

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Electric Transmission, a division of  
Duke Energy Corporation

Docket No. ER05-1452-000

ORDER ACCEPTING AFFECTED SYSTEM OPERATING AGREEMENT,  
SUBJECT TO CONDITION

(Issued November 7, 2005)

1. On September 8, 2005, Duke Electric Transmission (Duke) filed under section 205 of the Federal Power Act (FPA)<sup>1</sup> an unexecuted Affected System Operating Agreement (Affected System Agreement) with North Carolina Electric Membership Corporation (NCEMC).<sup>2</sup> The proposed Affected System Agreement sets forth the rates, terms, and conditions related to the Network Upgrades that are needed on the Duke transmission system, which will be affected by NCEMC's new generation facilities being interconnected to the Carolina Power & Light Company (CP&L) (d/b/a Progress Energy, Carolinas) transmission system. In this order, the Commission conditionally accepts Duke's Affected System Agreement, to become effective on September 1, 2005 as requested, subject to Duke correcting the Affected System Agreement to correspond with the *pro forma* Large Generator Interconnection Agreement (LGIA),<sup>3</sup> where appropriate.

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<sup>1</sup> 16 U.S.C. § 824d (2000).

<sup>2</sup> Duke Electric Transmission FERC Electric Tariff Third Revised Volume No. 4, Service Agreement No. 342.

<sup>3</sup> See *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (March 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004) (Order No. 2003-A), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2005) (Order No. 2003-B), *order on reh'g*, Order No. 2003-C, 70 Fed. Reg. 37,661 (June 30, 2005), FERC Stats. & Regs. ¶ 31,190 (2005) (Order No. 2003-C).

## **Background**

2. Duke states that it is an Affected System under Order No. 2003. Duke further states that a System Impact Study established that network upgrades on Duke's transmission system were necessary as a result of two generating facilities that NCEMC is interconnecting on the CP&L transmission system. A Facility Study was then performed to determine the estimated costs and to establish a timeline for construction of the Network Upgrades on Duke's system.

3. Duke states that, in February 2005, it created the Affected System Agreement based on the *pro forma* LGIA, after negotiating with NCEMC.<sup>4</sup> Duke states that it is submitting an unexecuted Affected System Agreement to the Commission because Duke and NCEMC were unable to agree on transmission service crediting provisions of the Affected System Agreement.

4. Duke maintains that the language in the Affected System Agreement comports with the corresponding language in the *pro forma* LGIA and with Order No. 2003 transmission service crediting policy. Duke notes that Order No. 2003-C reaffirmed that credits would be available "only when the Interconnection Customer takes transmission service with the Large Generating Facility identified as the primary point of receipt of that service."<sup>5</sup> Under this policy, if the interconnection customer has not been fully repaid through credits at the end of 20 years, an "Affected System Operator must provide the 20-year lump sum reimbursement to refund any remaining balance, even if no transmission service was taken."<sup>6</sup>

5. Duke states that NCEMC's two new generating facilities are located in CP&L's control area and that their primary use will be to serve load in the CP&L control area. Though NCEMC serves native load in the CP&L and Duke control areas, and, thus, is a network transmission customer of both utilities, the new generating facilities will be designated as Network Resources only under the CP&L Open Access Transmission Tariff (OATT). Duke states that NCEMC will not be designating any portion of the capacity of either of these new generating facilities as a Network Resource under the Duke OATT. Duke further states that NCEMC may occasionally use the new generators

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<sup>4</sup> Duke states that certain inapplicable sections of the LGIA were eliminated from the Affected System Agreement and that other sections were renumbered. Duke has provided a list of the provision numbers and their corresponding LGIA numbers as Attachment 2.

<sup>5</sup> See Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 at P 13 (2005).

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

as a secondary resource and import power from them under NCEMC's network service agreement with Duke to serve load in the Duke control area. NCEMC may also make off-system sales in or through the Duke control area. If NCEMC sells energy from these new generators that is scheduled to flow over the Duke transmission system, Duke states that it will provide transmission credits in accordance with Commission policy. Additionally, Duke states that if NCEMC has not been fully repaid through credits when 20 years are up, Duke will make the lump sum payment in accordance with Order No. 2003-C.

### **Notice and Pleadings**

6. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 44,350 (2005), with comments, protests and interventions due on or before September 29, 2005. A timely motion to intervene and protest was filed by NCEMC. Duke filed a response to NCEMC's protest on October 14, 2005.

7. NCEMC states that section 7 of the unexecuted Affected System Agreement fails to provide NCEMC with timely credits against the network integration transmission service (NITS) it takes from Duke. It also argues that section 7 unfairly requires the credits only when the generating facilities are identified as the "primary points of receipt" for the transmission service taken on the Affected System. According to NCEMC, section 7 should require that credits be provided when NITS is taken because NCEMC is Duke's native load/network customer.<sup>7</sup>

8. NCEMC argues that transmission credits on the Affected System should not be tied to the designation of NCEMC's generating facilities as network resources or primary receipt points on the Affected System. The Commission's current rules do not permit generating resources having their capacity fully designated as network resources on one system to have that same capacity designated as network resources on an Affected System. NCEMC asserts that the Affected System Agreement unfairly denies transmission credits to transmission dependent systems like NCEMC that are striving to optimize power supply to consumers native to adjacent, separately dispatched transmission systems. Although the new generating facilities will be designated as network resources and primary receipt points only on the CP&L transmission system, NCEMC states it may re-designate one or both of these generating facilities, or portions of the capacity output, as network resources on the Duke system. NCEMC asserts, however, that it is prevented from designating the generating facilities as network resources on both CP&L and Duke systems at the same time because their OATTs

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<sup>7</sup> NCEMC seeks to delete "transmission services with respect to the Large Generating Facility" from section 7.2.1 and 7.2.2.

prohibit simultaneous designation of generating facilities resource as a network resource on more than one system.

9. Moreover, NCEMC argues that Duke's proposed language requiring credits only against transmission service from the generating facilities at issue means that NCEMC will have to pay the carrying cost of upgrades for 20 years, even though the upgrades will ultimately benefit other users of the Duke system. NCEMC asserts that waiting 20 years to be compensated for its contribution to Duke's network is inequitable and will have financial effects on NCEMC, its member cooperatives, and the retail consumers they serve. NCEMC argues that this is unreasonable when NCEMC is Duke's NITS customer and will be paying for the Affected System Network Upgrades through its NITS rates.

10. Additionally, NCEMC argues that regardless of whether any portion of the generating facilities at issue are designated as network resources and primary receipt points on Duke's system, the underlying goals of Order No. 2003 are met in its particular circumstance. Since it is a native load/network customer of both the Duke and CP&L systems, the Commission's goals of proper cost allocation and creating proper incentives for economically efficient siting of generating facilities are satisfied. NCEMC argues that it pays its load ratio share of Duke's transmission system revenue requirement, which includes the transmission credits paid to network customers who fund network upgrades. It will remain a customer of Duke's for the foreseeable future, since Duke's system is the only means that NCEMC has to serve its load in western North Carolina. Further, NCEMC argues that the Commission's concern with cost shifting is not an issue here because NCEMC's two generating facilities will enhance its supply portfolio, reducing its reliance on remote supply sources and enabling it to work within the constraints of CP&L's limited transfer capability. Thus, it asserts that the risk that these generating facilities will not achieve commercial operation is remote.

11. NCEMC also seeks clarification that a network customer has the right to receive a refund of its upfront payments for Affected System Network Upgrades because the Commission did not address the issue when NCEMC raised it in the interconnection rulemaking proceeding in Order No. 2003-C. In Order No. 2003-C, the Commission noted that NCEMC's request for clarification involves highly fact-specific circumstances that are more appropriately addressed in a specific proceeding. NCEMC states that this is that proceeding.

## **Discussion**

### **A. Procedural Matters**

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motion to intervene serve to make the

entity that filed it party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.213(a)(2) (2005), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Duke's answer and will, therefore reject it.

### **B. Substantive Matters**

13. We find that the Affected System Agreement appropriately reflects the Commission's transmission crediting policy in Order No. 2003, except as noted below. In Order No. 2003-C, we stated that "our crediting and refund policy, including the 20-year reimbursement requirement, provides a reasonable balance between the objectives of promoting competition and infrastructure development, protecting the interests of Interconnection Customers, and protecting native load and other Transmission customers."<sup>8</sup> Moreover, we clarified that credits for transmission service are provided only when the interconnection customer "takes transmission service with the Large Generating Facility identified as the primary point of receipt of that service."<sup>9</sup> NCEMC has not explained why it should be treated any differently than other generators.

14. The Commission indicated in Order No. 2003-C that we would consider NCEMC's comments regarding Order No. 2003's credit policy in a specific proceeding, and NCEMC states that this is the appropriate proceeding. The factual circumstances presented here by NCEMC, however, do not persuade us to deviate from the transmission service crediting provisions of the LGIA. To the contrary, NCEMC's situation is exactly the type of a situation where the Commission intended its transmission service crediting policy to apply.

15. The Commission's policy regarding the application of transmission credits to Affected System upgrades, like our policy regarding credits for upgrades to the transmission system with which the generator is interconnecting, is designed to ensure that the risk is appropriately placed. If NCEMC does not designate the generators that caused the network upgrades to be installed on the Duke system as network resources or otherwise as the point of receipt for transmission service on Duke, it should receive no credits under Order No. 2003. This puts NCEMC in the same situation as other network customers that obtain transmission credits for the network upgrades they funded; they too receive transmission credits only if the generating facility associated with the funded network upgrades is identified by the interconnection customer as a network resource or otherwise as the primary point for receipt for the transmission service being taken.<sup>10</sup>

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<sup>8</sup> Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 at P 9.

<sup>9</sup> *Id.* at P 13.

<sup>10</sup> If a generating facility has not been designated as an network resource, or

16. However, if NCEMC chooses to use the generators at issue to serve its native load on Duke's system and designates the generators as network resources for the NITS it takes from Duke, it will receive transmission credits in accordance with Order No. 2003. NCEMC is correct that the same generating capacity may not be a network resource on two systems.<sup>11</sup> However, as NCEMC acknowledges above, it can designate a portion of the capacity of its generating facilities as a network resource on CP&L's system and designate the remainder as a network resource on Duke's system, and begin receiving transmission credits on both systems immediately. In any event, Order No. 2003 requires that Duke fully reimburse NCEMC for its upfront payment after 20 years with interest, if NCEMC has not earned enough credits to reimburse it for its network upgrades.

17. Certain other provisions in the Affected System Agreement, most notably section 7.2.1,<sup>12</sup> contain substantive or typographical variations from corresponding provisions in the *pro forma* LGIA. While the Commission realizes that certain of the *pro forma* LGIA language may not apply to an Affected System Agreement, the deviations in the Affected System Agreement go beyond what is necessary to reflect this difference and have not otherwise been supported as being just and reasonable. We therefore direct Duke to file a compliance filing, within 60 days of the date of this order, that includes revisions to the Affected System Agreement to conform its provisions to the corresponding provisions in

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scheduled to serve network load on a non-firm basis under the *pro forma* tariff's provisions for secondary service, then the transmission service cannot be deemed to be provided "with respect to the Large Generating Facility" as required by the LGIA. See *Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Service by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,530 (1997), *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). Similarly, if a generating facility has not been specified as the point of receipt or as a secondary point of receipt, the transmission service cannot be deemed to be provided "with respect to the Large Generating Facility" as required by the LGIA. *Id.* at 30,515–29.

<sup>11</sup> Section 30.1 of the *pro forma* tariff states: "Network Resources may not include resources, or any portion thereof, that are committed for sale to non-designated third party load or otherwise cannot be called upon to meet the Network Customer's Network Load on a non-interruptible basis." See Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,533.

<sup>12</sup> The reference to twenty years in the second paragraph, first sentence, fourth line of subsection 7.2.1 should be replaced with five years, as the *pro forma* LGIA dictates.

the *pro forma* LGIA or otherwise explain why the proposed language is just and reasonable.

18. Accordingly, the Commission accepts Duke's unexecuted Affected System Agreement, subject to modifications as discussed above, to become effective September 1, 2005, as requested. Granting waiver of our 60-day prior notice requirement to allow the requested effective date is appropriate in this instance, given that the unexecuted Affected System Agreement was filed within 30 days of the proposed effective date.<sup>13</sup>

The Commission orders:

(A) The unexecuted Affected System Agreement is hereby conditionally accepted for filing, effective September 1, 2005, as discussed in the body of this order.

(B) Duke is directed to file a revised Affected System Agreement within 60 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner Brownell dissenting in part with a separate statement attached.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>13</sup> Prior Notice and Filing Requirements Under Part II of the Federal Power Act, 64 FERC ¶ 61,139 at 61,984, order on reh'g, 65 FERC ¶ 61,081 (1993).

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Docket No. ER05-1452-000

(Issued November 7, 2005)

Nora Mead BROWNELL, Commissioner *dissenting in part*:

For the reasons I articulated in my partial dissent to Order No. 2003-B, I would have granted NCEMC's request and required Duke to revise the Affected System Agreement to provide NCEMC with the ability to apply credits to transmission service taken from sources other than the specific interconnecting generating facilities. Therefore, I dissent from this portion of today's order.

Nora Mead Brownell