

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Duke Power

Docket No. ER05-1236-000

ORDER ACCEPTING INDEPENDENT ENTITY
AND TRANSMISSION MONITORING PLAN

(Issued December 19, 2005)

1. On July 22, 2005, Duke Power (Duke), a division of Duke Energy Corporation, submitted under section 205 of the Federal Power Act (FPA)¹ proposed revisions to its Open Access Transmission Tariff (OATT) to assign to a third party, referred to as an Independent Entity, the responsibility for performing certain OATT-related functions on Duke's transmission system.² Duke also requests that the Commission approve a transmission monitoring plan related to the OATT amendments. It submits agreements retaining Midwest Independent Transmission System Operator, Inc. (Midwest ISO) as the Independent Entity, and Potomac Economics, Ltd. (Potomac Economics) as the Independent Monitor under the transmission monitoring plan. We find that Duke's Independent Entity proposal is an improvement over the transmission service and transmission decision-making currently offered under Duke's OATT and is thus "consistent with or superior to" the *pro forma* OATT. The Commission accepts, without condition, Duke's Independent Entity proposal, transmission monitoring plan, and the agreements between Duke and the Independent Entity and Independent Monitor, which were all part of the same filing, to be effective on November 1, 2006, as requested.

¹ 16 U.S.C. § 824d (2000).

² Duke Energy Corporation's FERC Electric Tariff, Third Revised Volume No. 4, Original Sheet Nos. 330-358 (Attachment K).

Background

2. Duke states that the primary aim of its proposal is to increase confidence in the independence and transparency of the operation of its transmission system. Under its proposal, Duke will remain the owner and operator of its transmission system and will continue to have ultimate responsibility to provide transmission service, including the sole authority to amend its OATT under section 205 of the FPA.

3. The Independent Entity would be responsible for a number of core transmission functions listed in proposed Attachment K to the Duke OATT. These functions include: (1) evaluation and approval of all transmission service requests; (2) calculation of Total Transfer Capacity (TTC) and Available Transfer Capability (ATC); (3) operation and administration of Duke's Open Access Same Time Information System (OASIS); (4) evaluation, processing, and approving of all generation interconnection requests and performance of related interconnection studies; and (5) coordination of transmission planning. Duke contends that each of the functions that will be assigned to the Independent Entity includes, or exceeds, the level of responsibility that the Commission has held will facilitate competition through independent administration of transmission.³

4. In addition, Duke will retain a third party, Potomac Economics, to act as an autonomous monitor of its transmission system. The Independent Monitor will regularly perform a number of screens and other analyses related to the transmission system, *e.g.*, it will examine the dispatch of Duke's system, ATC use on the system, transmission line loading relief events, redispatch, outages, and deratings, and will assess Duke's cooperation in providing information to the Independent Entity. The Independent Monitor will also have the authority to conduct investigations into potentially anticompetitive behavior and will submit quarterly reports summarizing its analyses to the Commission and Duke's state commissions. Duke estimates that it will be able to institute the Independent Entity and Independent Monitor for approximately \$3 million to \$4 million per year.⁴

³ 110 FERC ¶ 61,295 (2005) (*Entergy*).

⁴ We note that Duke's initial Independent Entity proposal, which it submitted to stakeholders in April 2005, would have made the Independent Entity the reliability coordinator for the Duke control area, at an estimated cost of \$10 million to \$20 million dollars per year. After considering input from its stakeholders, Duke scaled its proposal back to exclude the reliability function, thereby reducing the estimated cost to \$3 million to \$4 million dollars per year.

5. Duke proposed to establish the Independent Entity for an initial two-year period, to continue thereafter unless Duke made and the Commission approved a filing to amend or withdraw Attachment K. The Independent Entity agreement also provides that under certain circumstances,⁵ Duke may terminate the agreement before completion of the initial term, and allows for termination if Duke withdraws Attachment K because of legislative or regulatory actions.

Notice and Responsive Pleadings

6. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 44,350 (2005), with comments, protests and interventions due on or before August 12, 2005. The Commission granted a notice of extension of time for comments until August 31, 2005.

7. Motions to intervene were filed by the American Public Power Association Midwest Stand-Alone Transmission Companies, North Carolina Utilities Commission, Southeastern Power Administration, Dynegy Power Marketing, Inc. and Rockingham Power, L.L.C., and South Carolina Electric & Gas Company. FirstEnergy Service Company (FirstEnergy) filed a motion to intervene out-of-time on September 1, 2005.

8. Motions to intervene and comments were filed by Alcoa Power Generating Inc. (Alcoa), Carolina Utility Customers Association, Inc. (Carolina Customers), ConocoPhillips Company (Conoco), Electric Power Supply Association (EPSA), Morgan Stanley Capital Group Inc. (Morgan Stanley), North Carolina Municipal Power Agency Number 1 and Piedmont Municipal Power Agency (Power Agencies), Midwest ISO, and Public Staff-North Carolina Utilities Commission and the Attorney General of the State of North Carolina (North Carolina Consumer Agencies).

9. Calpine Corporation (Calpine) filed comments. Entergy Services, Inc. (Entergy) filed a motion to intervene out-of-time and comments on September 21, 2005, and North Carolina Electric Membership Corporation (NCEMC) filed a motion to intervene and protest.

⁵ These circumstances include, for example, the following: (i) mutually-agreed termination between Duke and the Independent Entity; (ii) termination due to certain regulatory or legislative actions; and (iii) termination for cause such as the Midwest ISO no longer being independent, violation of confidentiality obligations, or a pattern of failure to comply with required standards of performance. Independent Entity Agreement, sections 4.3-4.6.

10. Duke filed a response to the comments and protests on September 15, 2005. Midwest ISO filed an answer to the comments of Morgan Stanley on September 15, 2005. Potomac Economics filed an answer on September 22, 2005. Morgan Stanley filed an answer to Midwest ISO on October 13, 2005.

Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will also accept the motions to intervene out-of-time. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.213(a)(2) (2005), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. However, we will accept the answers filed by Duke, Midwest ISO, Morgan Stanley, and Potomac Economics and Entergy's comments because they have provided us with information that has assisted us in our decision-making process.

Discussion

13. As discussed below, the comments generally address: (1) the appropriate standard of review for the Independent Entity proposal; (2) independence of the Independent Entity; (3) enhancements or expansions of the Independent Entity proposal; (4) whether the costs of implementing the Independent Entity proposal are justified by the resulting benefits; and (5) suggestions regarding the Independent Monitor.

14. Before addressing these comments, we note that there are significant differences between Duke's Independent Entity proposal and the proposal by Entergy to establish an Independent Coordinator of Transmission (ICT), which we addressed in *Entergy*. In particular, as part of its ICT proposal, Entergy sought a determination by the Commission that the ICT is sufficiently independent to qualify for the "independent entity variation" standard under Order No. 2003.⁶ In that filing, Entergy identified the creation of an ICT

⁶ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (2004), FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (2005), FERC Stats. & Regs. ¶ 31,171 (2005), *order on reh'g*, Order No. 2003-C, 70 Fed. Reg. 37,661 (2005), FERC Stats. & Regs. ¶ 31,190 (2005).

as a justification of its transmission pricing proposal, which sets forth a new process and standard for assigning cost responsibility for transmission upgrades. Thus, in *Entergy*, Entergy requested that the Commission issue a declaratory order finding that its ICT proposal is consistent with the Commission's transmission pricing policy, including this independence requirement.⁷ The Commission determined that there were certain enhancements and modifications that were needed to support the transmission pricing sought by Entergy to ensure that, among other things, the ICT was sufficiently independent to satisfy the Commission's standards.

15. By contrast, in its Independent Entity proposal, Duke is not seeking a determination that the Independent Entity satisfies the Commission's "independent entity variation" standard to implement a transmission pricing proposal or special rate treatment; in fact, Duke does not seek at this time any changes to its existing transmission rates. Accordingly, the question of whether the Independent Entity is in fact "independent" within the meaning of Order Nos. 2000⁸ or 2003 is not before the Commission, and we will not address this issue at this time. Thus, while we will refer to the third party to which Duke proposes to transfer the responsibility for performing certain core transmission functions as the Independent Entity (because Duke has chosen to designate it as such), we emphasize that we are not herein finding that the Independent Entity meets the RTO independence standard or the independent entity variation standards under Order Nos. 2000 and 2003, nor is this designation meant to prejudge the outcome of any future proceedings in which the question of its independence may be at issue.

1. Standard of Review

a. Comments and Protests

16. NCEMC states that the Commission should review whether Duke's proposal satisfies the standards in Order No. 2000 for the independence of governance, regional

⁷ In particular, Entergy stated that the ICT would be subject to the same structural independence requirements imposed on regional transmission organizations (RTOs) and independent market monitors. Entergy, Petition for Declaratory Order at 1, 12 (Docket No. EL05-52-000, Jan. 3, 2005).

⁸ *Regional Transmission Organizations*, FERC Stats. & Regs. ¶ 31,089 at 30,993 (1999), 65 Fed. Reg. 810 (2000) (Order No. 2000), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 30,092, 65 Fed. Reg. 12,088 (2000), *aff'd*, *Public Utility District No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

scope, regional planning and single tariff function requirements. First, NCEMC claims that Duke's proposal does not satisfy the independence requirement because it does not ensure financial independence of the Independent Entity from Duke, its affiliates, and market participants in Duke's markets; it does not contain the type of bans on financial instruments and ownership control required under Order No. 2000; and it fails to set forth a clearly defined protocol for balanced representation and voting among different types of stakeholders in the process or how that representation and votes would affect the Independent Entity's decision-making process. Second, NCEMC asserts that the Duke Independent Entity does not have sufficient geographic reach because it covers just two states; does not address regional operations, planning or expansion needs; and does not comply with the Order No. 2000 requirement to ensure a single regional plan across the Independent Entity footprint. Third, NCEMC states that, although the Duke Independent Entity proposal provides for a single tariff, it is only for Duke's system and achieves no incremental benefits because most tariff functions and terms and conditions remain under the control of Duke. Additionally, NCEMC says that because the Duke Independent Entity is limited in geographic scope and the tariff does not encompass the coordination of several transmission systems, there is no elimination of rate pancaking.

b. Duke's Response

17. Duke responds that it is proposing an OATT amendment, rather than the establishment of an RTO, and thus that the standards of Order No. 2000 do not apply. According to Duke, the standard of review, established by a long line of Commission precedent, is whether these OATT amendments are "consistent with or superior to" the Order No. 888⁹ *pro forma* OATT. Duke states that its Independent Entity proposal satisfies this standard, as the benefits of independence and transparency exceed those provided by the *pro forma* OATT. For the same reasons, NCEMC's argument that the Independent Entity should have Order No. 2000-like section 205 filing rights is

⁹ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles, January 1991 – June 1996 ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg., 12,274 (March 4, 1997), FERC Stats. & Regs., Regulations Preambles, July 1996-December 2001 ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group, et al. v. FERC*, 225 F.3d 667 (D.C. Cir. 2002), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

misplaced because Duke has not proposed to create a new transmission provider that needs authority to propose revisions to its own OATT.

c. Commission Determination

18. We agree with Duke that the applicable standard of review is Order No. 888, not Order No. 2000, as NCEMC contends. The Order No. 2000 standards are specifically designed to address RTO proposals. NCEMC's concerns regarding financial independence; appropriate and balanced representation; single regional planning for transmission; and incremental benefits that theoretically would accrue if Duke gave up control of its transmission system (e.g., the elimination of rate pancaking) relate to RTO-like standards and requirements. Duke has not proposed to establish an RTO, and therefore the Order No. 888 standard, rather than that of Order No. 2000, applies to its Independent Entity proposal. Order No. 888 allows a utility the flexibility to propose to modify non-rate terms and conditions of the *pro forma* tariff if it can demonstrate that such terms are consistent with, or superior to, those in the *pro forma* OATT. While utilities are free to file revisions to their *pro forma* OATT, any such filing will be carefully reviewed by the Commission to assure that the revised tariffs and service agreements are just and reasonable and consistent with the principles of Order No. 888.¹⁰ We find that Duke's Independent Entity proposal is an improvement over the existing transmission services and transmission decision-making offered under Duke's OATT and thus meets our "consistent with or superior to" standard under Order No. 888.

2. Independent Entity Independence

a. Comments and Protests

19. EPSA states that, while the optimum approach is for transmission owners to join an RTO that is approved under Order No. 2000, it supports the creation of entities that are truly independent from the vertically-integrated transmission utilities that retain them. This means the Commission should review the independence of the Independent Entity from the transmission owner and without regard to the proposed Independent Entity's independence in another region with other transmission owners. EPSA states that the Duke Independent Entity proposal is a significant step in the right direction, and offers provisions that improve on the initial proposal addressed in *Entergy*. Midwest ISO states that it supports Duke's Independent Entity proposal. It also states that its status as the Independent Entity will not interfere with its existing responsibilities or operations.

¹⁰ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,309.

20. Carolina Customers argue that Duke's Independent Entity proposal should be rejected outright because Duke has not provided sufficient data to justify its proposal or explained how it would provide material benefits to wholesale customers. They also contend that the Independent Entity would not be truly independent, since both the Independent Entity and Independent Monitor were selected by Duke alone and Duke exerts control over the funding of the Independent Entity. According to Carolina Customers, the Independent Entity must be selected, overseen, and terminated by a board or other group elected by market participants.

21. Power Agencies assert that, to preserve Independent Entity independence, the Independent Entity should be precluded from sub-delegating any aspect of its assigned functions (including System Impact Studies) back to Duke, or to other commercially-interested market participants. Power Agencies also seek clarification as to whether the Independent Entity's authority to process transmission service requests includes Duke's designation of network resources by its regulated generation function to serve Duke's native load. Lastly, Power Agencies assert that the Independent Entity and Independent Monitor annual budgets should be submitted to the Commission with the opportunity for interested parties to comment and request Commission resolution of any budget issues.

b. Duke's Response

22. Duke contends that its Independent Entity is fully independent. According to Duke, Attachment K provides the Independent Entity with full responsibility for operating Duke's OASIS and administering its OATT, codifies that Duke and the Independent Entity cannot share financial interests or be otherwise affiliated, requires the Independent Entity to have access to the data it needs to perform its functions, and subjects the Independent Entity's employees to the Commission's Standards of Conduct¹¹ as though they were transmission employees of Duke.

c. Commission Determination

23. The Commission finds that the Independent Entity will provide increased transparency and will give market participants increased confidence that they can receive transmission service on a comparable basis to that received by Duke, and is consistent with or superior to the *pro forma* OATT. However, for these benefits in terms of transparency and increased confidence to be realized, market participants and the Commission must be able to ascertain whether the Independent Entity is actually performing the tasks assigned to it. While we do not believe it is necessary to limit the

¹¹ 18 C.F.R. Pt. 358 (2005).

Independent Entity's ability to sub-delegate certain tasks to Duke, we will require the Independent Entity (which is responsible for administration of Duke's OASIS) to immediately post on Duke's OASIS site each instance in which the Independent Entity sub-delegates to Duke any of the tasks or functions assigned to the Independent Entity in the Independent Entity Agreement. We also remind Duke that it cannot undertake any sub-delegations of authority from the Independent Entity that are unduly preferential. Any party that believes preferential treatment was given to Duke by the Independent Entity in its sub-delegation of any of its duties can file a complaint with this Commission under section 206. Accordingly, Duke is directed to file within 60 days of the date of this order a compliance filing amending Attachment K of its OATT and the Independent Entity Agreement to require such a posting on its OASIS site.

24. Commenters' concerns about independence are misplaced. As discussed above, Duke need only show that its Independent Entity proposal is consistent with or superior to the *pro forma* OATT in Order No. 888, not that it satisfies the criteria found in Order No. 2000 or that it will perform any of the functions of an RTO. We also find that commenters' concerns are without merit, given: (i) the fact that the Independent Monitor has the authority to independently investigate any potential anticompetitive behavior; and (ii) the fact that the Independent Monitor will submit a summary of its analyses to this Commission and to Duke's state commissions each quarter. Accordingly, we will not require Duke to modify its proposal to permit greater market participant oversight of the selection of the Independent Entity or to require that the annual budgets for the Independent Entity and Independent Monitor be submitted to the Commission for public comment.

25. We will reject Power Agencies' request for clarification as to whether the Independent Entity's authority to process transmission requests includes Duke's network resources that are used to serve its native load. Duke states in its proposal that the Independent Entity will process all requests for transmission service. Under the terms of its OATT, all network transmission service is included, and we interpret that to include network transmission service for Duke's native load. Accordingly, we find that there is no need for further clarification of this provision.

3. Proposed Expansions of the Independent Entity proposal

a. Comments

26. Several commenters argue that Duke should improve its Independent Entity proposal in various ways. For example, Morgan Stanley proposes that the Independent Entity establish an executable price index at which counterparties can buy and sell physical quantities of energy and engage in financial transactions and that the Independent Entity should be responsible for pricing transmission on a firm and non-firm

basis. NCEMC argues that the Independent Entity should address regional operations, planning or expansion needs. Power Agencies believe the Independent Entity should establish an “into Duke” electricity trading hub, publish prices for products traded at the new hub, participate in mediated discussions to expand the Independent Entity’s role to cover a broader Southeastern trading area, have the Independent Entity and Independent Monitor prepare regular reports to the Commission related to the new hub, and negotiate reciprocity pricing arrangements with other transmission-owning utilities in the region, and to eliminate rate pancaking. Calpine submits the following recommendations: that Duke should develop a single, unified, non-pancaked OATT to govern transmission service on Duke’s system; that Duke commit to negotiate the de-pancaking of transmission between Duke and the other jurisdictional utilities in North Carolina and South Carolina; that the Independent Entity’s transmission planning role be enhanced; that the Independent Entity be given the responsibility for assessing congestion and re-dispatch options, including costs and benefits in real time; and that the Independent Entity administer and seek to improve the functional element of the OASIS, including ATC posting for day-ahead markets, standardize calculated ATC values, study of transmission service reservations for day-ahead markets and standardize transmission loading relief posting requirements.

27. NCEMC further alleges that Duke’s Independent Entity proposal fails to comply with the minimum requirements for an independent coordinator of transmission set forth in *Entergy*, including responsibility for developing transmission planning and the transmission base plan, clear authority to review and revise the methodology for calculating ATC, congestion management, an automatic two-year sunset, and the authority to investigate rate de-pancaking.

28. North Carolina Consumer Agencies, on the other hand, urge the Commission to reject requests to expand the Independent Entity proposal. They are concerned that the proposed expansions would require fundamental changes to the industry structure and regulatory authority in North Carolina. They further contend that the preservation of state jurisdiction is an essential element of Duke’s proposal and that the Commission should treat the Independent Entity as a non-jurisdictional independent contractor, rather than as a public utility under the FPA for that reason.

b. Duke’s Response

29. Duke states that most of the comments regarding expansions of the Independent Entity proposal are beyond the scope of this proceeding. According to Duke, arguments for expansion of its Independent Entity proposal are simply arguments that the Independent Entity must be “more superior” or “more just and reasonable” and are thus inconsistent with the standard adopted in Order No. 888 and applied in *Entergy*. Duke further asserts that, since the Commission has announced its intent to revisit aspects of

Order No. 888 and the *pro forma* OATT, it would be inappropriate to address the comprehensive changes to Duke's OATT and to the design and administration of its OASIS in this proceeding. With regard to the suggestions of NCEMC and Power Agencies that the Commission require other transmission providers in the region to join the Independent Entity or to enlarge the Independent Entity's footprint, Duke states that it is not opposed to other entities joining.

30. With respect to NCEMC's protest, Duke argues that the Commission never said in *Entergy* that all Independent Entity proposals must be the same, or even that every Independent Entity must prepare a transmission base plan. Duke disagrees with NCEMC that its Independent Entity proposal should be subject to all of the requirements imposed on Entergy's ICT proposal by the Commission to ensure independence. Duke claims that Power Agencies' limitations on the Independent Entity's authority to delegate study functions to other entities are overly broad and unnecessary. Duke believes the Independent Entity needs the ability to perform its functions in the manner it sees fit, based on its own objective and experienced judgment, and that Duke should not be precluded from performing transmission studies, as long as the Independent Entity maintains the ultimate responsibility for any study tasks it delegates.

c. Commission Determination

31. The Commission concurs with Duke that its Independent Entity proposal is voluntary, and we will not require the commenters' proposed modifications and expansions, as they are not necessary to make its proposal consistent with or superior to the *pro forma* OATT. As discussed throughout this order, Duke's Independent Entity proposal is an amendment to its OATT, and we find that it is an improvement over the transmission service currently offered under Duke's OATT and that it is consistent with or superior to the Order No. 888 *pro forma* OATT; Duke is not seeking a determination that it qualifies for RTO status or for the independent entity variation standards in Order No. 2003. In particular, we note that proposals of commenters such as Power Agencies and Calpine appear to be an attempt to convert the Independent Entity into an RTO, or, at the very least, to require Duke to turn over to the Independent Entity a number of RTO-like functions with respect to market administration. Given these facts we will not require the proposed modifications and expansions of Duke's Independent Entity proposal.

32. We also disagree with NCEMC's characterization of the Commission's *Entergy* order, and what it contends are the minimum requirements for an independent coordinator of transmission proposal. As discussed above, the Entergy ICT is distinguishable from the Duke Independent Entity largely because, unlike Entergy's ICT, Duke has not sought special rate treatment that is dependent on a Commission determination that the Independent Entity qualifies under the Order No. 2003

“independent entity variation” standard. As such, it cannot be evaluated on the same basis as the Entergy ICT, since the enhancements and modifications that the Commission has thus required for the Entergy ICT were found to be necessary to support the transmission pricing plan sought by Entergy.

4. Cost Justification for Independent Entity Proposal

a. Comments and Protests

33. NCEMC argues that the Commission should reject Duke’s Independent Entity proposal because it has failed to demonstrate the need for the Independent Entity and because it has failed to justify the cost of its Independent Entity proposal. Stakeholders have informed Duke that they do not perceive any undue discrimination in Duke’s provision of transmission service under its OATT, and there have not been any customer complaints of unfair or discriminatory treatment under the OATT. NCEMC further contends that Duke has not provided the detailed cost information needed to determine the prudence of this expense under section 205 of the FPA, such as information regarding: what incremental benefits, if any, customers would receive under this proposal; how the costs of the Independent Entity and monitoring functions were derived; how those costs compare with Duke’s cost of performing the functions; the proposed cost recovery mechanism required to fully understand the cost impact of the proposal on each customer; and the comparison of the potential benefits with the estimated costs.

34. Similarly, Carolina Customers state that Duke has failed to identify any existing problems with Duke’s administration of its OATT that implementation of the Independent Entity proposal would solve. They also complain that Duke has not shown that market participants lack confidence in Duke’s current administration of its OATT or that there is a need for greater transparency that might justify it incurring \$3 to \$4 million per year.

b. Duke’s Response

35. With respect to concerns of NCEMC and Carolina Customers about the cost of the proposal and the potential impact on transmission rates, Duke states that it has not proposed to change any of its OATT rates, although it contemplates that these costs could be reviewed in connection with future rate proceedings. Duke further states that it is not suggesting that problems of undue discrimination exist on its system; rather, it is attempting to balance the concerns of those market participants that favor broad regional restructuring with legitimate jurisdictional concerns.

c. Commission Determination

36. We find no basis for requiring Duke to perform a cost/benefit study at this time, since Duke is not currently seeking to recover costs associated with the Independent Entity. Since Duke is not seeking to recover these costs in its transmission rates, the question of whether these costs are just and reasonable is not before us in this proceeding. However, if Duke proposes to include these costs in its rates for transmission service or to revise its cost recovery methodology in any way in a future proceeding, Duke will be required to bear the ultimate burden to demonstrate that any costs it seeks to recover in its transmission rate or proposed cost recovery methods are just and reasonable. Interested parties may challenge any such costs that Duke seeks to flow through in its rates in that proceeding, and our approval of the Independent Entity here is without prejudice to parties' ability to challenge the level of Independent Entity cost recovery in rates. In addition, we note that the lack of complaints concerning undue discrimination does not mean that additional transparency and independence are not beneficial, and no party has alleged that the Independent Entity will degrade its existing service under the OATT.

5. The Independent Monitor

a. Comments

37. Power Agencies question whether the monitoring plan provides the Independent Monitor with access to the information and resources it will need to perform its functions. They argue that stakeholders should be granted access to any information that the Independent Monitor has indicating that Duke may have engaged in anticompetitive behavior, in cases where the Independent Monitor has communicated its concerns to this Commission, state regulatory agencies, and Duke. Also, Power Agencies are concerned that the various indices on which the Independent Monitor will rely do not have sufficient basis and content for their purpose, citing the Commission's *2004 State of the Market Report*,¹² which concluded that the markets in the Southeast were largely opaque. As discussed above, they propose that the Independent Monitor create an "Into Duke" trading hub, which Power Agencies contend would greatly enhance the depth and reliability of such information and improve the ability of the Independent Monitor and Commission to identify the exercise of market power or other anticompetitive conduct.

¹² Available at: <http://www.ferc.gov/EventCalendar/Files/20050615093455-06-15-05-som2004.pdf>.

b. Response of Duke and Potomac Economics

38. Duke responds that the Power Agencies' suggestion to publicly disclose potential anticompetitive behavior would frustrate the Independent Monitor's investigative role. It contends that it is standard operating procedure in Commission investigations and in other governmental misconduct proceedings that the only other party to be informed of potential misconduct before the filing of a formal complaint is the party that may have engaged in the conduct. Furthermore, given that the Independent Monitor is required to report potentially anticompetitive behavior within 48 hours, Duke states that the Independent Monitor, the Commission, and state regulators should have time to investigate potentially anticompetitive behavior free of the distraction that immediate public disclosure might cause. Duke also notes that its proposal uses the same public disclosure provisions approved by the Commission for other independent monitoring plans.¹³

39. Potomac Economics states that it fully supports the design of the transmission monitoring plan, the functions assigned to the Independent Monitor, and the provisions for Independent Monitor data access and budgeting. Potomac Economics notes that it was active in design of the monitoring plan and the contract to execute the plan. It says that other monitoring plans approved by the Commission are consistent with Duke's proposal.

c. Commission Determination

40. The Commission finds no reason to depart from its normal disclosure procedures when the Independent Monitor investigates potentially anticompetitive market behavior. Accordingly, we will deny commenters' request that stakeholders should be granted access to any information that the Independent Monitor has indicating that Duke may have engaged in anticompetitive behavior, in cases where the Independent Monitor has communicated its concerns to this Commission, state regulatory agencies, and Duke.

¹³ See, e.g., *PNM Resources, Inc.*, 110 FERC ¶ 61,204 (2005); *Unisource Energy Corp.*, 109 FERC ¶ 61,047 (2004); *Oklahoma Gas & Elec. Co.*, 108 FERC ¶ 61,004 (2004).

6. Other Comments**a. Early Termination Rights****i. Comments**

41. Power Agencies request that the Commission remove section 3.2 of Attachment K, which provides the standard under which Duke may file with the Commission to terminate Attachment K, because it appears to be an attempt to get pre-approval to terminate the Independent Entity arrangement.

42. In contrast to Power Agencies' position, North Carolina Consumer Agencies assert that section 3.2 is crucial to the preservation of state jurisdiction.

ii. Duke's Response

43. Duke claims that these termination provisions are consistent with Commission precedent on independence. Duke says that the Power Agencies mischaracterize section 3.2 of Attachment K and explains that Duke's approach places the parties on notice that the Independent Entity proposal might end if an action is taken that upsets the balance between federal and state jurisdiction. Duke argues this provision is consistent with *Atlantic City Electric Co. v. FERC*,¹⁴ which provides that the Commission has the authority to review a specific withdrawal under section 205 where the entrance and exit rights have been specified in advance in the tariff.

iii. Commission Determination

44. We accept the early termination provisions in sections 3.2 of Attachment K to the OATT since Duke's filing is voluntary in nature and is not required by the Commission. If Duke wants to terminate the Independent Entity arrangement, it should file a notice of termination with the Commission, consistent with the requirements of section 35.15 of the Commission's regulations. We can foresee no circumstances that would warrant a denial of termination and thus we would expect to grant a request from Duke to terminate its voluntary Independent Entity arrangement. However, if Duke should seek to terminate the Independent Entity arrangement within two years of when it commences operation, we may require Duke to demonstrate the prudence of any cost recovery Duke may want to charge its wholesale customers for the cost of the Independent Entity.

¹⁴ 295 F.3d 1, 12 (D.C. Cir. 2002).

b. Independent Entity Filing Rights**i. Comments**

45. Power Agencies and NCEMC argue that section 4.9 of Attachment K, which prohibits the Independent Entity from making a filing with the Commission that proposes any alteration of the scope and nature of the Independent Entity's functions, should be eliminated as an impermissible limitation on the Independent Entity's interactions with regulators. NCEMC notes that this section requires the Independent Entity to first obtain the approval of Duke before it can propose any modifications to Attachment K required in order for the Independent Entity to perform its functions. If Duke and the Independent Entity cannot agree on such modifications, only Duke may file a report with the Commission indicating why Duke disagrees with the requested modification, which the Commission may act on pursuant to section 206. NCEMC argues that this proposal does not provide the Independent Entity with any way to resolve disputes the Independent Entity has with Duke because the Independent Entity does not have filing rights under section 206 of the FPA.

ii. Duke's Response

46. Duke contends that section 4.9 of Attachment K reinforces section 3.2 because the Independent Entity will not seek to expand its duties beyond what the Commission approves.

iii. Commission Determination

47. We will reject the protests of Power Agencies and NCEMC regarding section 4.9 of Attachment K. Section 4.9 provides that, in the case of a disagreement between the Independent Entity and Duke concerning certain proposed revisions,¹⁵ the Independent Entity shall prepare an analysis of the proposed revisions, which Duke shall submit to the Commission, along with its reasons for opposing the proposed revisions, which the Commission may act on pursuant to section 206 of the FPA. This provision obligates Duke to submit the Independent Entity's proposed revisions for Commission review and, if Duke disagrees, its reasons for opposing the change. The Commission will thus have ample opportunity under these filing procedures to be informed of both the Independent Entity's and Duke's proposed revisions to the Independent Entity Agreement, and thus it is not necessary for the Independent Entity to have specific filing rights under Duke's

¹⁵ These revisions would seek to remedy limitations or restrictions on the Independent Entity's ability to perform the functions designated to it in Attachment K.

voluntary Independent Entity proposal. Furthermore, we will not require Duke to eliminate the provision of section 4.9 that prohibits the Independent Entity from proposing to alter, or proposing that Duke make a filing with the Commission to alter, the scope and nature of the Independent Entity's functions provided for under Attachment K. As discussed above, we find that Duke's Independent Entity proposal is consistent with or superior to the *pro forma* OATT, and we have rejected as unnecessary the numerous proposals above to expand or modify the scope or nature of the Independent Entity's function. For the same reasons, we see no reason to modify the Independent Entity Agreement to allow the Independent Entity to submit proposals to alter the scope or nature of its functions.

c. Commission Oversight

i. Comments

48. Power Agencies propose that the Duke Independent Entity agreement, like the Entergy ICT agreement, should be filed under FPA section 205 as a jurisdictional rate schedule. They argue that broad-based, third-party transmission administrative arrangements are new and that the Commission should have the direct authority under section 205 to adjust the arrangement. Power Agencies also suggest that the Independent Entity should file its annual budget proposal and its conflict of interest provisions with the Commission.

49. Morgan Stanley has concerns about having the Midwest ISO be the Independent Entity because Midwest ISO and Duke are not interconnected and Midwest ISO is a relatively new market and market operator. Morgan Stanley believes the PJM is more suitable to handle the Duke transmission system responsibilities.

50. Conoco requests that communications between Duke and the Independent Entity, including operating practices and transmission planning criteria, be noticed by the Commission.

ii. Duke's Response

51. In response to Power Agencies' comments, Duke notes that it has provided the Independent Entity agreement for the Commission to review and that any jurisdictional changes to the Independent Entity arrangement can be made through revisions to Attachment K. If such revisions require modifying the Independent Entity Agreement, Duke agrees to submit the revised Independent Entity Agreement to the Commission and stakeholders for review. Duke states that this is consistent with Commission precedent in

Entergy and in American Electric Power Company and Central & South West Corporation,¹⁶ which Duke claims did not require the contract to be filed as a rate schedule, even though the Commission reserved the right to approve the terms of the arrangement. Duke argues that the Independent Entity agreement already provides for stakeholder input into the Independent Entity budget process and that, if no agreement is reached on the Independent Entity budget, the Independent Entity agreement provides that the budget will be 103 percent of the prior year's budget. Duke maintains that there is no reason for the Commission to micromanage the day-to-day operations of the Independent Entity as the Power Agencies request. It also says that the information Conoco seeks is available on OASIS.

iii. Commission Determination

52. Section 35.1(a) of the Commission's regulations provide that "[e]very public utility shall file with the Commission ... all contracts which in any manner affect or relate to such [jurisdictional] rates, charges, classifications, services, rules, regulations or practices, as required by section 205(c) of the Federal Power Act."¹⁷ Since the agreements between Duke and the Independent Entity and the Independent Monitor, respectively, affect significantly the services provided under Duke's OATT and thus are jurisdictional contracts, they must be filed with the Commission under section 205(c) of the FPA.

53. We find that the Independent Entity Agreement provides for sufficient oversight by the Independent Entity, and therefore, we reject the request of Conoco and Power Agencies that the Commission oversee the Independent Entity's day-to-day actions. As discussed above, the Independent Entity will not have the independence and functions of an RTO, and we will not impose upon it the requirements that would apply to an RTO.

54. We also reject as without merit Morgan Stanley's concerns about the ability of Midwest ISO to act as the Independent Entity. While the Midwest ISO was established more recently than PJM, it nevertheless has substantial experience in performing the tasks assigned to the Independent Entity, which qualifies Midwest ISO to serve as the Independent Entity.

¹⁶ 91 FERC ¶ 61,208 (2000) (*AEP*).

¹⁷ 18 C.F.R. § 35.1(a) (2005).

c. Miscellaneous clarifications to Attachment K

i. Comments

55. Conoco requests that Duke clarify that it intends for the Independent Entity to process all point-to-point transmission requests under section 6.1 of Attachment K. It says that section 3.4 of Attachment K should state that the Independent Entity will perform the functions of Order No. 889, in addition to those of Order Nos. 888 and 2003. In addition, Conoco requests that Duke clarify that the Independent Entity's obligation to perform its functions is not limited only to nuclear and hydroelectric facilities, which have federal license conditions and requirements, but that the Independent Entity's obligations apply to all types of generators within Duke's footprint.

56. Carolina Customers and NCEMC urge the Commission to require Duke to revise section 1.4 of Attachment K, which provides that the Independent Entity is to be established for an initial two-year period and will continue thereafter unless Duke made and the Commission approved a filing to amend or withdraw. They argue that Duke should reverse this presumption, so that the Independent Entity will automatically sunset after two years unless Duke made a filing to keep Attachment K in place.

ii. Duke's Response

57. In its answer, Duke agrees to clarify that it intends for the Independent Entity to process all point-to-point transmission requests under section 6.1 of Attachment K and that that the Independent Entity's responsibilities apply to all types of generators within Duke's footprint. Duke also agrees to modify section 3.4 of Attachment K to state that the Independent Entity will also perform the functions of Order No. 889. In addition, Duke affirms that the Independent Entity will process all interconnection requests in accordance with the Large Generator Interconnection Procedures, and thus, to the extent the LGIP allows for clustering of interconnection requests, the Independent Entity will be able to use that approach.

iii. Commission Determination

58. We accept the proposed modifications and clarifications that Duke has agreed to make, which are identified above. However, we reject the request of Carolina Customers and NCEMC that we require Duke to automatically sunset the Independent Entity arrangement after two years. Intervenors have not provided compelling evidence to show that Duke's originally-filed section 1.4 is not just and reasonable.

The Commission orders:

The Commission accepts Duke's Independent Entity proposal, transmission monitoring plan, and the agreements between Duke and the Independent Entity and Independent Monitor, to be effective on November 1, 2006. Duke is directed to file within 60 days of the date of this order the revisions to Attachment K of its OATT directed by the Commission, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.