

163 FERC ¶ 61,189
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Duke Energy Corporation

Docket No. IN15-6-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued June 8, 2018)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement), Duke Energy Corporation and Duke Energy Corporation's public utility operating subsidiaries (referred to collectively as "Duke" or "Duke Respondents"). This order is in the public interest because it resolves on fair and equitable terms Enforcement's investigation under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2017), into whether Duke Respondents failed to fully and accurately communicate information to the Commission relating to certain transmission studies submitted in support of their application for the merger of Duke and Progress Energy, Inc. (Progress Energy) in violation of 18 C.F.R. § 35.41(b) (2017).

2. Duke stipulates to the facts in Section II of the Agreement, but neither admits nor denies the alleged violations. Duke agrees to pay a civil penalty of \$3.5 million to the United States Treasury and to submit compliance monitoring reports for two years.

I. Factual and Procedural Background

A. Duke Respondents

3. Duke Energy Corporation, a Delaware corporation, is a public utility holding company headquartered in Charlotte, North Carolina. Together with its subsidiaries, Duke Energy Corporation is a diversified energy company with both regulated and unregulated utility operations.

4. Duke Energy Corporation's operating subsidiaries include two regulated utilities, Duke Energy Carolinas, LLC (DEC) and Duke Energy Progress, LLC (DEP), each of which operates in North Carolina and South Carolina.

5. DEC is a vertically-integrated electric utility that generates, transmits, distributes, and sells electricity to approximately 2.5 million customers within its franchised service territory in central and western North Carolina and western South Carolina, and is a wholly-owned subsidiary of Duke Energy Corporation.

6. DEP is a vertically-integrated electric utility and provides electricity to approximately 1.5 million customers in North Carolina and South Carolina, and is a wholly-owned subsidiary of Duke Energy Corporation. Its service territories include much of the eastern half of North Carolina, the northeastern quadrant of South Carolina, and the Asheville area in Western North Carolina. Prior to the 2012 merger, DEP was known as Progress Energy Carolinas (PEC).

7. Both DEC and PEC had market-based rate authority during the period relevant to the investigation and therefore constituted "Sellers" within the meaning of 18 C.F.R. § 35.41(b).

B. The Applicants' April 4, 2011 Merger Application and Subsequent Mitigation Filings

8. On April 4, 2011, Duke and Progress Energy (together with both companies' public utility operating subsidiaries, referred to collectively as the "Applicants") filed an application with the Commission requesting authorization for a merger between Duke and Progress Energy. The application addressed possible concerns about the competitive effects of the proposed merger in the Carolinas, in light of the proximity of DEC's and PEC's utility operations.

9. In a September 30, 2011 order, the Commission found that without adequate mitigation, the merger could result in adverse effects on competition in the DEC and the PEC-East balancing authority areas (BAAs). *Duke Energy Corp.*, 136 FERC ¶ 61,245 (2011) (Initial Merger Order). In an order issued December 14, 2011, the Commission rejected the Applicants' proposed virtual divestiture of generation and directed the Applicants to propose alternative mitigation that would address the competitive concerns identified in the Initial Merger Order. *Duke Energy Corp.*, 137 FERC ¶ 61,210, at PP 91-92 (2011) (Compliance Order).

C. The Applicants' March 26, 2012 Revised Compliance Filing and Proposed Permanent Transmission Mitigation

10. On March 26, 2012, the Applicants submitted a revised compliance filing in accordance with the December 2011 Compliance Order (Revised Compliance Filing). The Applicants proposed permanent mitigation in the form of seven transmission expansion projects, at a cost of approximately \$110 million, to address the concerns identified in the Commission's Initial Merger Order. The transmission expansion projects were designed to increase competitive supplies in the DEC and PEC-East BAAs.

11. In support of the Revised Compliance Filing, the Applicants presented a Delivered Price Test (DPT) that studied the effects of the revised mitigation proposal on market concentration in the Carolina markets. As inputs to the DPT, personnel in the DEC and PEC transmission planning departments performed transmission studies to determine the impacts of the transmission expansion projects.

12. The Applicants' transmission studies included two sets of calculations. First, the Applicants calculated the Simultaneous Transmission Import Limit (SIL). SIL studies calculate the aggregated, simultaneous transfer capability into the BAA being studied from each of the adjacent first-tier control areas. The DPT analysis uses the SIL as the basis for establishing the amount of power that can be imported into the relevant geographic market. Second, the Applicants calculated the Available Transfer Capability (ATC) impacts of the transmission expansion projects over specific interfaces with the DEC and PEC-East BAAs.

13. On April 10, 2012, the Office of Energy Market Regulation (OEMR) issued a deficiency letter directing the Applicants to submit additional information about the SIL studies. The Applicants filed their response to this deficiency letter on April 13, 2012. Subsequently, the Commission issued an order on June 8, 2012, accepting the Applicants' mitigation proposal and granting authorization for the merger. *Duke Energy Corp.*, 139 FERC ¶ 61,194, at P 1 (2012).

D. The Investigation

14. Shortly after the Commission issued the final merger approval, Duke's management retained outside counsel and requested that counsel conduct a review of the Revised Compliance Filing in order to confirm the accuracy of the data and analyses submitted with that filing. This request was made after Duke's management learned of an anonymous letter submitted to the Commission in June 2012 after the Commission

issued its order accepting the mitigation proposal; the letter claimed that the Revised Compliance Filing contained erroneous and intentionally misleading data.

15. Duke's review identified two assumptions used in the calculation of ATC from the DEC to PEC-East BAAs that were open to question and which, depending on the methodology used in performing the DPT study, could affect the results of the permanent transmission mitigation proposed by the Applicants. *See Duke Energy Corp.*, 149 FERC ¶ 61,078, at PP 65-66 (2014) (Order Denying Rehearing). Specifically, PEC had modeled two phase shifters on its system as operational in the SIL calculation, but non-operational in the ATC calculation, which made the Applicants' share of the PEC-East market in the DPT analysis lower than it would have been if the phase shifters had been modeled as operational in the ATC calculation. The second assumption also related to ATC. PEC had used a transmission line in DEC's BAA as the limiting line for certain ATC calculations, rather than an internal PEC transmission line.

16. Duke presented the results of its review to Commission staff, and, in a subsequent December 6, 2013 supplemental compliance filing, explained the two questionable assumptions identified in the independent review and offered additional mitigation in the event the Commission concluded that such mitigation was warranted to remedy the previously identified market screen failure. *See Order Denying Rehearing* at PP 7, 67, 76. In its October 29, 2014 Order Denying Rehearing, the Commission accepted Duke's proposal for additional mitigation and referred the matter of Duke's treatment of the repair of certain phase shifters in the Revised Compliance Filing to Enforcement for further examination. *Id.* at PP 76-78.

17. Enforcement initiated this investigation in December 2014 following the referral from the Commission.

18. During the investigation, Duke determined and advised Enforcement that a PEC staff engineer made a programming error affecting one of the ATC calculations submitted with the Revised Compliance Filing. Specifically, the engineer made an error in the sequence in which he applied the algorithms used to model generation dispatch and transmission reliability margin, which affected the ATC calculation for the Duke to PEC-East interface.

II. Violations

19. After completing its fact-finding, Enforcement concluded that the Applicants violated 18 C.F.R. § 35.41(b) by failing to fully and accurately describe to the

Commission the condition of the phase shifters and their modeling in PEC's transmission studies.

20. Enforcement further concluded that the Applicants violated 18 C.F.R. § 35.41(b) by failing to fully and accurately describe the methodology for calculating ATC at the Duke to PEC-East interface.

III. Stipulation and Consent Agreement

21. Enforcement and Duke resolved this matter by means of the attached Agreement.

22. Duke stipulates to the facts in Section II of the Agreement, but neither admits nor denies that those facts establish violations of the Commission's rules, regulations, or policies.

23. Duke agrees to pay a civil penalty of \$3.5 million to the United States Treasury.

24. Duke agrees to submit annual compliance monitoring reports for two years in accordance with the terms of the Agreement.

IV. Determination of Appropriate Sanctions and Remedies

25. In recommending the appropriate remedy, Enforcement considered the factors in the Revised Policy Statement on Penalty Guidelines.¹

26. The Commission concludes that the Agreement is a fair and equitable resolution of the matters concerned and is in the public interest, as it reflects the nature and seriousness of the conduct and recognizes the specific considerations stated above and in the Agreement.

27. The Commission directs Duke to make the civil penalty payment required by the Agreement within twenty days of the Effective Date of the Agreement.

¹ *Enforcement of Statutes, Orders, Rules and Regulations*, 132 FERC ¶ 61,216 (2010).

The Commission orders:

The attached Stipulation and Consent Agreement is hereby approved without modification.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Duke Energy Corporation

Docket No. IN15-6-000

STIPULATION AND CONSENT AGREEMENT

I. Introduction

1. The Office of Enforcement (Enforcement) of the Federal Energy Regulatory Commission (Commission), Duke Energy Corporation, and Duke Energy Corporation's public utility operating subsidiaries (referred to collectively with Duke Energy Corporation as "Duke" or "the Duke Respondents") enter into this Stipulation and Consent Agreement (Agreement) to resolve a non-public investigation conducted by Enforcement pursuant to Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2017). The investigation addressed whether the Duke Respondents failed to fully and accurately communicate information to the Commission relating to certain transmission studies submitted in support of their application for the merger of Duke and Progress Energy, Inc. (Progress Energy), in violation of 18 C.F.R. § 35.41(b).

2. Duke stipulates to the facts in Section II of this Agreement, but neither admits nor denies the alleged violations. It agrees to pay a civil penalty of \$3.5 million to the United States Treasury and to submit compliance monitoring reports for two years.

II. Stipulations

Enforcement and the Duke Respondents hereby stipulate and agree to the following facts:

3. Duke Energy Corporation, a Delaware corporation, is a public utility holding company headquartered in Charlotte, North Carolina. Together with its subsidiaries, Duke Energy Corporation is a diversified energy company with both regulated and unregulated utility operations. Duke Energy Corporation's operating subsidiaries include Duke Energy Carolinas (DEC), a vertically-integrated electric utility that generates, transmits, distributes, and sells electricity to approximately 2.5 million customers within its franchised service territory in central and western North Carolina and western South Carolina, and Duke Energy Progress (DEP), formerly known as Progress Energy Carolinas (PEC), a vertically-integrated electric utility that provides electricity to approximately 1.5 million customers within its franchised service territory in North Carolina and South Carolina.

4. Both DEC and PEC had market-based rate authority during the period relevant to the investigation and therefore constituted “Sellers” within the meaning of 18 C.F.R. § 35.41(b).
5. On April 4, 2011, Duke Energy Corporation, Progress Energy, and both companies’ public utility operating subsidiaries (together, the Applicants) filed an Application with the Commission requesting authorization for a merger between Duke and Progress Energy.
6. Following the Commission’s issuance of an order on December 14, 2011, rejecting the Applicants’ virtual mitigation proposal, *Duke Energy Corporation*, 137 FERC ¶ 61,210 (2011), the Applicants submitted a March 26, 2012 Revised Compliance Filing that proposed permanent mitigation in the form of seven transmission expansion projects, at a cost of approximately \$110 million, to address the competition concerns identified in the Commission’s September 2011 Merger Order, *Duke Energy Corp.*, 136 FERC ¶ 61,245 (2011).
7. In support of the revised mitigation proposal, the Applicants submitted a Delivered Price Test (DPT) that studied the effects of the revised mitigation proposal on market concentration in the Carolina markets. As inputs to the DPT, personnel in the DEC and PEC transmission planning departments performed transmission studies to determine the impacts of the transmission expansion projects.
8. The Applicants’ transmission studies included two sets of calculations: First, the Applicants calculated the Simultaneous Transmission Import Limit (SIL), which is the aggregated, simultaneous transfer capability into the balancing authority area (BAA) being studied from each of the adjacent, first-tier control areas. Second, the Applicants calculated the Available Transfer Capability (ATC) impacts of the transmission expansion projects over specific interfaces with the DEC and PEC BAAs.
9. Following the Applicants’ April 13, 2012 submission of their response to a deficiency letter issued by the Office of Energy Market Regulation, the Commission issued an order on June 8, 2012, accepting the Applicants’ mitigation proposal and granting authorization for the merger. *Duke Energy Corp.*, 139 FERC ¶ 61,194, at P 1 (2012).
10. Shortly after the Commission issued the final merger approval, an anonymous letter was submitted to the Commission in June 2012. The letter claimed that the Revised Compliance Filing contained “three pieces” of “erroneous” data that were “intended to mislead.” After learning of the anonymous letter, Duke’s management retained outside

counsel to conduct an independent review of the Revised Compliance Filing in order to confirm the accuracy of the data and analyses submitted with that filing.

11. Duke's independent review identified two assumptions used in the calculation of ATC from the DEC to PEC-East BAAs that were open to question and which, depending on the methodology used in performing the DPT study, could affect the results of the permanent transmission mitigation proposed by the Applicants. *See Duke Energy Corp.*, 149 FERC ¶ 61,078, at PP 65-66 (2014) (Order Denying Rehearing). The first assumption related to two phase shifters on PEC's system. PEC modeled the phase shifters as operational in the SIL calculation, but non-operational in the ATC calculation, which made the Applicants' share of the PEC-East market in the DPT analysis lower than it would have been if the phase shifters had been modeled as operational in the ATC calculation. The phase shifters had been taken out of service in 2008, when one of them was damaged. Duke had implemented plans to repair the phase shifters and restore them to service, but did not identify those plans as part of its mitigation proposal. The second assumption also related to ATC. PEC had used a transmission line in DEC's BAA as the limiting line for certain ATC calculations, rather than an internal PEC transmission line.

12. Duke presented the results of its independent review to Commission staff, and, in a subsequent December 6, 2013 Supplemental Compliance Filing, explained the two questionable assumptions identified in the independent review and offered additional mitigation in the event the Commission concluded that such mitigation was warranted to remedy the previously identified market screen failure. The Commission accepted Duke's offer of additional mitigation and referred the matter of Duke's treatment of the repair of certain phase shifters in its mitigation proposal to Enforcement for further examination. *See Order Denying Rehearing at PP 7, 65-67, 76-78.*

13. Enforcement initiated this investigation in December 2014 following the referral from the Commission.

14. During the investigation, Duke determined and advised Enforcement that a PEC staff engineer made a programming error affecting one of the ATC calculations submitted with the Revised Compliance Filing. Specifically, the engineer made an error in the sequence in which he applied the algorithms used to model generation dispatch and transmission reliability margin, which affected the ATC calculation for the Duke to PEC-East interface.

III. Violations

15. Enforcement concluded that the Applicants violated 18 C.F.R. § 35.41(b) by failing to fully and accurately describe to the Commission the condition of the phase shifters and their modeling in PEC's transmission studies.

16. Enforcement further concluded that the Applicants violated 18 C.F.R. § 35.41(b) by failing to fully and accurately describe the methodology used to calculate ATC at the Duke to PEC-East interface.

IV. Remedies and Sanctions

17. For purposes of settling any and all claims, civil and administrative disputes and proceedings arising from or related to the conduct evaluated in Enforcement's investigation, Duke agrees with the facts as stipulated in Section II of this Agreement, but it neither admits nor denies the violations described in Section III of this Agreement.

A. Civil Penalty

18. Duke agrees to pay a civil penalty of \$3.5 million to the United States Treasury, by wire transfer, within twenty days after the Effective Date of this Agreement, as defined herein. Duke shall promptly notify the Director of the Office of Enforcement by e-mail when it has made the penalty payment.

B. Compliance

19. For two years following the Effective Date of this Agreement, Duke shall submit annual reports to Enforcement concerning its compliance with the laws and regulations administered by the Commission. Duke will file its first annual report on January 31, 2019; the first report will cover the period from the Effective Date of this Agreement until December 31, 2018. Duke will file its second annual report on January 31, 2020, covering the period from January 1, 2019, to December 31, 2019.

20. Each compliance report shall (1) identify any known violations of Commission regulations in any of Duke's filings with the Commission that occurred during the reporting period, including a description of the nature of the violation and what steps were taken to correct it and prevent a recurrence; (2) describe all policies and procedures related to compliance with Commission regulations that Duke newly instituted or materially modified during the reporting period; and (3) describe all Commission-related compliance training that Duke delivered during the reporting period, including the dates

the training occurred, the topics covered, and the procedures used to confirm which personnel attended.

21. Each compliance report shall include an affidavit executed by an officer of Duke attesting that the report is true and accurate to the best of his or her knowledge.

22. On request by Enforcement, Duke shall provide to Enforcement documentation to support the contents of its compliance reports.

V. Terms

23. The “Effective Date” of this Agreement shall be the date on which the Commission issues an order approving this Agreement without material modification. When effective, this Agreement shall resolve the matters specifically addressed herein, and that arose on or before the Effective Date, as to Duke or any affiliated entity.

24. Commission approval of this Agreement without material modification shall release Duke and forever bar the Commission from holding Duke, any affiliated entity, and any successor in interest liable for any and all administrative or civil claims arising out of the conduct addressed and stipulated to in this Agreement and that occurred on or before the Agreement’s effective date. Failure by Duke to (a) make timely payment of the civil penalty agreed to herein, or (b) comply with the compliance obligations specified herein or any other provision of this Agreement shall be deemed a violation of a final order of the Commission issued pursuant to the Federal Power Act (FPA), 16 U.S.C. § 792, et seq., and may subject Duke to additional action under the enforcement provisions of the FPA.

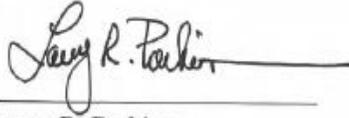
25. Duke shall not seek to, and take no action to, pass through to ratepayers or customers any part of the civil penalty made under this Agreement.

26. If Duke does not make the required civil penalty payment described above at the time agreed by the parties, interest will begin to accrue pursuant to the Commission’s regulations at 18 C.F.R. § 35.19a (2017) from the date that payment is due, in addition to the penalty specified above and any other enforcement action and penalty that the Commission may take or impose.

27. The Agreement binds Duke and its agents, successors, and assignees. The Agreement does not create any additional or independent obligations on Duke, or any affiliated entity, its agents, officers, directors, or employees, other than the obligations identified in this Agreement.

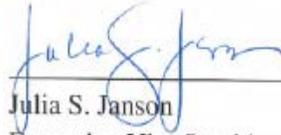
28. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer or promise of any kind by any member, employee, officer, director, agent or representative of Enforcement or Duke has been made to induce the signatories or any other party to enter into the Agreement.
29. Unless the Commission issues an order approving the Agreement in its entirety and without material modification, the Agreement shall be null and void and of no effect whatsoever, and neither Enforcement nor Duke shall be bound by any provision or term of the Agreement, unless otherwise agreed to in writing by Enforcement and Duke.
30. In connection with the civil penalty provided for herein, Duke agrees that the Commission's order approving the Agreement without material modification shall be a final and unappealable order assessing a civil penalty under the FPA, 16 U.S.C. § 792, et seq., as amended. Duke waives findings of fact and conclusions of law, rehearing of any Commission order approving the Agreement without material modification, and judicial review by any court of any Commission order approving the Agreement without material modification.
31. This Agreement can be modified only if in writing and signed by Enforcement and Duke, and any modifications will not be effective unless approved by the Commission.
32. Each of the undersigned warrants that he or she is an authorized representative of the entity designated, is authorized to bind such entity, and accepts the Agreement on the entity's behalf.
33. The undersigned representative of Duke affirms that he or she has read the Agreement, that all of the matters set forth in the Agreement are true and correct to the best of his or her knowledge, information and belief, and that he or she understands that the Agreement is entered into by Enforcement in express reliance on those representations.
34. This Agreement is executed in duplicate, each of which so executed shall be deemed to be an original.

Agreed to and accepted:



Larry R. Parkinson
Director, Office of Enforcement
Federal Energy Regulatory Commission

Date: 5-24-18



Julia S. Janson
Executive Vice President, External
Affairs, Chief Legal Officer & Corporate
Secretary, Duke Energy Corporation

Date: 5.23.18