

130 FERC ¶ 61,079
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Duke Energy Carolinas, LLC

Docket No. ER09-1717-000

ORDER ACCEPTING DEPRECIATION RATES

(Issued January 29, 2010)

1. Duke Energy Carolinas, LLC (Duke) submits a 2008 Depreciation Study (2008 Study)¹ of its in-service electric plant, in support of the revised depreciation accrual rates contained in that study. Duke started using these revised depreciation rates for accounting purposes effective January 1, 2009, and it requests permission to use the 2009 depreciation rates in certain formula rates, effective January 1, 2009. Duke requests waiver of the prior notice requirement in order to make these depreciation rates effective on January 1, 2009. In this order, we accept the new depreciation rates for rate purposes and grant the request for waiver of the prior notice requirement for good cause shown.

I. Background

2. Duke provides long-term power service to wholesale customers in North Carolina and South Carolina through power sales agreements.² Several of its sales agreements

¹ The 2008 Depreciation Study was completed on May 20, 2009.

² The agreements with formula rates are: North Carolina Electric Membership Corporation, Rate Schedule Nos. 273 and 326; Blue Ridge Electric Membership Corporation, Rate Schedule No. 315; Piedmont Electric Membership Corporation, Rate Schedule No. 316; Rutherford Electric Membership Corporation, Rate Schedule No. 317; North Carolina Municipal Power Agency Number 1, Rate Schedule No. 325; City of Concord, NC, Rate Schedule No. 327; Town of Dallas, NC, Rate Schedule No. 328; Town of Due West, SC, Rate Schedule No. 329; Town of Forest City, NC, Rate Schedule No. 330; City of Kings Mountain, NC, Rate Schedule No. 331; Lockhart Power Company, Rate Schedule No. 332; Town of Prosperity, SC, Rate Schedule No. 333; City of Greenwood, SC, Rate Schedule No. 334; and Haywood Electric Membership Corporation, Rate Schedule No. 335.

contain formula rates that include depreciation expense based on Duke's FERC Form No. 1 data and company records.³ Duke explains that it has been using the revised depreciation rates in the 2008 Study for accounting purposes effective January 1, 2009, and through this filing seeks to use the revised depreciation rates for its formula rates as well. Duke notes that all of the formula rates require the use of Duke's depreciation rates as booked, and suggests that this requires the use of the new depreciation rates effective January 1, 2009.

3. Duke states that the 2008 Study determined revised depreciation rates based on plant investment as of December 31, 2008. Duke explains that the 2008 Study uses the straight-line remaining life depreciation method, with the Average Service Life procedure, and was prepared with practices generally accepted in the field of depreciation. Duke states that the revised depreciation rates were used starting January 1, 2009, filed with the North Carolina Utilities Commission on June 2, 2009 for informational purposes, and also filed with the Public Service Commission of South Carolina (South Carolina PSC) on June 16, 2009. According to Duke, the South Carolina PSC approved adoption of the new depreciation rates for accounting purposes effective January 1, 2009.⁴ The 2008 Study shows the proposed depreciation accrual rates result in a net decrease in depreciation expense for accounting purposes of \$54,556,343 for twelve months ending December 31, 2008.⁵ However, Duke estimates that the new depreciation rates increase charges under its wholesale formula rate schedules by \$1,105,232.⁶

³ The depreciation rates currently used to determine depreciation expense under these agreements are set forth in a 2004 Depreciation Study that Duke filed in Docket No. ER06-1040, accepted by Order issued on June 29, 2006.

⁴ Duke provides the South Carolina PSC's order approving the adoption of the new depreciation rates effective January 1, 2009, in Attachment 3 (August 5, 2009).

⁵ The \$54.6 million net decrease in depreciation expense is broken down by plant function as follows: Production \$15,798,430 increase, Transmission \$16,929,663 decrease, Distribution \$62,504,940 decrease, General \$9,288,968 increase, and Depreciable Land Rights \$209,138 decrease. *See* Part III, Results of Study, at page III-4. The rate increases under Duke's formula rate schedules reflect amounts primarily allocated from the Production and the General plant functions to the wholesale services at issue here.

⁶ Duke notes that several of the rate schedules were not in effect in 2008 and Rate Schedule No. 325 does not take effect until 2010. Therefore, Duke adjusted the data to show the charges to which the customers would have been subject to during 2009 due to the depreciation rate changes. *See* Attachment Nos. 1 and 2.

4. Duke requests permission to use the new depreciation rates in its formula rates effective January 1, 2009. To the extent necessary, Duke requests waiver of the prior notice requirement to permit this effective date. Duke states that making these depreciation rates effective on the same date as directed by the South Carolina PSC would promote consistency in the depreciation rates used for federal and state ratemaking purposes, and would serve the interests of federal-state comity, which the Commission has sought to encourage.⁷ Duke advises that a January 1, 2009 effective date would also be consistent with Commission policy finding that, where the effective date of a rate schedule change is prescribed by contract, the Commission will ordinarily find that good cause exists to waive the sixty-day prior notice requirement.⁸ Duke submits that here, the effective date is prescribed by the rate schedules, because the formula rates prescribe for use of Duke's costs as booked, and those costs changed January 1, 2009. Duke also submits that waiver of notice would implement the terms of the filed rate itself, which contemplates the use of Duke's as-booked costs.

5. On November 13, 2009, the Acting Director, Division of Electric Power Regulation – East, issued a letter advising Duke that its filing was deficient and requiring Duke to file additional information. Specifically, the letter asked whether Duke's filing was asking the Commission to approve recalculations of the estimated formula rate billings rendered during 2009 to reflect the use of the revised depreciations rates, or whether Duke was requesting that the Commission approve the revised depreciation rates for use only in future billings to occur after 2009, in accordance with the individual terms of each of Duke's 15 formula rate wholesale power sales agreements.

6. On December 2, 2009, Duke clarified that it does not intend to recalculate its estimated formula rate billings rendered during 2009 to reflect the use of the new depreciation rates. Instead, Duke is requesting for approval to reflect the new depreciation rates in its true-up calculations for its 2009 charges. Those calculations will be performed in 2010, in accordance with the parties' agreements.

II. Notice of Filings and Responsive Pleadings

7. Notice of Duke's September 17, 2009 filing was published in the *Federal Register*, 74 Fed. Reg. 49,369 (2009), with interventions and protests due on or before October 8, 2009. North Carolina Electric Membership Corporation (North Carolina EMC) filed a timely motion to intervene and protest. Duke filed an answer to North Carolina EMC's protest.

⁷ Duke Transmittal Letter at 6 (citing *San Diego Gas and Elec. Serv.*, 79 FERC ¶ 61,372, at 62,565 (1997)).

⁸ *Id.* at 7 (citing *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (1993)).

8. Notice of Duke's December 2, 2009 filing was published in the *Federal Register*, 74 Fed. Reg. 68,263 (2009), with interventions and protests due on or before December 23, 2009. No responses were received.

III. Discussion

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits answers to protests unless otherwise ordered by the decisional authority. We will accept Duke's answer because it provided information that assisted us in our decision-making process.

Effective Date

11. In its protest, North Carolina EMC states that it has two wholesale power contracts that are affected by the revised depreciation rates that Duke filed: Rate Schedule No. 273, the Catawba Interconnection Agreement, and Rate Schedule No. 326, the 2008 Power Purchase Agreement. North Carolina EMC complains that the demand charges on these power contracts will increase by \$168,238 if Duke is allowed to use the revised depreciation rates for 2009. It contends that Duke should not be granted waiver of the prior notice requirement or be allowed to make the new depreciation rates retroactively effective from January 1, 2009. North Carolina EMC contends that, consistent with Opinion No. 499,⁹ Commission precedent requires *prior* approval of a change in depreciation rates before the new depreciation rates can be used for ratemaking purposes.¹⁰ North Carolina EMC notes that the South Carolina PSC's order approving the adoption of the new depreciation rates effective January 1, 2009, is only for accounting purposes, and that the depreciation rates can be challenged in Duke's upcoming South Carolina general rate case proceeding. North Carolina EMC complains that Duke's change in depreciation rates is based on a depreciation study that did not become available until mid-2009. North Carolina EMC also contends that, in Opinion No. 499, the Commission explained that, in Order No. 618,¹¹ the Commission determined that it would no longer require prior Commission approval to charge depreciation rates

⁹ North Carolina EMC Protest at 3-4 (citing *New Dominion Energy Coop., Old Dominion Elec. Coop.*, Opinion No. 499, 122 FERC ¶ 61,174, at P 88 (2008)).

¹⁰ *Id.* at 4.

¹¹ *Depreciation Accounting*, Order No. 618, FERC Stats. & Regs. ¶ 31,104, at 31,695 (2000).

for accounting purposes;¹² however, filing requirements for prior approval of a change in depreciation rates for ratemaking purposes remain.¹³ North Carolina EMC contends that the 60-day prior notice requirement should establish an effective date no earlier than November 16, 2009, for a proposed change in wholesale power charges.

12. North Carolina EMC states that the formula rates in Rate Schedule Nos. 273 and 326 do not provide for the retroactive application of a change in depreciation rates. According to North Carolina EMC, the Catawba Interconnection Agreement (Rate Schedule No. 273) provides that, by December 1 of the year prior to the billing year, Duke must provide North Carolina EMC with an estimate of the monthly demand charges for Reserve Capacity to be used in the coming year in billing for Reserve Capacity, and the demand charge is subject to a true-up adjustment to reflect actual costs.¹⁴ It argues that, by February 15 of the year subsequent to the billing year, Duke computes the fees and charges actually due and payable for the preceding calendar year, and any adjustment between the estimated payments and actual amount due is payable or credited on the next monthly statement.¹⁵ North Carolina EMC explains that when Duke made the estimate of depreciation expense for the 2009 rates (i.e., by December 1, 2008), the 2008 FERC Form No. 1 was not yet available, and Duke would have had to use the depreciation expense in the 2007 FERC Form No. 1, which was filed on April 15, 2008.¹⁶ North Carolina EMC explains when Duke calculates the true-up for actual amounts due for calendar year 2009 (which would be done by February 15, 2010), Duke would have to reflect in the final rates for 2009 the depreciation expense from the 2008 FERC Form No. 1, the most recent Form No. 1 as of that date. Thus, North Carolina EMC contends that Rate Schedule No. 273 does not support the proposed change in demand charges, even if the change in depreciation rates were made effective retroactively to January 1, 2009, because the formula requires use of the 2008 FERC Form No. 1 data.¹⁷

13. North Carolina EMC also asserts that the 2008 Purchase Power Agreement (Rate Schedule No. 326 (2008 PPA)) contains formula rate provisions similar to Rate Schedule

¹² North Carolina EMC Protest at 3-4 (citing Opinion No. 499, 122 FERC ¶ 61,174 at P 87).

¹³ *Id.* at 3-4.

¹⁴ *Id.* at 6 (citing section 17.2 (Computation of Certain Monthly Capacity Fees and Charges) and Exhibit IC-1).

¹⁵ *Id.*

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 8.

No. 273.¹⁸ It states that the charges are to be calculated in accordance with Schedule 1 of the 2008 PPA, and Duke is to true-up the charges no later than June 30 of the year following that in which service is provided.¹⁹ The calculation of the formula rate is based on FERC Form No. 1 data and company records. Attachment 2 to the 2008 PPA clarifies that the demand rate for the 2009 calendar year, the initial period under the contract, is based on the 2007 FERC Form No. 1.²⁰ However, North Carolina EMC acknowledges that, unlike the Catawba Agreement, the 2008 PPA true-up occurs at a point during calendar year 2010 that post-dates when the FERC Form No. 1 reports are to be filed for calendar year 2009.²¹ Nevertheless, North Carolina EMC argues that the depreciation rates cannot lawfully be reflected in the true-up depreciation expense for any month that predates the Commission's order in this proceeding.

14. Accordingly, North Carolina EMC requests that the Commission reject Duke's request for an effective date for the change in depreciation rates retroactive to January 1, 2009 for rate purposes, and instead grant an effective date no earlier than November 16, 2009.

15. In its Answer, Duke explains that depreciation rates used to calculate the depreciation expense that is included in these formula rates are routinely determined using studies that are not completed until after the date the new depreciation rates take effect because the studies typically rely upon historical data to calculate the most appropriate depreciation rate as of the end of the most recent calendar year. Duke emphasizes that none of its customers protest the proposed depreciation rates nor does any customer request that the depreciation rates be set for hearing. Duke argues that North Carolina EMC's proposed effective date should be rejected. In support of a January 1, 2009 effective date, Duke submits that the depreciation rates used to calculate Duke's as-booked depreciation expense changed January 1, 2009, and nothing in the agreements conditions this change on the filing of new depreciation rates, let alone the filing of such rates prior to their effectiveness. According to Duke, if the depreciation rates did not become effective for ratemaking purposes until sixty days after they were filed with the Commission, every utility under a formula rate would face the prospect of either maintaining two sets of books – one for FERC Form No. 1 purposes and the

¹⁸ *Id.*, citing Article 6, section 6.2.1 of the 2008 PPA (Monthly Demand Rate).

¹⁹ North Carolina EMC Protest at 9.

²⁰ *Id.*

²¹ *Id.*

second for purposes of calculating rates under formula rates – or absorbing the unrecovered depreciation expense and thereby failing to recover its costs.²²

16. Duke states that its proposed effective date is consistent with Commission precedent and is supported by public policy. Duke argues that nothing in Opinion No. 499 and Order No. 618 require “prior” approval in the sense in which North Carolina EMC uses this term – that such approval must occur prior to the effective date of the depreciation rate change. Duke explains that section 205(d) of the Federal Power Act allows the Commission to waive the 60-day prior notice requirement for good cause shown. Duke cites to *Central Hudson*,²³ in which the Commission explained that it would “generally grant waiver of the 60-day prior notice requirement for filings that increase rates when the rate change and the effective date are prescribed by contract, such as annual rate revisions required by contract to become effective on a date specified in the contract....” Duke states that the customer has already contractually agreed to the January 1, 2009 effective date, because the formula rates provide for the use of Duke’s costs as booked, and those costs changed effective January 1, 2009, in part, due to the new depreciation rates.²⁴ Duke also argues that permitting the depreciation rates to take effect on January 1, 2009 is consistent with the purpose of the formula rates, i.e., to recover Duke’s costs.²⁵ Duke contends that granting waiver of the prior notice period is required in these circumstances when it implements the parties’ agreement and would be consistent with Commission policy.²⁶

Determination

17. Based on our review of Duke’s 2008 Study, we find that proposed depreciation rates are just and reasonable, and therefore, will approve their use for jurisdictional rate purposes, to become effective January 1, 2009.

²² Duke’s Answer at 3.

²³ *Id.* at 6 (citing *Central Hudson Gas and Elec. Corp.*, 60 FERC ¶ 61,106, at 61,338, *reh’g denied*, 61 FERC ¶ 61,089 (1992) (*Central Hudson*)).

²⁴ Duke’s Answer at 7.

²⁵ *Id.*

²⁶ *Id.* at 7 (citing, *e.g.*, *Consol. Edison Co.*, 68 FERC ¶ 61,230, at 62,090 (1994); *Texas Utilities Elec. Co.*, 79 FERC ¶ 61,092, at 61,427 (1997); and *Pub. Serv. Co. of Colorado*, 63 FERC ¶ 61,253, at 61,695 (1993)).

18. Under Order No. 618,²⁷ a utility is allowed to change its depreciation rates for accounting purposes without Commission approval. However, in order to change its rates for jurisdictional power sales or transmission services (whether determined by stated rates or formula rates) to reflect a change in depreciation, the utility must make a filing pursuant to section 205 of the FPA.²⁸ The 2008 Study uses the straight-line method of depreciation and the assets' estimated useful lives, and it is well-supported with plant additions and retirement data through 2008.²⁹ We conclude that the 2008 Study produces just and reasonable results. Further, because the depreciation expense recorded on Duke's books since January 1, 2009 reflects the 2008 Study's depreciation rates, we find no need to adjust such depreciation expense for jurisdictional rate purposes.

19. Duke requests waiver of the 60-day prior notice requirement to allow the proposed depreciation rates to become effective January 1, 2009. Citing *Prior Notice*, it argues that the Commission ordinarily finds good cause to waive the 60-day prior notice requirement if the effective date of a rate schedule change is prescribed by contract.³⁰ Consistent with *Central Hudson*,³¹ we will grant waiver of the prior notice requirement to allow the revised depreciation expenses to be included under the formula rate schedules, effective January 1, 2009. As noted by Duke, the Commission generally grants waiver of the 60-day prior notice requirement for good cause shown, e.g., for filings that increase rates when the rate change and the effective date are prescribed by contract in order to implement a contract requirement.³² In this case, the respective sales agreements require the use of the depreciation rates that Duke used for accounting purposes. The depreciation expense recorded on Duke's books since January 1, 2009 reflects the 2008 Study's depreciation rates. Because we find that the 2008 Study produces reasonable depreciation results for rate purposes beginning January 1, 2009, it is appropriate for

²⁷ See *Depreciation Accounting*, Order No. 618, FERC Stats. & Regs. ¶ 31,104 at n.25 (2000).

²⁸ *Id.*

²⁹ Order No. 618 explains that the straight-line method of depreciation and estimated useful lives is the predominant method used by utilities. However, other proposed methods of depreciation that allocate the cost of property in a systematic and rational manner to the periods that the property is used in utility operations can also be used and will be evaluated by the Commission on a case-by-case basis.

³⁰ Duke Transmittal Letter at 7 (citing *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (1993)).

³¹ 60 FERC ¶ 61,106 at 61,338, *reh'g denied*, 61 FERC ¶ 61,089.

³² *Id.*

Duke, consistent with its contractual commitment, to revise its formula rates to use the 2008 Study depreciation results as of January 1, 2009.

20. While we grant waiver for good cause shown, we note that Duke waited to file the depreciation rates study, which was completed on May 20, 2009, until September 17, 2009. Duke should have submitted the 2008 Study to us immediately upon its completion in May 2009. Duke's does not explain or attempt to justify its delay.

21. In addressing North Carolina EMC's concerns regarding the impact of Duke's proposed January 1, 2009 effective date upon 2008 PPA and Rate Schedule No. 273, we agree with North Carolina EMC that a January 1, 2009 effective date will yield different results for its two contracts with Duke. The 2008 PPA states that the charges are to be calculated in accordance with Schedule 1, which provides that "the Rates will be trued-up based on actual costs and loads for the most recent calendar year...the calculations will be based on Duke's FERC Form [No.] 1 data and Duke's company records."³³ Thus, FERC Form No. 1 data *available at that time* must be used to calculate depreciation rates. FERC Form No. 1 data is published prior to July 1, when the sales agreements designate that a true-up based on actual costs and loads for the most recent calendar year will begin, so the most recent FERC Form 1 will coincide with the calendar year of the true-up according to the terms of 2008 PPA and similar sales agreements. Thus, Duke must use the depreciation expense from the 2009 FERC Form No. 1 when calculating the final 2009 rates for the 2008 PPA.

22. However, the terms of Rate Schedule No. 273 provide that, "[b]y February 15... Duke shall compute the fees and charges actually due and payable for the preceding year in accordance with Exhibit IC-1...." According to Exhibit IC-I-6, the Depreciation Expense will be reported on "[p]age 429 of the FPC [Federal Power Commission, now FERC] Form 1." FERC Form No. 1 data is not published prior to February 15, therefore, Rate Schedule No. 273 provides for the use of FERC Form No. 1 data from the year prior to that of the calendar year that is being trued-up. North Carolina EMC correctly asserts that, when Duke calculates the true-up for actual amounts due for calendar year 2009 (which would be done by February 15, 2010), according to the terms of Rate Schedule No. 273, Duke must reflect in the final rates for 2009 the depreciation expense from the 2008 FERC Form No. 1; the most recent FERC Form No. 1 published as of that date.

³³ Rate Schedule No. 362, Schedule 1, Original Sheet No. 53 (Effective Jan. 1, 2009).

The Commission orders:

The proposed depreciation accrual rates are hereby accepted for rate purposes effective January 1, 2009, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.