

149 FERC ¶ 61,266
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Carolina Power & Light Co.	Docket Nos. ER13-1313-000 ER13-1313-001
Duke Energy Progress, Inc.	ER13-2186-000 ER13-2186-001 EL14-2-000 EL14-2 -001 (consolidated)
Duke Energy Progress, Inc.	AC13-170-000

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued December 22, 2014)

1. In this order, the Commission approves an uncontested settlement agreement (Settlement) filed by Duke Energy Progress, Inc. (Duke Energy) on behalf of itself, the Public Works Commission of the City of Fayetteville, North Carolina (Fayetteville), North Carolina Electric Membership Corporation (NCEMC), North Carolina Eastern Municipal Power Agency (Power Agency), and French Broad Electric Membership Corporation (French Broad) (collectively, Settling Parties).

I. Background

2. On April 19, 2013, as amended on April 25, 2013, Carolina Power & Light Company¹ filed in Docket No. ER13-1313-000 proposed changes to the depreciation

¹ On June 23, 2013, the Commission accepted Duke Energy's Notice of Succession, which it filed to notify the Commission that it would be succeeding to all of the tariffs, rate schedules, and service agreements of Carolina Power & Light Company, effective April 29, 2013 as a result of the merger of Duke Energy Corporation into Progress Energy, Inc. *Duke Energy Progress, Inc.*, 143 FERC ¶ 61,270 (2013).

rates in its Power Supply and Coordination Agreement (Fayetteville Agreement) with Fayetteville pursuant to section 205 of the Federal Power Act (FPA).² On June 18, 2013, the Commission accepted the proposed rates for filing, suspended them for a nominal period, to become effective on July 1, 2012, subject to refund, and established hearing and settlement judge procedures.³

3. On August 16, 2013, as amended on August 22, 2013, Duke Energy filed, in Docket No. ER13-2186-000, proposed changes to the depreciation rates under the Fayetteville Agreement. In an order issued on October 15, 2013, the Commission accepted the proposed rates for filing, suspended them for a nominal period to become effective April 1, 2013, subject to refund and to the outcome of Docket No. ER13-1313, and established hearing and settlement judge procedures.⁴ Because the filing decreased depreciation rates, the Commission initiated a proceeding under FPA section 206,⁵ in Docket No. EL14-2-000. The Commission also consolidated Docket Nos. ER13-1313-000, ER13-2186-000, and EL14-2-000 for the purposes of settlement, hearing, and decision.⁶ Duke Energy filed a request for rehearing of the 2013 Hearing Order on November 14, 2013.

4. In addition, in a separate docket, Docket No. AC13-170-000, Duke Energy filed a request for approval to use Account No. 182.2 (Unrecovered plant and regulatory study costs), to account for the actual and planned early retirement of certain generating units in North Carolina and South Carolina. Duke Energy also requested authority to amortize the balance in Account No. 182.2 to Account No. 407 (Amortization of property losses, unrecovered plant and regulatory study costs).

5. On October 20, 2014, Duke Energy filed a motion to hold in abeyance both its request for rehearing of the 2013 Hearing Order and its filing in Docket No. AC13-170-000 pending Commission action on the Settlement. In its motion filing, Duke Energy states that as part of the Settlement it has agreed to withdraw its request for rehearing following Commission approval of the Settlement and that Commission approval of the Settlement would terminate Docket No. AC13-170-000.

² 16 U.S.C. § 824d (2012).

³ *Carolina Power & Light Co.*, 143 FERC ¶ 61,237 (2013).

⁴ *Duke Energy Progress Inc.*, 145 FERC ¶ 61,037 (2013) (2013 Hearing Order).

⁵ 16 U.S.C. § 824e (2012).

⁶ 2013 Hearing Order, 145 FERC ¶ 61,037 at Ordering Paragraph (C).

6. Subsequently, on October 24, 2014, Duke Energy filed the Settlement. On November 13, 2014, Commission Trial Staff (Trial Staff) filed comments on the Settlement and, on November 21, 2014, Duke Energy filed reply comments. On November 25, 2014, the Settlement Judge certified the settlement as uncontested⁷ and the Chief Judge terminated the settlement judge procedures on December 1, 2014.

II. Settlement

7. The Settlement resolves all issues with respect to Duke Energy's depreciation rates and related accounting issues that the Commission set for hearing and settlement judge procedures. The Settlement provides for revisions to the separate formula rate power purchase agreements between Duke Energy and each of Fayetteville, Power Agency, NCEMC, and French Broad. Section 1.1 of the Settlement lists the formula rate power purchase agreements.

8. Section 6.9 of the Settlement provides as follows:

[u]nless the Settling Parties otherwise agree in writing, any modifications to this Agreement proposed by one of the Settling Parties after the Agreement has been accepted or approved by the Commission shall, as between them, be subject to the "public interest" application of the just and reasonable standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the *Mobile-Sierra* doctrine) as clarified in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County, Wash.*, 554 U.S. 527 (2008) and refined in *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010). Any modifications proposed by the Commission acting *sua sponte* or by a non-settling party shall be subject to the just and reasonable standard. Nothing in this Agreement affects the standard of review for changes to the Formula Rate [power purchase agreements]. As provided in Section 2.2, changes to the depreciation life accrual and cost of removal accrual rates set forth in Rate Schedule No. 199 for ratemaking purposes shall be made pursuant only to section 205 or 206 of the FPA applying the just and reasonable standard (not the "public interest" standard) of review.

9. The Settlement also provides for withdrawal of Duke Energy's pending request for rehearing in Docket Nos. ER13-1313-001, ER13-2186-001 and EL14-2-001 and that Docket No. AC13-170-000 will be terminated.

⁷ *Duke Energy Progress, Inc.*, 149 FERC ¶ 63,016 (2014).

III. Discussion

A. Comments

10. Trial Staff notes that the substantive terms of the Settlement are fair, reasonable, and in the public interest. Furthermore, Trial Staff states that the Settlement is beneficial because it resolves a factually and technically complex matter, resolves multiple dockets, and negates the need for costly litigation. However, Trial Staff asserts that certain aspects of the Settlement are contrary to Commission rate schedule and tariff policies. Specifically, Trial Staff objects to the inclusion of Duke Energy's depreciation rates in a separate rate schedule (Rate Schedule No. 199)⁸ rather than in the power purchase agreements that would be amended by the Settlement. Trial Staff also objects to references in the power purchase agreements to the amortization schedules in Attachments 4 and 6 of the Settlement rather than those amortization schedules being included in the power purchase agreements themselves. Trial Staff recommends that the Commission approve the Settlement, subject to the condition that Duke Energy submit compliance filings to incorporate the depreciation rates shown on Rate Schedule No. 199 and the amortization schedules in Attachments 4 and 6 of the Settlement into the body of the relevant power purchase agreements.

11. In its response, Duke Energy asserts that the inclusion of the depreciation rates in Rate Schedule No. 199 and the references in the power purchase agreements to the amortization schedules in Attachments 4 and 6 in the Settlement are appropriate and consistent with the Commission's rate schedule and tariff policies and practices. According to Duke Energy, under the terms of the Settlement it is required to use the depreciation life accrual and cost of removal accrual rates set forth in Attachment 2 to the Settlement for wholesale ratemaking purposes and the same rates apply to all wholesale transactions. Duke Energy adds that pursuant to the terms of the Settlement, it has included these rates in Rate Schedule No. 199, which it has filed with the Commission in Docket No. ER15-191-000. Duke Energy states that filing these depreciation life accrual and cost of removal accrual rates under Rate Schedule No. 199 makes all wholesale transactions subject to the same rates and is also administratively efficient for the Commission, Duke Energy and Duke Energy's wholesale customers. Duke Energy states that having a single set of depreciation life accrual and cost of removal accrual rates on file with the Commission rather than duplicate copies of the rates in every rate schedule avoids the need for Duke Energy to file, and for the Commission to review, changes to each of Duke Energy's wholesale power sales agreements each time Duke Energy amends any of its depreciation life accrual and cost of removal accrual rates.

⁸ On October 24, 2014, consistent with sections 4.1 through 4.4 of the Settlement, Duke Energy filed with the Commission, under FPA section 205, Rate Schedule No. 199 in Docket No. ER15-191-000.

12. In addition, Duke Energy disagrees with Trial Staff's assertion that cross-referencing Attachments 4 and 6 of the Settlement for the amortization schedules is inconsistent with the Commission's policies concerning rate schedules and tariffs. Duke Energy explains that Trial Staff's proposal for the amortization schedules in Attachments 4 and 6 to be included in the formula rate power purchase agreements themselves would mean a lower standard of review for the amortization schedules than the parties intend. Duke Energy states that changes to the formula rate power purchase agreements are subject to the just and reasonable standard while, under the Settlement, changes proposed by a Settling Party are subject to the public interest standard. Duke Energy states that as a result, the inclusion of the amortization schedules in Attachments 4 and 6 in the formula rate power purchase agreements would create a conflict between the formula rate power purchase agreements and the Settlement with respect to the standard of review that would apply to proposed changes to the amortization schedules in Attachments 4 and 6. Duke Energy adds that cross-referencing the amortization schedules in Attachments 4 and 6 is a practical solution that is fully consistent with the Commission's regulations and ensures consistency among customers.

13. Duke Energy states that regardless of how the Commission resolves the issues raised by Trial Staff's comments, Duke Energy requests that the Commission act on the Settlement prior to the end of 2014, if at all possible. According to Duke Energy, the Settlement provides for changes to Duke Energy's journal entries for 2014, and if the Settlement is not approved by December 31, 2014, or shortly thereafter, in 2015 Duke Energy will have to retroactively record journal entries back to 2014. Duke Energy adds that depending upon materiality and timing, Duke Energy may have to file restated Generally Accepted Accounting Principles financials with the United States Securities and Exchange Commission.

B. Commission Determination

14. We find Trial Staff's requested conditions to be unnecessary. Having Duke Energy's depreciation rates in a single rate schedule (Rate Schedule No. 199) promotes administrative efficiency for Duke Energy and transparency for its wholesale customers. As Duke Energy states, having a single rate schedule avoids the need for Duke Energy to file, and for the Commission to review, changes to each of Duke Energy's wholesale power sales agreements each time Duke Energy amends any of its depreciation life accrual and cost of removal accrual rates. Because the same depreciation life accrual and cost of removal accrual rates apply to all of Duke Energy's wholesale transactions, the use of a single rate schedule is appropriate in this case. In addition, Duke Energy filed Rate Schedule No. 199 under section 205 of the FPA and in eTariff,⁹ and as Duke Energy

⁹ Duke Energy's filing in Docket No. ER15-191-000 is pending Commission action.

notes in its reply comments, a customer using the eTariff viewer would only need to access two tariff records (the formula rate power purchase agreement and Rate Schedule No. 199) to determine the appropriate rates.¹⁰

15. Similarly, we find the Settling Parties' agreement to provide a reference in each power purchase agreement to Attachments 4 and 6 of the Settlement for the appropriate amortization schedules to be reasonable under the circumstances of this Settlement. However, Duke Energy did not file the Agreement in the eTariff format required by Order No. 714.¹¹ Therefore, Duke Energy is required to make a compliance filing within 30 days of the date of this order in eTariff format to reflect the Commission's actions in this order.

16. The Settlement resolves all issues in dispute in these proceedings. The Settlement appears to be fair and reasonable and in the public interest, and is hereby approved. The Commission's approval of the Settlement does not constitute approval of, or precedent regarding any principle or issue in this proceeding.

17. This order terminates Docket Nos. ER13-1313-000, ER13-1313-001, ER13-2186-000, ER1-2186-001, EL14-2-000, EL14-2-001 and AC13-170-000. Approval of the Settlement renders holding Duke Energy's request for rehearing of the 2013 Hearing Order and its filing in Docket No. AC13-170-00 in abeyance unnecessary. Duke Energy's motion is therefore moot.

The Commission orders:

(A) The Settlement is hereby approved, as discussed in the body of this order.

(B) Duke Energy is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁰ Duke Energy Reply Comments at 6-7.

¹¹ *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008).