

121 FERC ¶ 61,144
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Duke Energy Shared Services, Inc.	Docket No.	ER07-1383-000
Duke Energy Shared Services, Inc.	Docket No.	ER07-1384-000
Duke Energy Shared Services, Inc.	Docket No.	EL08-5-000

ORDER ACCEPTING AND SUSPENDING FILING, INSTITUTING SECTION 206
INVESTIGATION, ESTABLISHING REFUND EFFECTIVE DATE AND HEARING
AND SETTLEMENT JUDGE PROCEDURES, AND CONSOLIDATING DOCKETS

(Issued November 15, 2007)

1. On September 18, 2007, Duke Energy Shared Services, Inc. (f/k/a Cinergy Services, Inc.), on behalf of Duke Energy Indiana, Inc., Duke Energy Kentucky, Inc., and Duke Energy Ohio, Inc. (collectively, Duke), submitted for filing, pursuant to section 205 of the Federal Power Act (FPA),¹ (1) a notice of cancellation of Duke's Open Access Transmission Tariff (OATT) and (2) a proposed Ancillary Services Tariff. In this order, we accept Duke's proposed notice of cancellation and Ancillary Services Tariff, and suspend them for a nominal period, to become effective October 11, 2007, subject to refund. We also establish hearing and settlement judge procedures. Further, we institute an investigation pursuant to section 206 of the FPA² in Docket No. EL08-5-000 and establish a refund effective date. Finally, we consolidate the proceedings for purposes of settlement, hearing and decision.

Background

2. Duke ceased providing point-to-point and network integration transmission service under its OATT as of February 1, 2002, the date upon which the Midwest Independent

¹ 16 U.S.C. § 824(d) (2000).

² 16 U.S.C. § 824(e) (2000).

Transmission System Operator, Inc. (Midwest ISO) commenced providing open access transmission service over the Duke transmission system under the Midwest ISO tariff. However, the Duke OATT, as modified by Duke, remained in effect after that date in order to permit Duke to sell ancillary services to the Midwest ISO. Given that Order No. 890³ would require significant reformation of provisions of the OATT that are no longer in use but remain in the OATT, Duke indicates that it has decided to cancel its OATT and replace it with an Ancillary Services Tariff.

3. Duke explains that ancillary services are being provided to the Midwest ISO, acting as agent on behalf of certain of its transmission customers, pursuant to Service Agreement No. 344 under Duke's OATT. Thus, Duke asks that Service Agreement No. 344 be redesignated Service Agreement No. 1 under the Ancillary Services Tariff as of the effective date of the Ancillary Services Tariff.⁴

4. Duke states that, aside from Service Agreement No. 344, there are seven other service agreements currently in effect under the Duke OATT. According to Duke, all of these service agreements recognize or assume that there may no longer be a Duke OATT and its cancellation has no substantive impact on the Service Agreements. Thus, Duke asserts, the only issue presented by cancelling the OATT with regard to these seven service agreements is how Duke should report these service agreements on its Electric Quarterly Report after its OATT is cancelled. Duke proposes that it be permitted to list the Midwest ISO tariff as the relevant tariff for these seven service agreements. It maintains that over time these service agreements likely will receive designations as service agreements under the Midwest ISO tariff, because, if they are modified, they will be refiled as three-party agreements under the Midwest ISO tariff.

5. Duke further explains that its proposed Ancillary Services Tariff is modeled on the relevant provisions of the Order No. 890 *pro forma* OATT, but that there are several key differences. It states that these differences arise largely because Duke is not a transmission provider and the tariff is only applicable to those customers that the Midwest ISO has determined must obtain certain ancillary services from Duke, with the Midwest ISO acting as their agent. Duke states that the rates set forth in the schedules to the proposed Ancillary Services Tariff are unchanged from the rates for the corresponding services in the Duke OATT. It adds that the Ancillary Services Tariff is

³ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007).

⁴ Duke explains that there are several minor differences between Service Agreement No. 344 and the *pro forma* Service Agreement in the Ancillary Services Tariff and, if necessary, it will re-file Service Agreement No. 344 as Service Agreement No. 1 under the Ancillary Services Tariff on compliance.

intended to reflect the status quo, which it expects will remain in effect until the Midwest ISO's planned ancillary services market is operational, at which point further changes to the Ancillary Services Tariff will be required. Duke requests waiver of the Commission's prior notice requirements to permit an effective date of October 11, 2007, in order to ensure conformity with revisions to the Midwest ISO tariff required by Order No. 890, which will be effective October 11, 2007.

Notice of Filing and Responsive Pleadings

6. Notice of Duke's filing was published in the *Federal Register*, 72 Fed. Reg. 62,225 (November 2, 2007), with protests and interventions due on or before October 9, 2007. Hoosier Energy Rural Electric Cooperative, Inc. (Hoosier) filed a timely motion to intervene and protest.

7. Hoosier protests the rates for Reactive Supply and Voltage Control from Generation and Other Sources Service (Reactive Supply Service) in Schedule 2 of Duke's proposed Ancillary Services Tariff. While Duke points out that these rates were previously accepted by the Commission in 1998, Hoosier explains that these rates are based on a ratemaking methodology that can reasonably be characterized as a "rule of thumb" approach that has been abandoned by the Commission.

8. Hoosier further explains that, prior to Order No. 888,⁵ the Commission allowed utilities to use a ceiling rate of 1 mill per kWh for a package of three ancillary services,⁶ the costs of which were then considered "difficult to quantify." According to Hoosier, in Order No. 888, the Commission explained that "[i]n the absence of a demonstration that the seller does not have market power in such services, rates for ancillary services should be cost-based and established as price caps, from which transmission providers may offer

⁵ *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, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *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 v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁶ The services in the package were Reactive Supply, Regulation and Frequency Response Service, and System Protection Service. System Protection Service reflected a combination of the services known as Operating Reserve – Spinning Reserve Service, and Operating Reserve – Supplemental Reserve Service in the Order No. 888 *pro forma* OATT.

a discount to reflect cost variations or to match rates available from any third party.”⁷ Subsequently, Hoosier explains, in addressing compliance tariffs filed in response to Order No. 888, the Commission accepted the proposed ancillary service rates of some utilities, including Duke, that spread the 1 mill/kWh rate across the separate ancillary services.⁸ However, Hoosier states, the Commission stated that “in any future filings, we expect that each ancillary rate will be supported on the basis of the service’s cost.”⁹ Thus, Hoosier asserts, Duke is obligated to comply with the Commission’s order and provide cost data to support its proposed rates for Reactive Supply Service. Hoosier further argues that, based on cost analysis performed by its expert witness and attached to the protest, the existing rates are in excess of Duke’s cost of providing the service. Hoosier requests that Duke’s proposed Ancillary Services Tariff be set for hearing.

9. Duke responds that the proposed Ancillary Services Tariff does not trigger the need to re-examine the Schedule 2 rates. It argues that the need to alter those rates should not be deemed to be triggered by the mere movement of the Schedule 2 rates from one tariff to another. It maintains that the plain intent of the Commission was that, when a utility filed to change any rates that were based on the 1 mill/kWh adder, then such rate change would trigger the need for a cost-of-service approach. It adds that Hoosier has not demonstrated that such rates are unjust and unreasonable and Hoosier’s protest should not trigger a *sua sponte* section 206 investigation by the Commission.

10. Duke challenges a number of aspects of Hoosier’s calculation of the cost of providing Reactive Supply Service. It argues that Hoosier has not made a *prima facie* case that the Schedule 2 rates are unjust and unreasonable. Duke also takes issue with Hoosier’s assertion that the proposed rates are not cost based.

11. Finally, Duke points out that it made a ministerial error. It notes that the hourly reactive power rate was misstated in its Ancillary Services Tariff. It states that the hourly rate should be fixed and a correction will be made in any compliance filing ordered in this proceeding.

Discussion

12. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), Hoosier’s timely, unopposed motion to intervene serves to make it a party to this proceeding. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless

⁷ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,720.

⁸ See *Allegheny Power Sys., Inc.*, 80 FERC ¶ 61,143 (1997).

⁹ *Id.* at 61,540.

otherwise ordered by the decisional authority. We will accept Duke's answer because it has provided information that assisted us in our decision-making process.

13. Duke's submittals raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

14. Our preliminary analysis indicates that Duke's submittals have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Duke's submittals for filing, suspend them for a nominal period, make them effective October 11, 2007, as requested, subject to refund, and set them for hearing and settlement judge procedures.

15. We also will institute a section 206 proceeding in Docket No. EL08-5-000, concerning the rates in Duke's Ancillary Services Tariff. In addition, because this investigation will involve issues of material fact, we will set the matter for a trial-type evidentiary hearing.

16. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b), as amended by the Energy Policy Act of 2005,¹⁰ requires that the Commission establish a refund effective date that is no earlier than the date of the publication by the Commission of notice of the initiation of the Commission's proceeding in the *Federal Register*, and no later than five months after the publication date. In order to give maximum protection to customers, and consistent with our precedent,¹¹ we will establish a refund effective date at the earliest date allowed. This date will be the date on which notice of the initiation of the proceeding in Docket No. EL08-5-000 is published in the *Federal Register*.

17. In addition, section 206 requires that, if no final decision has been rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Given the nature and complexity of the matters to be resolved, we expect that, assuming the case does not settle, the presiding judge should be able to render a decision by August 30, 2008. If the presiding judge is able to render a decision by that date, and assuming the case does not settle, we estimate that we will be able to issue our decision within approximately five months of the filing of briefs on and opposing exceptions or by March 30, 2009.

¹⁰ Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005).

¹¹ See, e.g., *Canal Electric Co.*, 46 FERC ¶ 61,153 *reh'g denied*, 47 FERC ¶ 61,275 (1989).

18. Because Docket Nos. ER07-1383-000, ER07-1384-000, and EL08-5-000 raise common issues of law and fact, we will consolidate them for purposes of settlement, hearing and decision.

19. While we are setting these matters for investigation and a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹² If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹³ The settlement judge shall report to the Chief Judge and the Commission, within 30 days of the date of the appointment of the settlement judge concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

20. Finally, we will require Duke to submit, as it committed to do, a compliance filing, within 30 days of the date of this order, correcting the misstated hourly rate for Reactive Supply Service set forth in its Ancillary Services Tariff. We further require Duke to submit, in that compliance filing, a restatement of Service Agreement No. 344 designated as Service Agreement No. 1 under the Ancillary Services Tariff, in accordance with Order No. 614.¹⁴

The Commission orders:

(A) Duke's submittals are hereby accepted for filing and suspended for a nominal period, to become effective October 11, 2007, as requested, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred on the Federal Energy Regulatory Commission by section 402(a) of the

¹² 18 C.F.R. § 385.603 (2007).

¹³ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (<www.ferc.gov> — click on Office of Administrative Law Judges).

¹⁴ Designation of Electric Rate Schedule Sheets, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000).

Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning Duke's submittals. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (F) and (G) below.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held in Docket No. EL08-5-000 concerning the rates in Duke's Ancillary Services Tariff, as discussed in the body of this order. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (F) and (G) below.

(D) The Secretary shall promptly publish a notice of the Commission's initiation of the investigation under section 206 of the Federal Power Act in Docket No. EL08-5-000 in the *Federal Register*.

(E) The refund effective date in Docket No. EL08-5-000, established pursuant to section 206(b) of the Federal Power Act, will be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (D) above.

(F) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2007), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(G) Within thirty (30) days of the date of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(H) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15)

days of the date of the presiding judge's designation, convene a pre-hearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, D.C. 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(I) Duke is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

(J) Docket Nos. ER07-1383-000, ER07-1384-000, and EL08-5-000 are hereby consolidated for purposes of settlement, hearing and decision.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.