

123 FERC ¶ 61,201  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

May 23, 2008

Reply Refer To:  
Duke Energy Carolinas, LLC  
Docket No. ER08-730-000

Steptoe & Johnson LLP  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036-1795

Attention: Gary A. Morgans  
Counsel for Duke Energy Carolinas, LLC

Reference: Order on First Amended and Restated Full Requirements Power Purchase Agreement between Duke Energy Carolinas, LLC and Piedmont Electric Membership Corporation

Dear Mr. Morgans:

1. Duke Energy Carolinas, LLC (Duke) filed a first amended and restated full requirements power purchase agreement (Amended Piedmont Agreement) with Piedmont Electric Membership Corporation (Piedmont) for approval under Federal Power Act (FPA) section 205.<sup>1</sup> The Amended Piedmont Agreement makes changes to the formula rate in the existing full requirements agreement between Duke and Piedmont (Original Piedmont Agreement), and proposes other changes that are described in greater detail below. Duke states that it is required to make this filing under its cost-based tariff because the Amended Piedmont Agreement's term is more than one year.<sup>2</sup>
2. Notice of Duke's filing was published in the *Federal Register*, 73 Fed. Reg. 19,201 (2008), with interventions and protests due on or before April 17, 2008. None was filed.

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<sup>1</sup> 16 U.S.C. § 824d (2000 & Supp. V 2005).

<sup>2</sup> See *Duke Power*, 111 FERC ¶ 61,506 (2005).

3. The Amended Piedmont Agreement is a long-term sale of capacity and energy to Piedmont, a customer in Duke's balancing authority area. It revises an earlier agreement between the parties,<sup>3</sup> and sets forth the terms and conditions of continued service from Duke to Piedmont. The changes proposed by the parties to this agreement incorporate several provisions that were included in a separate full requirements service agreement that the Commission accepted in a similar docket.<sup>4</sup> Duke explains that the changes proposed by the parties to this case are substantially the same as the changes proposed and accepted in the Blue Ridge Agreement.

4. Duke explains that section 5.9 of the Original Piedmont Agreement provides for the parties to work together to formulate plans to implement Piedmont's renewable energy requirements. The Amended Piedmont Agreement modifies this provision to clarify the parties' obligations on this matter. Duke states that the amended section 5.9 is substantially the same as section 5.9 of the Blue Ridge Agreement. The Amended Piedmont Agreement also includes a new section 16.38, which provides for the parties to cooperate in fulfilling their requirements under the North Carolina Renewable Energy and Energy Efficiency Portfolio Standards.<sup>5</sup>

5. Duke also states that it has revised the Amended Piedmont Agreement's formula rate to conform it to the Blue Ridge Agreement. Specifically, it states that the formula rate now includes the cost of generator step-up substations and Duke's Interconnection Facilities for post-March 15, 2000 generating units.<sup>6</sup> It argues that these are costs that the Commission has determined to be generation-related.<sup>7</sup>

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<sup>3</sup> Duke filed the Original Piedmont Agreement with the Commission on October 24, 2007. *Duke Power Company LLC*, Docket No. ER08-89-000 (Dec. 4, 2007) (unpublished letter order accepting the Original Piedmont Agreement). The Original Piedmont Agreement, in turn, replaced an earlier partial requirements agreement between Duke and Piedmont. *Duke Power Company LLC*, Docket No. ER06-1040-000 (June 29, 2006) (unpublished letter order).

<sup>4</sup> *Duke Power Company LLC*, Docket No. ER08-347-000 (Jan. 28, 2008) (unpublished letter order accepting an agreement between Duke and Blue Ridge Electric Membership Corporation (Blue Ridge) (Blue Ridge Agreement)).

<sup>5</sup> *Rulemaking Proceeding to Implement Session Law 2007-397*, Docket No. E-100, Sub 113 (State of North Carolina Utilities Commission Feb. 29, 2008).

<sup>6</sup> Duke notes that the pricing is unchanged and that the agreement does not change the fuel rate or the variable operating and maintenance rate. Duke includes with its filing a calculation of the demand rate using FERC Form 1 data, and explains that the actual monthly demand rate will change from year to year based on Duke's actual cost and load

(continued)

6. Duke notes that section 7.3.2.5 provides a credit for certain generation-related ancillary service charges that the customer pays to Duke Electric Transmission in connection with the network service provided for the delivery of energy under the Amended Piedmont Agreement. It argues that the credit takes into account the portion of the customer's load that is served under the Amended Piedmont Agreement as well as the different billing determinants that are used under that agreement and under Duke's Open Access Transmission Tariff.

7. Duke proposes other changes, including a clarification in section 4.4 that full or partial requirements agreements between Duke and Blue Ridge or Rutherford Electric Membership Corporation are deemed to be substantially similar to the Amended Piedmont Agreement, and therefore, do not constitute non-conforming load. In addition, Duke states that it deleted section 9.3 (ancillary services) from the agreement because the provision is no longer applicable.

8. Duke further states that the parties have clarified section 12.3 regarding Duke's right to submit a section 205 filing to include construction work in progress (CWIP) in rate base. Duke notes additional changes to the billing and audit provisions (Article 14) to reflect the credits or reimbursement due Piedmont under the agreement, and to both parties' representations and warranties in sections 16.1.2.3 and 16.1.2.4. It also notes wording changes to the description of Piedmont's resources in Attachment 4-3 of its filing.

9. Duke states that the termination date of the agreement is unchanged, and that the January 1, 2008 requested effective date is subject to conditions set forth in Article 3 of the agreement, including the requirement that the Commission shall have issued an order accepting or approving the Amended Piedmont Agreement without modification, suspension, investigation or other conditions unacceptable to Duke (section 3.1(b)), and that the United States Department of Agriculture Rural Utilities Service shall have approved the Amended Piedmont Agreement without modification, suspension, investigation or other condition unacceptable to Piedmont (section 3.2(b)). Duke notes that these same conditions are included in the Blue Ridge Agreement.

10. We accept the proposed changes in the Amended Piedmont Agreement as just and reasonable and not unduly discriminatory or preferential. While the parties in the Amended Piedmont Agreement seek only limited changes to the Original Piedmont

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data, as provided in the formula. Duke also provides details on the proposed changes' revenue impact.

<sup>7</sup> Duke cites *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 743 (2003), and *Kentucky Utilities Co.*, 85 FERC ¶ 61,274, at 61,111 (1998).

Agreement under FPA section 205, Duke has filed the entire agreement between the parties,<sup>8</sup> including unchanged, previously-accepted provisions. However, although the parties agreed to refile the entire agreement, and not file just the amendments, we do not find that the fact that the entire agreement was refiled opens up the entire agreement, and the provisions that are not being changed, to Commission review under FPA section 205. Our review of the Amended Piedmont Agreement under FPA section 205 is limited in this case to the changes that Duke proposed under FPA section 205 and that it highlighted in its filing.<sup>9</sup> The unchanged, previously-accepted provisions are not subject to our review under FPA section 205, and therefore, will not be considered at this time.<sup>10</sup>

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<sup>8</sup> Our filing requirements allow the parties to file just the amendments to their Original Piedmont Agreement or to refile the entire agreement. *See* 18 C.F.R. Part 35 (2007); *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096, at 31,502, 31,510-13 (2000). For service agreements under umbrella tariffs, our filing requirements expressly dictate that when such an agreement is amended, the entire agreement be refiled. 18 C.F.R. § 35.9(a) (2007); Order No 614, FERC Stats. & Regs. ¶ 31,096 at 31,504. Such a refiling of an entire agreement, however, does not necessarily open the entire agreement to Commission review under FPA section 205.

<sup>9</sup> Commission review of proposed changes under FPA section 205 does not extend to separate and discrete provisions that the filing public utility has not proposed to change. *E.g.*, *Western Resources v. FERC*, 9 F.3d 1568, 1578-79 (D.C. Cir. 1993); *see also Public Service Commission of New York v. FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1980).

<sup>10</sup> The Commission notes that the Amended Piedmont Agreement contains a number of provisions previously accepted by the Commission under FPA section 205 that Duke and Piedmont do not propose to change. Among those provisions is section 12.2 of the Amended Piedmont Agreement, which would apply a “public interest” standard of review to non-parties to the agreement should non-parties seek certain modifications to the agreement. The Commission also recognizes new court precedent involving the “public interest” standard of review and its applicability to non-contracting third parties. *Maine Pub. Util. Comm’n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) (*Maine PUC*). If and when a previously approved “public interest” provision is invoked regarding non-contracting third parties, the Commission will follow all applicable court precedent in interpreting and applying such provision. The Commission further notes that, in light of the *Maine PUC* decision, to the extent contracting parties file new provisions that seek to impose a “public interest” standard of review on non-contracting third parties, the Commission would find acceptable a substitute provision that imposes on non-contracting third parties “the most stringent standard permissible under applicable law.”

11. As a final matter, Duke requests waiver of the Commission's 60-day notice requirement, 18 C.F.R. 35.3 (2007), to make the proposed tariff change effective January 1, 2008. Duke states that it submitted the Amended Piedmont Agreement immediately following its execution, and that the customer has requested that the agreement be made effective on January 1, 2008, so that it can begin to realize the benefits of the agreement as soon as possible. In light of these circumstances, we find good cause exists to grant Duke's requested waiver,<sup>11</sup> to be effective January 1, 2008.

By direction of the Commission. Commissioners Kelly and Wellinghoff  
dissenting in part with separate statements to be  
issued at a later date.

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>11</sup> See *Central Hudson Gas and Elec. Co., et al.*, 60 FERC ¶ 61,106, at 61,337, *reh'g denied*, 61 FERC ¶ 61,089 (1992); *Prior Notice Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,974-75 (1993), *clarified*, 65 FERC ¶ 61,081 (1993).