

134 FERC 61,230
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

March 25, 2011

In Reply Refer To:
Duke Energy Ohio, Inc., Duke
Energy Fayette II, LLC, and Duke
Energy Hanging Rock II, LLC
Docket No. RP11-1791-000

Thompson Hine, LLP
1920 N St., NW
Suite 800
Washington, DC 20036-1600

Attention: Peter C. Lesch
Attorney for Petitioners

Reference: Temporary Waiver Request

Dear Mr. Lesch:

1. On February 22, 2011, Duke Energy Ohio, Inc. (DEO), Duke Energy Fayette II, LLC (Fayette II), and Duke Energy Hanging Rock II, LLC (Hanging Rock II) (collectively, the Petitioners) filed a request for temporary waiver of certain of the Commission's capacity release regulations and policies, in order to facilitate the prearranged permanent release of firm natural gas transportation agreements with Texas Eastern Transmission, LP (Texas Eastern) from DEO to Fayette II and Hanging Rock II (Petition). The Petitioners state this release of capacity would be an essential part of a transaction by which DEO would transfer its gas-fired assets to separate generating companies, which include Fayette II and Hanging Rock II. The Petitioners request the waiver become effective March 25, 2011, and continue for 90 days past the closing date of the transaction.¹ For the reasons discussed below, and for good cause shown, we grant the requested temporary, limited waiver.

¹ Petitioners state that they anticipate the closing date to be on or around April 1, 2011, and request that the Commission act by March 25, 2011.

2. The Petitioners state that pursuant to the subject transaction, DEO will transfer all of its gas-fired generation assets to separate affiliate companies, which include Fayette II and Hanging Rock II. As part of that acquisition, the Petitioners state, DEO will assign and permanently release to Fayette II and Hanging Rock II two firm interstate natural gas transportation agreements with Texas Eastern.² The Petitioners state that the transfer of these transportation agreements is necessary for the continued operation of the Fayette II and Hanging Rock II facilities.

3. In order to permit the transaction, the Petitioners seek temporary waiver of the Commission's capacity release rules set forth in section 284.8 of the Commission's regulations, as well as the prohibition on tying, the posting and bidding requirements for capacity release transactions, the shipper-must-have-title policy, the prohibition on buy-sell arrangements, and the restrictions on capacity releases below or above the maximum rate. The Petitioners state that the waiver would be temporary and would only be used for the limited purpose of consummating the referenced transaction. The Petitioners request that the waiver become effective March 25, 2011, and continue until 90 days past the transaction closing date in order to allow adequate time to consummate the transaction.

4. The Petitioners state that the Commission has previously granted temporary waivers of the capacity release regulations to permit parties to consummate complex transactions involving, for example, transfers of gas-fired electric generating plants and related natural gas transportation agreements, similar to the waiver they request here.³ They contend that the Commission has also stated that its policy is to permit broad

² The rates for service on these laterals are negotiated and filed under Texas Eastern's MLS-1 rate schedule. The Fayette-related contract has a capacity of 125,000 Dth/day and the Hanging Rock-related contract has a capacity of 250,000 Dth/day. These contracts still appear under the names of Fayette I and Hanging Rock I in the Texas Eastern tariff; however, the contracts were in fact assumed by DEO, with DEO acting as the customer, following the completion of a merger.

³ Petitioners cite, among others, *EnergyMark, LLC*; *Constellation NewEnergy – Gas Division, LLC*, 130 FERC ¶ 61,059 (2010) (*EnergyMark*); *Macquarie Cook Energy, LLC and Constellation Energy Commodities Group, Inc.*, 126 FERC ¶ 61,160 (2009) (*Macquarie*); and *Barclays Bank PLC and UBS AG*, 125 FERC ¶ 61,383 (2008) (*Barclays*).

waiver of its capacity release requirements so that the parties can consummate the transfer of an entire business unit.⁴

5. Public notice of the filing was issued on February 23, 2011. Interventions and protests were due on or before March 1, 2011. Pursuant to Rule 214,⁵ all timely filed motions to intervene and any unopposed motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

6. The Commission has reviewed the Petitioners' request for a temporary waiver and finds that the request is adequately supported and consistent with previous waivers that the Commission has granted under similar circumstances. Our actions here are consistent with those decisions where the Commission granted similar limited, temporary waivers in order to facilitate the transfer of interstate pipeline transportation capacity as part of various types of corporate restructurings, including corporate mergers and transfers of entire business units.⁶

7. Accordingly, for good cause shown, the Commission grants the Petitioners' request for a temporary waiver of the specified capacity release regulations, policies, and tariff provisions to allow the permanent release of the firm transportation service agreements with Texas Eastern from DEO to Fayette II and Hanging Rock II. Specifically, the Commission grants a limited, temporary waiver of section 284.8 of its regulations. The Commission also grants a limited, temporary waiver of the prohibition on tying, the posting and bidding requirements for capacity release transactions, the shipper-must-have-title policy, the prohibition on buy-sell arrangements, and the restrictions on capacity releases below or above the maximum rate, so that Petitioners can complete their transaction in an orderly and efficient manner within their time constraints.

⁴ *Request for Clarification of Policy Regarding Waivers of Applicable Requirements to Facilitate Integrated Transfers of Marketing Businesses*, 127 FERC ¶ 61,106, at P 8 (2009) (Notice Terminating Proceeding).

⁵ 18 C.F.R. § 385.214 (2010).

⁶ *E.g.*, *Conectiv Energy Supply, Inc.*, 132 FERC ¶ 61,247 (2010); *Macquarie*, 126 FERC ¶ 61,160; and *Barclays*, 125 FERC ¶ 61,383.

The Commission orders:

(A) The temporary, limited waivers requested by Applicants are granted from March 25, 2011, until 90 days following the closing of the Transaction, as discussed more fully above.

(B) Applicants will provide notice to the Commission in this docket of the closing of the Transaction.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.