

148 FERC ¶ 61,149
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Duke Energy Carolinas, LLC
Duke Energy Progress, Inc.

Docket Nos. ER14-2356-000
ER14-2357-000

ORDER REJECTING AS-AVAILABLE CAPACITY AGREEMENT

(Issued August 28, 2014)

1. On July 3, 2014, Duke Energy Carolinas, LLC (Duke Carolinas) and Duke Energy Progress, Inc. (Duke Progress) (collectively, Applicants), pursuant to section 205 of the Federal Power Act (FPA),¹ filed an As-Available Capacity Agreement (Capacity Agreement). Duke Progress submitted a Certificate of Concurrence (Concurrence) to the Capacity Agreement, as Duke Carolinas is the Capacity Agreement's designated filing entity. As discussed below, we reject the Capacity Agreement and the Concurrence.

I. Background

2. Applicants, both indirect, wholly-owned subsidiaries of Duke Energy Corporation (Duke), serve retail and wholesale customers in North Carolina and South Carolina. In connection with the merger of Duke and Progress Energy, Inc. (Progress),² Duke Carolinas and Duke Progress entered into a joint dispatch agreement pursuant to which

¹ 16 U.S.C. § 824d (2012).

² On September 30, 2011, the Commission conditionally authorized the merger, subject to its approval of market power mitigation measures. *Duke Energy Corp. and Progress Energy, Inc.*, 136 FERC ¶ 61,245 (2011). On June 8, 2012, the Commission accepted, subject to certain revisions, Duke's and Progress' proposed interim and permanent market power mitigation. *Duke Energy Corp. and Progress Energy, Inc.*, 139 FERC ¶ 61,194 (2012). Duke and Progress consummated the merger on July 2, 2012. Filing at 2.

they share economic dispatch of their respective owned and purchased generating resources.³

3. Applicants state that the joint dispatch agreement does not provide a framework for one party to make capacity available to the other. Applicants state that they created the Capacity Agreement to provide such a framework to obtain additional savings for their native load customers. More specifically, Applicants state that the Capacity Agreement would allow them to “minimize purchases on the open market for capacity that is needed on a short-term, temporary basis” and to “minimize commitment of additional generation.”⁴

II. The Agreement

4. The Capacity Agreement will terminate one year from its effective date.⁵ The Capacity Agreement provides that Duke Carolinas and Duke Progress may “make temporarily excess Capacity available to each other for time periods when” one party “is projected to have more Capacity than is required to meet applicable reliability standards” and the other party “has determined that it would benefit from an acquisition” of such capacity.⁶ The party providing capacity may do so for up to one week, and the party receiving the capacity must “procure transmission service into [its balancing authority area] for the full quantity of such Capacity for such time period” pursuant to the terms of the Joint Open Access Transmission Tariff of Duke Carolinas, Duke Progress, and Duke Energy Florida, Inc.⁷ Section 4.4 states that each party will make capacity available to the other “for no additional monetary compensation.” Finally, section 4.5 provides that

³ The Commission conditionally approved the joint dispatch agreement on June 8, 2012, and Duke Carolinas’ and Duke Progress’ compliance filing was accepted by delegated letter order on July 18, 2013. *Duke Energy Corp. and Progress Energy Inc.*, 139 FERC ¶ 61,193 (2012); Duke Energy Carolinas, LLC, Docket Nos. ER12-1338-002 and ER12-1347-003 (July 18, 2013) (delegated letter order).

⁴ Filing at 2 (citing Joint Advance Notice of As-Available Capacity Agreement to the North Carolina Utilities Commission, Docket Nos. E2, SUB 1042 and E2, SUB 1056 (May 19, 2014)).

⁵ Capacity Agreement at 2.1.

⁶ *Id.* at 4.1.

⁷ *Id.* at 4.2 and 4.3.

the parties will not buy and sell energy pursuant to the Capacity Agreement, and nothing in the Capacity Agreement “is intended to modify or alter” the joint dispatch agreement.

III. Notice and Responsive Pleadings

5. Notice of the filing of the Capacity Agreement was published in the *Federal Register*, 79 Fed. Reg. 40,748 (2014), with protests and interventions due on or before July 24, 2014. The North Carolina Electric Membership Corporation filed a timely motion to intervene.

IV. Discussion

A. Procedural Matters

6. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motion to intervene serves to make the North Carolina Electric Membership Corporation a party to this proceeding.

B. Substantive Matters

7. Applicants have not met their burden of demonstrating that the Capacity Agreement is just and reasonable, and not unduly discriminatory or preferential. As a result of the Capacity Agreement, Duke Carolinas and Duke Progress, two affiliated entities, would share capacity with one another outside of the market at no charge. Applicants state that the reciprocal nature of the Capacity Agreement justifies the zero price term, citing *California Pacific Electric Co., LLC*.⁸ The agreement in that case, titled the “Reliability Support Agreement,” governed the provision of transmission service that would only be necessary in very limited, last resort circumstances. In the instant proceeding, Applicants indicate that they intend to share temporarily available capacity in the normal course for the duration of the Capacity Agreement, without any further specifics, such as estimates of the amounts of capacity to be exchanged, explanation of why a zero price term for the capacity is just and reasonable, and not unduly discriminatory, and how transmission will be acquired. Applicants have failed to demonstrate how sharing capacity with an affiliate at a zero price term to the exclusion of other parties is just and reasonable, and not unduly discriminatory or preferential under FPA section 205.

⁸ Filing at n. 2 (citing *Cal. Pac. Elec. Co., LLC*, 133 FERC ¶ 61,018, at P 43 (2010)).

The Commission orders:

The Capacity Agreement and Concurrence are hereby rejected, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.