



June 18, 2015

Commissioner Philip D. Moeller

FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT

Docket No. EL09-63-000

Item No. E-15

Statement of Commissioner Philip D. Moeller on Orangeburg, South Carolina Request for Declaratory Order

"The Commission should have granted Orangeburg's petition for declaratory order years ago. However, the mere passage of time does not render Orangeburg's petition moot, nor does it relieve the Commission of its obligation to defend its exclusive jurisdiction over wholesale rates. Orangeburg, Duke, and other parties have provided compelling reasons for the Commission to exert its authority to preempt the North Carolina Utility Commission's (NCUC) March 2009 order,¹ notwithstanding the termination of the underlying Agreement. Unfortunately, over the six years this case has been pending before the Commission, there have never been three votes in favor of action.

"The NCUC Order intruded on the Commission's jurisdiction over wholesale rates by denying an out-of-state wholesale customer (Orangeburg) the benefit of its wholesale Agreement with Duke. By ruling that the associated costs would be allocated on the basis of incremental costs, rather than the lower system average costs contained in the wholesale Agreement, the NCUC made clear that it would require Duke to absorb trapped costs had it proceeded to make sales under the Agreement.² Faced with such a prospect, Duke had no choice but to exercise the Agreement's regulatory-out clause, thereby denying Orangeburg its anticipated \$10 million a year in associated savings.

"The majority maintains that Orangeburg's petition is moot because Duke voluntarily exercised the regulatory-out clause and the parties need not have included such a clause in the Agreement. To say that the Agreement was terminated voluntarily ignores the NCUC's finding that Duke would suffer trapped costs if it transacted pursuant to the wholesale Agreement. NCUC's actions demonstrate why such regulatory-out clauses are a necessary and frequent feature of such contracts. The majority identifies only two alternatives to such regulatory-out clauses: negotiating contracts sufficiently far in advance to allow time for appeals or so that the contracts remain operative while such appeals are pending. In light of the six years that this matter has spent pending before the Commission, it is difficult to view these expectations as reasonable ones. Asking parties to negotiate contracts that remain operative while appeals are pending would force parties to design wholesale rates that contemplate the possibility of inappropriate retail rate treatment. Parties should not have to expose themselves to the possible ramifications of trapped costs - or attempt to negotiate contracts many years in advance - simply to create a test case that prompts timely and meaningful review by this Commission.

"Moreover, notwithstanding the termination of the Agreement, the NCUC Order itself is an ongoing obstacle to the ability of North Carolina utilities to engage in competitive wholesale transactions and for customers to access least-cost power. As Orangeburg explains:

Potential wholesale power purchasers across the Southeast, including numerous municipal and cooperative utilities, will be operating in a market where NCUC-regulated power suppliers are unable

¹ *In the Matter of Duke Energy Carolinas, LLC's Advance Notice of Purchase Power Agreement with the City of Orangeburg, South Carolina and Joint Petition for Declaratory Order*, Docket No. E-7, Sub 858 (Mar. 30, 2009) (NCUC Order).

² *Id.* Chairman Finley, Concurring in Part and Dissenting in Part, at 2-3.



to offer the lowest prices and most favorable terms that the market will bear. The NCUC policy will hamper, and is hampering, the ability of buyers to purchase least-cost power for their customers and to coordinate the most economical use of their resources with power suppliers. Instead, because the NCUC Order specifically targets new wholesale power agreements, customers are likely to become captive to their current suppliers, which are not affected by the NCUC's policy statement.[³]

Contrary to the majority's assertion that Orangeburg asks the Commission to consider a hypothetical scenario, Orangeburg explains that the NCUC Order prevented the Fayetteville, North Carolina, Public Works Commission from entering into a long-term power purchase agreement with Duke, rather than its historical power supplier, thereby foregoing \$60 million in savings over the life of the contract.⁴ It is unclear how many other agreements have been affected over the last six years, or what the Commission's inaction has meant for wholesale competition and prices in the Southeast. These questions deserve further inquiry by this Commission.

"The majority maintains that there is not a live controversy in this proceeding because the NCUC Order was clear that its findings applied only to the specific Agreement at issue and not to other parties or future contracts. However, the NCUC Order established precedent by including a broad "ruling or policy statement" applicable to "any future retail ratemaking proceeding" regarding the Agreement, including an explicit finding that the associated costs should be allocated based upon incremental costs, rather than the system-average costs reflected in the wholesale Agreement, because Orangeburg had not been served historically by Duke.⁵ The NCUC further concluded that "it would not be preempted by federal law from allocating wholesale revenues and costs in such a manner for retail ratemaking purposes,"⁶ and proceeded - in considerable detail - to describe its views on FERC's filed rate doctrine, relevant FERC precedent, and federal preemption in retail ratemaking.⁷ It is difficult to reconcile the majority's repeated assertions that the NCUC Order was limited in its applicability with the NCUC's own rulings regarding future retail ratemaking proceedings and related interpretations of federal law.

"As the Chairman of the NCUC stated with regard to the NCUC Order, "[the NCUC's] jurisdiction over wholesale contracts is preempted, and as the issues in this docket make clear, efforts to circumvent FERC's otherwise exclusive jurisdiction through generic orders and regulatory conditions raise numerous difficulties and concerns."⁸ North Carolina's utilities should be able to sell wholesale energy at system average prices to willing buyers without suffering adverse retail rate impacts, thereby allowing the largest number of retail ratepayers to receive least-cost energy without regard to their location or their status as historically-served load. To do otherwise is contrary to the public interest and the promotion of a competitive wholesale marketplace.

"Accordingly, I respectfully dissent."

³ Orangeburg Petition at 19.

⁴ Orangeburg September 1, 2009 Answer at 6.

⁵ In particular, the NCUC ruled that "[i]n any future retail ratemaking proceeding, the [NCUC] should allocate the wholesale revenues and costs of the Orangeburg Agreement in the manner that produces the lowest cost power...for Duke's retail native load customers" and that applying this policy to the Orangeburg Agreement would entail an allocation "based upon incremental costs in any future retail ratemaking proceeding." NCUC Order at 33.

⁶ *Id.*

⁷ *Id.* at 33-36.

⁸ *Id.* Chairman Finley, Concurring in Part and Dissenting in Part, at 14.