> *Id.* at 13-14.

<sup>14</sup> Duke states that it performed a discounted cash flow (DCF) analysis using a national proxy group of other electric utilities with comparable risks. It also states that the implementation of the Commission's DCF methodology results in a range of reasonableness of 8.1 percent to 15 percent, with a median and midpoint of 10.2 percent and 11.6 percent, respectively. Transmittal Letter at 13 and Ex. DEC-303.

<sup>15</sup> Ex. DEC-300 at 5 (citing *S. Cal. Edison Co.*, 131 FERC ¶ 61,020 (2010); *Bangor Hydro-Elec. Co., et al.*, 117 FERC ¶ 61,129 (2006); *Midwest Indep. Transmission Sys. Operator, Inc.*, 100 FERC ¶ 61,292 (2002), *reh'g denied*, 102 FERC ¶ 61,143 (2003), *modified on other grounds sub nom. Pub. Serv. Comm'n v. FERC*, 397 F.3d 1004 (D.C. Cir. 2005); *S. Cal. Edison Co.*, 92 FERC ¶ 61,070 (2000), *reh'g denied*, 108 FERC ¶ 61,085 (2004)).

11. Duke requests an effective date of June 1, 2011 for its proposed OATT revisions, and requests that its filing be accepted with no suspension, condition, or modification.<sup>16</sup>

12. On May 6, 2011, Duke submitted corrections and clarifications to the formula rate to ensure that it will operate properly (Supplement). Duke reiterated its request that the formula rate be made effective June 1, 2011. Duke states that the information submitted with the Supplement clarifies the operation of the formula rate and that the parties have agreed to a June 1, 2011 effective date.

13. On May 16, 2011, in anticipation of the formula rate and accompanying Formula Rate Implementation Protocols becoming effective on June 1, 2011, in Docket No. ER11-3585-000, Duke submitted the informational filing provided for under section 2 of the Formula Rate Implementation Protocols (Informational Filing).<sup>17</sup> On June 3, 2011, Duke submitted a letter to the Commission requesting that the deadline for submitting protests and motions to intervene in response to its Informational Filing be suspended pending further action by the Commission in order to allow Transmission Customers the full four-month period for review and challenge provided for under the Formula Rate Implementation Protocols (June 3 Letter).

## **II. Notice of Filing and Responsive Pleadings**

14. Notice of Duke's February 16, 2011 Filing in Docket No. ER11-2895-000 was published in the *Federal Register*, 76 Fed. Reg. 10,346 (2011), with interventions and protests due on or before March 9, 2011. Timely motions to intervene and comments in support of the filing were filed by the Central Electric Power Cooperative, Inc. (Central Electric) and the North Carolina Electric Membership Corporation (NCEMC). Notice of Duke's May 6, 2011 Supplement in Docket No. ER11-2895-001 was published in the *Federal Register*, 76 Fed. Reg. 28,017 (2011), with interventions and protests due on or before May 16, 2011. None was filed.

15. Notice of Duke's Informational Filing in Docket No. ER11-3585-000 was published in the *Federal Register*, 76 Fed. Reg. 30,700 (2011) with interventions and protests due on or before June 6, 2011. A joint motion to intervene and conditional protest was filed by NCEMC and Central Electric. In addition, a motion to intervene out-of-time and conditional protest was filed by North Carolina Municipal Power Agency Number 1 and Piedmont Municipal Power Agency (Power Agencies).

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<sup>16</sup> *Id.* at 20.

<sup>17</sup> Section 2 of the Formula Rate Implementation Protocols provides that, on or before May 15 of each year, Duke will recalculate its annual transmission revenue requirement and its annual revenue requirement for scheduling, system, and dispatch service for the preceding year and submit this annual update to the Commission as an informational filing. Duke, OATT, Schedule 10 (0.0.0), Section 2(a).

16. NCEMC and Central Electric, as well as the Power Agencies, conditionally protest Duke's Informational Filing and request that the Commission allow the Formula Rate Implementation Protocol procedures to control the review and challenge process for the Informational Filing.<sup>18</sup> Power Agencies note that the conditional protest may be rendered unnecessary if the Commission permits the Formula Rate Implementation Protocols process to go forward, as Duke requested in its June 3 Letter.<sup>19</sup> NCEMC, Central Electric, and Power Agencies state that the Formula Rate Implementation Protocols provide for a 120-day review period for the formula rate annual updates, which is significantly longer than the review period provided in the May 19 notice issued in Docket No. ER11-3585-000.

17. On July 5, 2011, the Director of the Division of Electric Power Regulation - East issued a deficiency letter seeking more information regarding Duke's GridSouth RTO start-up costs. On July 29, 2011, Duke submitted a motion for extension of time to respond to the deficiency letter requesting that the deadline be extended to August 22, 2011. The Commission granted this request for extension of time. On August 22, 2011, Duke submitted its response to the deficiency letter. On September 12, 2011, NCEMC and Central Electric submitted additional comments requesting approval of Duke's filing without modification.

### **III. Discussion**

#### **A. Procedural Matters**

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene in Docket Nos. ER11-2895-000, ER11-2895-001, and ER11-3585-000 serve to make the entities that filed them parties to the proceedings in which they sought to intervene.

19. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2011), the Commission will grant the Power Agencies' late-filed motion to intervene in Docket No. ER11-3585-000, given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

#### **B. Commission Determination**

20. We will conditionally accept Duke's tariff revisions, effective June 1, 2011. Except as otherwise noted below, we find that Duke's proposed tariff revisions are just and reasonable. We also accept Duke's revisions to its Point-to-Point Service Agreement

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<sup>18</sup> NCEMC and Central Comments at 5, Power Agencies Comments at 5.

<sup>19</sup> Power Agencies Comments at 5.

with the Carolina Power and Light Company as just and reasonable, to be effective June 1, 2011, as requested.

### 1. Recovery of GridSouth Start-Up Costs

21. In its response to the deficiency letter, Duke provides detailed cost information to support the recovery of its GridSouth start-up costs. The information includes summaries of vendor invoices and information regarding the compensation and expenses of specifically identified Duke employees. In addition, Duke provides a narrative description of the thirteen GridSouth project cost categories and descriptions of the specific kinds of costs that fall into each of these categories. Moreover, Duke has broken down these cost categories into approximately 5,000 lines of supporting costs. The response to the deficiency letter shows that the amounts and types of costs Duke seeks to recover for its efforts to create an RTO are not unreasonable. Therefore, we find that Duke has adequately supported the recovery of its GridSouth start-up costs consistent with Commission precedent.<sup>20</sup>

### 2. Return on Equity

22. As discussed above, Duke proposes to use an ROE of 10.2 percent. We find that Duke's use of a national proxy group is an appropriate starting point for identifying companies with comparable risks.<sup>21</sup> While geographic proximity may be a relevant factor in identifying companies with comparable risks, it is not the sole basis for

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<sup>20</sup> *Idaho Power Co.*, 123 FERC ¶ 61,104 (2008) (finding that workpapers itemizing each cost, the date the cost was incurred, a description of the cost, and the identity of the employee that incurred the cost provides sufficient support to recover failed RTO costs); *Northeast Utils. Serv. Co.* 121 FERC ¶ 61,308 (2007) (finding that an applicant must describe the nature of its RTO formation costs and their relationship to RTO formation efforts to recover such costs), *order on compliance*, *Northeast Utils. Serv. Co.*, 124 FERC ¶ 61,098 (2008).

<sup>21</sup> Duke's national proxy group was composed of fifteen companies, which included: ALLETE Inc., Alliant Energy Corp., Consolidated Edison Inc., Dominion Resources Inc., DPL Inc., Duke Energy Corp., NextEra Energy, Inc., PG&E Corp., Progress Energy, SCANA Corp., Sempra Energy, Southern Company, Vectren Corp., Wisconsin Energy Corp. and Xcel Energy, Inc. *See* Ex. DEC-303.

inclusion of companies in a proxy group.<sup>22</sup> We also find that the corporate credit rating screen that Duke used is consistent with Commission precedent.<sup>23</sup>

23. We accept Duke's proposal to use an ROE of 10.2 percent, which is the median value of Duke's DCF analysis. The Commission has found that the median of the DCF analysis is appropriate for establishing the base ROE for an individual utility.<sup>24</sup>

### **3. Inconsistency Between Agreement and OATT Revisions**

24. Section 205(c) of the FPA requires that every public utility file with the Commission "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges."<sup>25</sup> We note that the Agreement contains provisions regarding rates, terms, and conditions of the transmission service that Duke provides under its OATT that are not included in the proposed OATT revisions. That is, Duke has failed to include all of the specific rates, terms, and conditions set forth in Article II of the Agreement in its proposed OATT revisions. For example, while the Agreement states that the total amount of GridSouth startup costs to be amortized is \$44,689,400, that amount does not appear anywhere in the OATT revisions and, thus, is not set forth in a rate schedule on file with the Commission. As another example, section 2.2 of Article II of the Agreement provides that Duke cannot file a request for incentive-based rate treatment for transmission infrastructure investment with the Commission for the first three full-year billing periods during which the formula rate is used to calculate charges to customers. This provision also does not appear in the OATT revisions. Because Duke has failed to include all of the terms in Article II of the Agreement in the OATT revisions, we will require Duke to submit a compliance filing to reconcile the two documents by including the omitted rates, terms, and conditions in the revised version of its OATT.

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<sup>22</sup> *Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152, at P 60 (2010).

<sup>23</sup> *Potomac-Appalachian Transmission Highline, L.L.C.*, 122 FERC ¶ 61,188, at P 95 (2008). While Duke has proposed Value Line's Safety Rank and Financial Strength Rating, we find the use of the corporate credit rating to be sufficient.

<sup>24</sup> *Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152 at P 65 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,302, at P 8-15 (2004); *Pioneer Transmission, LLC*, 130 FERC ¶ 61,044 (2010); *S. Cal. Edison Co.*, 131 FERC ¶ 61,020 at P 84-93 (2010)).

<sup>25</sup> 16 U.S.C. § 824d(c) (2006).

25. Our precedent requires that all rates, terms, and conditions of transmission and ancillary services be contained in a transmitting utility's OATT.<sup>26</sup> While Duke included the Agreement as an attachment to its Transmittal Letter, it did not submit the Agreement for filing. Duke cannot separate such rates, terms, and conditions of jurisdictional transmission and ancillary services between its OATT and another agreement, particularly one that was not signed by all of its transmission customers and that is not on file with the Commission.

26. With the exception of the standard of review provision, which we discuss below, we will accept Duke's proposed OATT revisions subject to the condition that Duke modify the proposed revisions to include all of the rates, terms, and conditions of service under its OATT, including any relevant language concerning such rates, terms, and conditions contained in Article II of the Agreement. We direct Duke to submit these modifications in a compliance filing within thirty days of the issuance of this order.

#### **4. Standard of Review Provision**

27. As described above, Duke's revised OATT states that any "initiating party"<sup>27</sup> that seeks to modify "any provisions of the Formula Rate which reflect any Specific Settlement Provisions" must show that the application of such provisions "seriously harms the public interest as set forth in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish, Washington*, 128 S. Ct. 2733, 171 L. Ed. 2d 607 (2008)."<sup>28</sup> This section purports to apply a standard of review that is often referred to as

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<sup>26</sup> 16 U.S.C. § 824d(c) (2006); 18 C.F.R. § 35.1, § 35.28 (2011); *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>27</sup> We read the term "initiating party" to include all Duke customers, including those that did not sign the Agreement.

<sup>28</sup> Duke, OATT, Schedule 10 (0.0.0), Section 3(h). We note that Section 3(h) of Schedule 10 of Duke's proposed OATT revisions is inconsistent with the comparable standard of review provision in section 3.2 of the Agreement, which provides that:

Any proposal to modify any provision of Article II of this Settlement Agreement or to modify any provision of the Transmission Service Formula Rate or the Schedule 1 Formula Rate which reflects any of the specific agreements of the Parties embodied in Article II of the Settlement

(continued...)

the *Mobile-Sierra* “public interest” standard of review. As we explain below, we find that Duke has not sufficiently justified its request to include that standard in its OATT.

28. The Supreme Court has stated that the “public interest” standard is not “a standard independent of, and sometimes at odds with, the ‘just and reasonable standard.’”<sup>29</sup> Instead, the Supreme Court has explained that the Commission must presume that rates set “out in a freely negotiated wholesale-energy contract meet[ ] the ‘just and reasonable’ requirement” imposed by the FPA.<sup>30</sup> This “public interest” presumption does not apply “of its own force” if the rates in question are not such contract rates.<sup>31</sup> Nevertheless, the Commission has concluded that it has the discretion to apply “a similar more rigorous standard when faced with challenges to other rates . . . if considerations relevant to what is ‘just and reasonable’ make that approach appropriate.”<sup>32</sup>

29. The Commission has indicated that any such decision would be based on the particular circumstances presented.<sup>33</sup> In *Devon Power*, the Commission found that under the specific circumstances presented by the uncontested settlement that established an ISO-New England (ISO-NE) forward capacity market, it was appropriate to exercise its discretion and approve a more stringent application of the just and reasonable standard. In several subsequent cases, including *High Island Offshore System, LLC*, the Commission found that “absent compelling circumstances, such as we found to exist in *Devon Power*, the Commission will not approve the application of the *Mobile-Sierra*

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Agreement shall be subject to the “public interest” standard as construed in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish, Washington*, 128 S. Ct. 2733, 171 L. Ed. 2d 607 (2008), provided that the standard for review of any such modification that is proposed by an entity that is not a Party to this Settlement Agreement or by the Commission acting *sua sponte* shall be the most stringent standard permissible under then-applicable law.

Agreement at Section 3.2.

<sup>29</sup> *NRG Power Marketing, LLC. v. Me. Pub. Utils. Comm’n*, 130 S. Ct. 693, 700 (2010) (*NRG*); see also *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 546 (2008) (*Morgan Stanley*).

<sup>30</sup> *Morgan Stanley*, 554 U.S. at 530.

<sup>31</sup> *Devon Power*, 134 FERC ¶ 61,208 at P 11 (citing *Morgan Stanley*, 554 U.S. at 553).

<sup>32</sup> *Id.* P 16.

<sup>33</sup> *Id.* P 2, 9, 24.

public interest standard of review.”<sup>34</sup> The Commission found that the rates at issue in *HIOS* were not contract rates, but “tariff rates that [would] be generally applicable to all present and future” customers and “not just to the Settling Participants.”<sup>35</sup> Further, the Commission found that the situation in *HIOS* did not present “compelling circumstances,” noting that the purpose of the settlement was “simply to resolve an ordinary . . . rate case of general applicability.”<sup>36</sup> The Commission directed changes with respect to the proposed standard of review.<sup>37</sup>

30. Duke proposes to apply what it describes as the “public interest” standard of review to rates, terms, and conditions of its OATT, a tariff of general applicability.<sup>38</sup> Therefore, the rates at issue here are tariff rates, not contract rates. As was the case in *HIOS*, the Commission finds that Duke’s filing does not present compelling circumstances, such as we found to exist in *Devon Power*.<sup>39</sup> For this reason, we will direct Duke to submit a compliance filing within thirty days of the issuance of this order to modify its proposed OATT revisions by removing the proposed “public interest” standard of review.

##### **5. Informational Filing in Docket No. ER11-3585-000**

31. The Commission’s notice in Docket No. ER11-3585-000 required interventions and protests to be filed in 21 days. Upon further consideration, parties will be allowed the full 120-day period for review and challenge provided in the Formula Rate Implementation Protocols and as accepted herein. Thus, the protests filed in response to the notice are hereby dismissed as moot. Upon receipt of future informational filings, the Commission will not issue a *Federal Register* notice of the informational filings as there

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<sup>34</sup> 135 FERC ¶ 61,105, at P 25 (2011) (*HIOS*).

<sup>35</sup> *Id.* P 19.

<sup>36</sup> *Id.* P 24.

<sup>37</sup> *Id.* P 25.

<sup>38</sup> Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,636, 31,936; Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,309; *Duke Power*, 113 FERC ¶ 61,288, at P 18 (2005); *accord, e.g., Terra-Gen Dixie Valley, LLC*, 135 FERC ¶ 61,134, at P 12 (2011); *New York Independent System Operator, Inc.*, 134 FERC ¶ 61,255, at P 3 (2011); *New York Independent System Operator, Inc.*, 131 FERC ¶ 61,074, at P 3, 16 (2010); *ISO New England, Inc.*, 123 FERC ¶ 61,300, at P 13 (2008); *PJM Interconnection, LLC*, 115 FERC ¶ 61,107, at P 19 (2006).

<sup>39</sup> *See also Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014, at P 16-17 (2011).

is not need to given that the Formula Rate Implementation Protocols already provide specific procedures for notice to the customers, review, and challenges to the Annual Updates.

The Commission orders:

(A) Duke's OATT revisions are hereby conditionally accepted, as discussed in the body of this order, to be effective June 1, 2011.

(B) Duke is hereby directed to make a compliance filing within thirty days of the date of this order, as discussed in the body of this order.

(C) Duke's proposed revisions to its Point-to-Point Service Agreement with Carolina Power and Light Company are hereby accepted, to be effective June 1, 2011, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating. Commissioner Norris is concurring with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Duke Energy Carolinas, LLC

Docket No. ER11-2895-000  
ER11-2895-001  
ER11-3585-000

(Issued October 20, 2011)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally accepts tariff revisions to allow Duke to implement a cost-of-service formula rate, subject to Duke removing revisions that would impose the public interest standard of review with respect to changes to “any provisions of the Formula Rate which reflect Specific Settlement Provisions”. I agree that the rates are generally applicable tariff rates rather than contract rates, and that, as a result, the public interest presumption does not apply.<sup>1</sup> For the reasons I expressed in my partial dissent in *Devon Power LLC*, however, I disagree that the Commission can or should exercise its discretion to extend the public interest standard of review to non-contract rates, terms, and conditions.<sup>2</sup> Therefore, I disagree with the analysis in this order of whether the Commission should permit the application of the public interest standard to future changes to the rates in the tariff.<sup>3</sup>

For these reasons, I respectfully concur.

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John R. Norris, Commissioner

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<sup>1</sup> *Duke Energy Carolinas, LLC*, 137 FERC ¶ 61,058, at P 27-30 (2011)

<sup>2</sup> *Devon Power LLC*, 134 FERC ¶ 61,208 (2011), *Norris, dissenting in part*.

<sup>3</sup> *Duke Energy Carolinas*, 137 FERC ¶ 61,058 at P 28-30.