

152 FERC ¶ 61,028
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Carolinas, LLC
Duke Energy Florida, Inc.

Docket No. ER15-1712-000

ORDER ACCEPTING AND SUSPENDING TARIFF REVISIONS AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued July 13, 2015)

1. On May 14, 2015, pursuant to section 205 of the Federal Power Act (FPA),¹ Duke Energy Carolinas, LLC (Duke Energy Carolinas) on behalf of its public utility affiliate, Duke Energy Florida, Inc. (Duke Energy Florida), (together, Duke) filed revisions to Schedule 10-A² of its joint open access transmission tariff (Joint OATT),³ seeking to change the formula for calculating Post-Retirement Benefits Other Than Pensions (PBOP)

¹ 16 U.S.C. § 824d (2012).

² Duke Energy Carolinas, LLC, Tariff, Rate Schedules, and Service Agreements, Tariff Volume No. 4, Schedule 10-A, Network Integration Transmission Service – FPC Zone 10.0.0.

³ Duke explains that as a result of the merger of Duke Energy Corporation and Progress Energy, Inc., Duke Energy Carolinas, Duke Energy Florida, and Duke Energy Progress have a Joint OATT. The Joint OATT was initially submitted for filing in Docket No. ER12-1243, and Duke Energy Florida and Duke Energy Progress have each filed certificates of concurrence. Duke Energy Carolinas is the designated filer under the Joint OATT. Duke states that this version of the Joint OATT was submitted in Docket No. ER14-2878 and was granted an effective date of November 29, 2013.

expenses.⁴ Duke asks for an effective date of January 1, 2014, in accordance with a settlement agreement between Duke Energy Florida and its transmission customers.⁵ In this order, we accept Duke Energy Florida's revised Schedule 10-A, suspend it for a nominal period, to be effective January 1, 2014, subject to refund, and establish hearing and settlement judge procedures.

I. Background

2. Duke states that Duke Energy Florida, a vertically-integrated investor-owned utility serving retail and wholesale customers in Florida, provides open access transmission services pursuant to the Joint OATT. Duke Energy Florida's cost-of-service formula rate for network integration service and point-to-point service is included in Schedule 10-A of the Joint OATT.

3. Duke explains that one component of its formula rate is the PBOP expense.⁶ Duke states that as a result of the proceeding in Docket No. ER95-469-000, Duke Energy Florida's fixed PBOP expense is \$22,191,000.⁷

4. Duke states that it is proposing to revise the formula rate to incorporate Duke Energy Florida's actual PBOP expense on an annual basis rather than adhering to the prior "fixed figure" (i.e., stated rate) methodology. Duke states that the purpose of the proposed tariff revision is to simplify and improve Duke Energy Florida's formula rate and Schedule 10-A by removing the fixed \$22,191,000 amount (on page 6 of Exhibit DEF-2)

⁴ PBOPs, which may include health plan and medical expenses, are "deferred compensation arrangements whereby an employer promises to exchange future benefits for employees' current service." *Post-Employment Benefits Other Than Pensions*, 61 FERC ¶ 61,330, at 62,199 (1992) (citing Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 106, Employers' Accounting for PBOPs (1990)) (*PBOP Policy Statement*).

⁵ Duke May 14, 2015 Transmittal Letter at 2 (May 14, 2015 Transmittal Letter).

⁶ Duke states that the formula is contained in Schedule 10-A.2, which is labeled within Schedule 10-A as Exhibit DEF-2. Duke adds that the process for deriving PBOP expense is in Exhibit DEF-2 at 6. May 14, 2015 Transmittal Letter at 2-3.

⁷ Duke explains that a "per book amount" is compared to this fixed amount to derive the PBOP Expense Adjustment, which is included in the formula rate at Exhibit DEF-2 at 16:3. *Id.* at 3.

and inserting the actual PBOP expense into the formula rate as a component of Total Administrative and General Expense (on page 3 of Exhibit DEF-2, line 5).⁸ Duke adds that the proposed tariff revision also removes the annual PBOP expense from the list of stated values in section 1.i of the Formula Rate Implementation Protocols for which an FPA section 205 or section 206 filing is required.⁹

5. Duke states that its proposed tariff revisions are the result of a settlement agreement between Duke and its transmission customers following the Duke Energy Florida 2014 annual update regarding 2013 costs.¹⁰ Duke asserts that the agreement will enable Duke Energy Florida's formula rate to track Duke Energy Florida's actual expenses, which Duke asserts are currently "substantially below" the fixed amount in the formula rate.¹¹ Duke argues that approving the proposed tariff revisions would be the most efficient way to effectuate the agreement between Duke Energy Florida and its transmission customers to implement a rate that results in "actual cost recovery."¹²

⁸ *Id.* at 4.

⁹ *Id.* at 3 n.6; *see also id.*, Attachment A, Schedule 10-A.1, Section 1. b.(i):

The values for (i) rate of return on equity; (ii) depreciation rates, (iii) ~~"Post Employment Benefits Other than Pensions" Pursuant to Statement of Financial Accounting Standards No. 106, Employers' Accounting for Postretirement Benefits Other Than Pensions ("PBOP")~~, and (v ~~iii~~) annual storm damage accruals and the maximum storm damage reserve level are deemed an integral part of the Formula Rate, not subject to change except pursuant to FPA Section 205 or 206 filing.

¹⁰ May 14, 2015 Transmittal Letter at 2, 4-5. Duke explains that the annual update process refers to Duke Energy Florida's calculation of its unit charges for transmission services that occurred in the prior year and its notification to customers of those charges. Duke states that preliminary challenges over the calculation and inclusion of certain costs in the annual update occasionally arise, which Duke and its customers try to resolve or settle. *Id.* at 5.

¹¹ *Id.* at 4.

¹² *Id.* at 4, 8.

6. Duke asserts that customers are protected under its proposal because Duke Energy Florida's outside actuaries will determine Duke Energy Florida's annual PBOP expenses by incorporating estimates such as Duke Energy Florida's employees' longevity and the returns available on plan assets.¹³ Duke asserts that, while the annual expense level reflects the exercise of judgment, it is the judgment of independent actuaries that will determine the PBOP expense level. Duke adds that, to the extent the estimates underlying the annual PBOP expense levels deviate from actual experience, these differences will be taken into account in future PBOP expense levels, ensuring that customers pay the correct amounts over time.¹⁴

7. Citing *PacifiCorp*,¹⁵ Duke asserts that its proposed tariff revisions are consistent with current Commission policy. Duke states that in *PacifiCorp*, the Commission recently approved a settlement that is virtually identical to the agreement in the present case between Duke Energy Florida and its transmission customers, Florida Municipal Power Agency and Seminole Electric Cooperative, Inc. (Seminole).¹⁶ Duke explains that in *PacifiCorp*, Utah Associated Municipal Power Systems filed a complaint under section 206 of the FPA¹⁷ against PacifiCorp alleging that the company's use of a fixed PBOP amount in its formula rate was unjust and unreasonable given that PacifiCorp's actual PBOP expenses were significantly lower than the imputed amount. Duke states that PacifiCorp agreed to settle the case according to the complainant's request that PacifiCorp only seek to recover its actual PBOP expenses on a year-to-year basis going forward and disregard the fixed amount method it had been using. Duke asserts that, "while on its face the case concerned a complaint and settlement, in reality it was merely both parties acknowledging that use of actual PBOP expenses on a year-to-year basis was the most equitable measure of the cost for all parties" and that the formula rate should be revised accordingly.¹⁸

¹³ *Id.* at 5-6.

¹⁴ *Id.* at 6.

¹⁵ 149 FERC ¶ 61,267 (2014).

¹⁶ May 14, 2015 Transmittal Letter at 6.

¹⁷ 16 U.S.C. § 824e (2012).

¹⁸ May 14, 2015 Transmittal Letter at 7.

8. Duke argues that the circumstances are virtually the same in this proceeding. According to Duke, the only difference is that in this case, the parties reached an equitable settlement through the annual review process and Duke Energy Florida is presenting the settlement in a filing under section 205 of the FPA.¹⁹ Duke points out that in both cases, the parties mutually agreed that incorporating actual PBOP expenses, rather than utilizing a fixed value, resulted in the fairest and most equitable treatment of PBOP costs. Duke argues that accepting the section 205 filing would be more efficient and economical than one party filing a complaint and the parties undergoing a second, unneeded, settlement negotiation.

9. Duke seeks confidential treatment pursuant to 18 C.F.R. § 388.112 (2014) (Requests for privileged treatment and Critical Energy Infrastructure Information for documents submitted to the Commission) for the cost data supporting the proposed PBOP tariff revision.²⁰ According to Duke, the cost support contains load data for Duke Energy Florida's customers that are both confidential and commercially sensitive. Duke states that it has aggregated these data in the public version of this filing to enable parties to review the cost support, to show the cost support for the proposed amendment, and to maintain the confidentiality of the load projections from which the aggregation is derived.²¹ Duke includes a table in its filing comparing, on the one hand, Duke Energy Florida's final OATT rate for 2013 with the stated PBOP expense of \$22.2 million in the formula and, on the other hand, what Duke Energy Florida's OATT rate for 2013 would have been had the changes proposed in this filing been implemented and Duke Energy Florida utilized actual PBOP expenses for 2014, which were \$1.531 million.²² Duke states that the final OATT rate for 2013 was \$2,313 per MW-month, while the final OATT rate would have been \$2,300 per MW-month had PBOP expenses for 2014 been included.²³ Duke states that this would have resulted in an overall revenue decrease to Duke Energy Florida of \$447,954.²⁴ Duke argues that this illustrates the benefits that would accrue to Duke Energy Florida's

¹⁹ 16 U.S.C. § 824d.

²⁰ May 14, 2015 Transmittal Letter at 3.

²¹ *Id.* at 4, 8-9.

²² *Id.* at 9.

²³ *Id.*

²⁴ *Id.*

customers upon implementing this change, and also “highlights that the proposed cost changes are cost supported and should be approved.”²⁵

10. Duke states that, to the extent necessary, it seeks waiver of 18 C.F.R. § 35.13 (2014) (Filing of changes in rate schedules, tariffs or service agreements) in order to implement the tariff changes proposed in this filing. In addition, Duke requests waiver of the notice requirement in 18 C.F.R. § 35.3 (2014) to give the proposed tariff revisions a retroactive effective date of January 1, 2014. Duke argues that good cause exists to grant the requested waiver because the revised tariff sheets reflect an amendment mutually agreed upon by Duke Energy Florida and its customers.²⁶ Duke states that courts have recognized that a rate adjustment may take effect prior to the section 205 filing when the parties have agreed to make a rate effective retroactively.²⁷ Duke adds that Commission policy favors granting waiver of the 60-day prior notice requirement for a rate decrease, and also where parties agree to the proposed effective date.²⁸

II. Notice of Filing and Responsive Pleadings

11. Notice of the filing was published in the *Federal Register*, 80 Fed. Reg. 28,990 (2015), with interventions or protests due on or before June 4, 2015. Seminole filed a timely motion to intervene and comments.

12. Seminole states that it supports the proposed revisions as consistent with changed circumstances concerning PBOPs, consistent with the settlement among Duke Energy Florida, Seminole, and Florida Municipal, and consistent with recent precedent on this issue.²⁹ Seminole endorses the tariff revisions because they result in a rate decrease. Seminole supports the requested effective date of January 1, 2014 because it is consistent

²⁵ *Id.*

²⁶ *Id.* at 11.

²⁷ *Id.* at 9-10 & n.12 (citing *Consol. Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003); *City of Holyoke Gas & Elec. Dep't v. FERC*, 954 F.2d 740, 744 (D.C. Cir. 1992)).

²⁸ *Id.* at 10 (citing *Cent. Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992)).

²⁹ Seminole Comments at 3 & n.1 (citing *PacifiCorp*, 149 FERC ¶ 61,267).

with the settlement agreement among the parties and because the tariff revisions result in a rate decrease.

13. In addition, Seminole asserts that the proposed tariff revisions need further clean-up edits. Specifically, Seminole points out that Duke Energy Florida notes that it has made some clean-up changes to its formula rate (page 1 of Exhibit DEF-6) to reflect changed line numbers in FERC Form No. 1, page 263. Seminole states that, while it supports this effort, it is incomplete. Seminole explains that it sent Duke Energy Florida an e-mail including particular changes that it believed needed to be made to conform the rate formula to the most recent (2014) Duke Energy Florida FERC Form No. 1 and urged the parties to work together to ensure all necessary changes were made. Seminole states that although Duke Energy Florida acknowledged receipt of Seminole's e-mail, Duke initiated no further discussions on this issue. Seminole states that it believes that Duke Energy Florida agrees that it needs to make these additional changes and urges Duke Energy Florida to consult with the parties as soon as possible to make sure all necessary changes are captured and, in responding to this pleading, to list all the changes that the parties agree need to be made to the formula rate to reflect changes to the Duke Energy Florida FERC Form No. 1.

III. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,³⁰ Seminole's timely motion to intervene serves to make Seminole a party to this proceeding.

B. Hearing and Settlement Judge Procedures

15. We find Duke Energy Florida's revised Schedule 10-A raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

16. Our preliminary analysis indicates that Duke Energy Florida's revised Schedule 10-A has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Duke seeks to change the PBOP component of the formula rate from a specified stated rate to varying "actual costs." Duke does not explain in its filing whether the revenues associated with PBOPs will be placed in an irrevocable external trust, or how its proposal maximizes tax deductions to the benefit of ratepayers, both of which are required for utilities to recognize, as a component of jurisdictional cost-based rates, allowances for prudently incurred costs

³⁰ 18 C.F.R. § 385.214 (2014).

of PBOPs of company employees when determined on an accrual basis.³¹ Additionally, in seeking waiver of the cost of service requirements necessary to support a rate change in 18 C.F.R. § 35.13, Duke fails to provide cost support for its proposed “actual costs.”³² Although the Commission has granted waiver of cost support in formula rate cases, in those cases the formula rate was populated by FERC Form No. 1 data and, therefore, full Period I and Period II data were not needed to evaluate the proposal.³³ Here, the “actuals” that Duke proposes to use are not separately identified in the FERC Form No. 1 and are not supported. Consequently, we deny waiver of the requirements of section 35.13 as they pertain to PBOPs, and require Duke to provide full cost support for the PBOP expenses for 2014 and 2015, including statements necessary to support the PBOP,³⁴ and require this data

³¹ See *PBOP Policy Statement*, 61 FERC ¶ 61,330 at 62,202.

³² Duke proposes to modify Duke Energy Florida’s Schedule 10-A to charge customers PBOPs based on “actual” costs, which will fluctuate year-after-year based on actuarial studies. Duke does not include the actuarial studies in its filing to support the change for the period covered by the effective date, nor does Duke indicate whether it will make these actuarial studies publicly available to its customers or available for audit by FERC through FERC Form No. 1 data. Duke states that its proposal would result in a reduction of \$447,954 in 2014 if actual PBOP expenses had been used for 2014. May 14, 2015 Transmittal Letter at 9. Duke does not explain how the over \$20 million difference between the stated and the actual PBOP expenses produce such a small savings in the transmission revenue requirement. See *id.* (Table). Duke does not provide any cost support for this calculation, or explain how costs will be affected for 2014, 2015, or future years.

³³ See, e.g., *Pioneer Trans., LLC*, 126 FERC ¶ 61,281, at PP 125-126, *reh’g denied* 130 FERC ¶ 61,044 (2009); see also *Commonwealth Edison Co. and Commonwealth Edison Co. of Indiana, Inc.*, 119 FERC ¶ 61,238, at P 94 (2007) (*Commonwealth Edison*); *Trans-Allegheny Interstate Line Co.*, 119 FERC ¶ 61,219, at P 57, *reh’g denied*, 121 FERC ¶ 61,009 (2007) (*Trans-Allegheny*); *Duquesne Light Co.*, 118 FERC ¶ 61,087, at P 79 (2007) (*Duquesne*); *Allegheny Power Sys. Operating Cos.*, 111 FERC ¶ 61,308, at PP 55-56 (2005), *order on reh’g*, 115 FERC ¶ 61,156 (2006) (*Allegheny*).

³⁴ *Tampa Elec. Co.* 133 FERC ¶ 61,023, at P 53 (2010) (denying request to waive 18 C.F.R. § 35.13, where formula rates would be updated using a substantial amount of costs not derived from FERC Form No. 1 data or publicly available documents). The Commission explained that “[w]here a utility includes line item numbers but does not record the formula used in calculating the rate, or where the utility does not show how the rate is derived from the FERC Accounts, or where the accounting transparency in the

(continued ...)

to be submitted as part of the hearing proceedings ordered herein, in addition to whatever additional discovery may be deemed appropriate.³⁵ We also deny Duke's request for waiver of filing an attestation in 18 C.F.R. 35.13(d)(6) that the data submitted is true, accurate, and a current representation of its books and records.³⁶

17. Accordingly, we accept Duke Energy Florida's revised Schedule 10-A for filing, suspend it for a nominal period, make it effective January 1, 2014, as requested,³⁷ subject to refund, and set it for hearing and settlement judge procedures.

18. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.³⁸ If the parties desire, they may by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.³⁹ The settlement judge shall report to the Chief Judge and the Commission within thirty (30) days of the date of the appointment of the settlement judge, concerning the status of settlement and discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their

formula rate is lacking due to projections of data or other factors, a company has the potential to exercise discretion in calculating the rate." *Id.* P 54.

³⁵ *Pioneer Trans., LLC*, 126 FERC ¶ 61,281 at P 126 (enabling presiding judge to provide for discovery of additional relevant information); *Commonwealth Edison*, 119 FERC ¶ 61,238 at P 94 (same); *Allegheny*, 111 FERC ¶ 61,308 at P 56 (same).

³⁶ *Trans-Allegheny*, 119 FERC ¶ 61,219 at P 57; *Duquesne*, 118 FERC ¶ 61,087 at P 79; *Commonwealth Edison*, 119 FERC ¶ 61,238 at P 93.

³⁷ *See Cent. Hudson Gas & Elec. Corp.*, 60 FERC at 61,338.

³⁸ 18 C.F.R. § 385.603 (2014).

³⁹ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

settlement discussions or provide for the commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Duke Energy Florida's revised Schedule 10-A to its Joint OATT is hereby accepted for filing and suspended for a nominal period, to become effective January 1, 2014, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Duke Energy Florida's revised Schedule 10-A of its Joint OATT. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rule of Practice and Procedure, 18 C.F.R. 385.603 (2014), the chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a

procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.