

128 FERC ¶ 61,055
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Carolinas, LLC

Docket No. ER07-188-005

ORDER ACCEPTING UPDATED MARKET POWER ANALYSIS AND
COMPLIANCE FILINGS

(Issued July 16, 2009)

1. In this order, the Commission accepts an updated market power analysis filed by Duke Energy Carolinas, LLC (Duke Energy Carolinas). As discussed below, the Commission concludes that Duke Energy Carolinas continues to satisfy the Commission's standards for market-based rate authority in the Southeast region, excluding the Duke Energy Carolinas balancing authority area.¹ The Commission also accepts Duke Energy Carolinas's proposed market-based rate tariff revisions, which incorporate provisions as adopted in Order No. 697 and 697-A, to be effective September 1, 2008, as requested.²

2. Additionally, the Commission finds that Duke Energy Carolinas meets the criteria for a Category 2 seller and is so designated. Duke Energy Carolinas's next updated

¹ Duke Energy Carolinas is subject to cost-based rates in this balancing authority area. *See Duke Energy Carolinas, LLC*, Docket No. ER07-1022-001 (Nov. 28, 2007) (unpublished letter order); *Duke/Louis Dreyfus, LLC*, 73 FERC ¶ 61,309 (1995) (authorizing Duke Energy Carolinas to sell capacity and energy at wholesale at market based rates).

² *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *order on reh'g and clarification*, 124 FERC ¶ 61,055 (2008), Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009).

market power analysis must be filed according to the regional schedule adopted in Order No. 697.³

I. Background

3. Duke Energy Carolinas is an indirect, wholly-owned subsidiary of Duke Energy Corporation (Duke Energy) that owns and controls generation and transmission in the Southeast region of the United States.

4. Duke Energy Carolinas's affiliates include Duke Energy Indiana, Inc. (Duke Energy Indiana), Duke Energy Kentucky, Inc., and Duke Energy Ohio, Inc., all of which are generation and transmission-owning utilities operating primarily in the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) market in the Central region of the United States.

5. Duke Energy Carolinas operates the Duke Energy Carolinas balancing authority area, where it owns or controls approximately 19,000 MW of generation. As noted above, Duke Energy Carolinas is currently subject to cost-based mitigation in the Duke Energy Carolinas balancing authority area and is not seeking market-based rate authority there.

6. On August 29, 2008, Duke Energy Carolinas filed an updated market power analysis in accordance with the regional reporting schedule adopted in Order No. 697.⁴ As part of that filing, Duke Energy Carolinas submitted a Simultaneous Import Limitation (SIL) study for several markets in the Southeast region. Duke Energy Carolinas also submitted revised tariff sheets to incorporate the required provisions adopted by the Commission in Order No. 697 and 697-A.⁵

³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882-893, App. D; Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 9, 10 (2007), App. D-1; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at Apps. D, D-1, and D-2. *See also* Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 at P 47-48 (amending in part App. D-2).

⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882. The Commission stated that "both the Commission and market participants will benefit from greater data consistency that will result from regional examination of updated market power analyses and a methodical study of all sellers in the same region. This will give the Commission a more complete view of market forces in each region and the opportunity to reconcile conflicting submissions, enhancing our ability to ensure that sellers' rates remain just and reasonable." *See also* Order Clarifying Final Rule, 121 FERC ¶ 61,260 at P 13.

⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914-918.

7. On December 23, 2008, Commission Staff issued a request that Duke Energy Carolinas submit additional information regarding the SIL study Duke Energy Carolinas submitted on August 29, 2008. On January 13, 2009, Duke Energy Carolinas submitted a filing in response to Commission Staff's December 23, 2008 request. On April 9, 2009, Commission Staff issued another request to Duke Energy Carolinas notifying them that additional information concerning Duke Energy Carolinas' SIL study was still needed. On May 8, 2009, Duke Energy Carolinas submitted additional information in response to Commission Staff's April 9, 2009 request.

II. Notices and Responsive Pleadings

8. Notice of Duke Energy Carolinas's August 29, 2008 filing was published in the *Federal Register*,⁶ with interventions or protests due on or before September 19, 2008. None was filed.

9. Notice of Duke Energy Carolinas's January 13, 2009 supplemental filing was published in the *Federal Register*,⁷ with interventions or protests due on or before February 23, 2009. None was filed.

10. Notice of Duke Energy Carolinas's May 8, 2009 second supplemental filing was published in the *Federal Register*,⁸ with interventions or protests due on or before May 29, 2009. None was filed.

III. Discussion

A. Market-Based Rate Authorization

11. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.⁹ As discussed below, the Commission concludes that Duke Energy Carolinas satisfies the Commission's standards for market-based rate authority.

⁶ 73 Fed. Reg. 53,858 (2008).

⁷ 74 Fed. Reg. 4421 (2009).

⁸ 74 Fed. Reg. 23,685 (2009).

⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

1. Horizontal Market Power

12. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.¹⁰

13. Duke Energy Carolinas has prepared the pivotal supplier and wholesale market share screens for the balancing authority areas first-tier to the Duke Energy Carolina's balancing authority area including: PJM Interconnection, LLC (PJM); Tennessee Valley Authority (TVA); Progress Energy Carolinas East and Progress Energy Carolinas West¹¹; South Carolina Electric and Gas Company (South Carolina Electric & Gas); Southern Company (Southern); and Santee Cooper. Duke Energy Carolinas, however, did not include Southeastern Power Administration or Yadkin, Inc. in its first-tier analysis because those areas are generation-only balancing authority areas. Duke Energy Carolinas explains that these areas were excluded from previously accepted triennial market-based rate analyses.¹²

14. The Commission has reviewed Duke Energy Carolinas' pivotal supplier and wholesale market share screens. As noted above, Commission staff issued data requests on December 23, 2008 and April 9, 2009, requesting that Duke Energy Carolinas provide additional information regarding the SIL study Duke Energy Carolinas submitted as part of its updated market power analysis. In response to those requests, Duke Energy Carolinas submitted additional information and revised SIL studies. Commission Staff requested the other transmission owners in the Southeast that filed SIL studies with their updated market power analyses (Southeast Transmission Owners)¹³ to submit similar information as well. As detailed in an order being issued concurrently with this order, the Commission has made adjustments to the SIL studies submitted by the Southeast

¹⁰ *Id.* P 62.

¹¹ Duke Energy Carolinas treats the two Progress Energy Carolinas' balancing authority areas as a single balancing authority area (Carolinas East).

¹² *See Duke Power*, 109 FERC ¶ 61,270, at P 29 (2004).

¹³ There were seven separate updated market power filings submitted on behalf of Southeast Transmission Owners. They include submissions by: (1) Duke Energy Carolinas, (2) South Carolina Electric & Gas, (3) Tampa Electric Company, (4) Carolina Power & Light Company and Florida Power Corporation, (5) Entergy Services, Inc., Entergy Power Ventures, LP, EWO Marketing, LP, and Entergy Power, Inc., (6) LG&E Energy Marketing Inc., Louisville Gas & Electric Company, Kentucky Utilities Company, and Western Kentucky Energy Corporation, and (7) Southern Company Services, Inc., Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company.

Transmission Owners, which the Commission will use in evaluating market power analyses filed in the Southeast region.¹⁴

15. We find that Duke Energy Carolinas passes the pivotal supplier and wholesale market share screens in all their first-tier markets. Specifically, using the Commission-adjusted SIL study results, Duke Energy Carolinas' market shares for the relevant balancing authority areas are as follows: Carolinas East market shares range from 7 to 8.3 percent; Santee Cooper market shares range from 4.1 to 9.8 percent; and South Carolina Electric & Gas market shares range from 2.6 to 4.3 percent; Southern market shares range from 1.8 to 3.7 percent; TVA market shares range from 3.8 to 6.2 percent; and PJM market shares range from 7.8 to 9.7 percent.

16. Accordingly, as discussed herein, we find that Duke Energy Carolinas satisfies the Commission's requirements for market-based rate authority regarding horizontal market power, excluding the Duke Energy Carolinas balancing authority area.

2. Vertical Market Power

17. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved Open Access Transmission Tariff (OATT) on file before granting that utility or affiliate market-based rate authorization.¹⁵ Duke Energy Carolinas states that it has an OATT on file with the Commission.¹⁶

18. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹⁷ The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities; sites for generation capacity development; and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).¹⁸ The Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to

¹⁴ *Carolina Power & Light Co.*, 128 FERC ¶ 61,039 (2009).

¹⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

¹⁶ *Allegheny Power Sys., Inc.*, 80 FERC ¶ 61,143 (1997).

¹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

¹⁸ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

electric power production does not allow a seller to raise entry barriers, but will allow intervenors to demonstrate otherwise.¹⁹

19. Duke Energy Carolinas states that neither it nor its affiliates owns or controls intrastate natural gas transportation or intrastate natural gas storage in the Southeast region.

20. Duke Energy Carolinas adds that it has options on four sites for new generation capacity development in the Carolinas. It also notes that a Duke Energy Carolinas affiliate controls one site for new generation capacity in the Midwest ISO balancing authority area. However, Duke Energy Carolinas and its affiliates do not own or have options on any sites for new generation capacity development in PJM nor any other balancing authority areas. Although Duke Energy Carolinas states that the precise quantification of sites for new generation capacity development is subject to change and is a function of market conditions and opportunities, it claims that its relationship with five generation sites in Midwest ISO, PJM, and the Carolinas should not raise any entry barrier concerns.

21. Duke Energy Carolinas also indicates that its affiliate, Duke Energy Indiana, has a leasehold interest in approximately 66 million tons of coal reserves and owns approximately 11,250 acres of coal reserves in Indiana. In addition, Duke Energy Carolinas and its affiliates own various limited “industry lead rail tracks” that are dedicated for private local transportation of coal to the companies’ respective generating stations. Duke Energy Carolinas and its affiliate Duke Energy Indiana control through lease agreements a fleet of coal rail cars for private use in connection with the companies’ coal fired generation. Duke Energy Carolinas further states that neither it nor its affiliates owns or controls any barges or related facilities.

22. The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.²⁰

23. Duke Energy Carolinas affirmatively states that neither Duke Energy Carolinas nor any of its affiliates has erected barriers to entry into the relevant market and that they will not erect barriers into the relevant markets.

24. Based on Duke Energy Carolinas’s representations, the Commission finds that Duke Energy Carolinas satisfies the Commission’s requirements for market-based rate authority regarding vertical market power.

¹⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 446.

²⁰ *Id.* P 447.

B. Compliance Filings

25. In Order No. 697, the Commission adopted two standard required provisions that each seller must include in its market-based rate tariff: (1) a provision requiring compliance with the Commission's regulations; and (2) a provision identifying any limitations and exemptions regarding the seller's market-based rate authority.²¹ In addition to the required tariff provisions, the Commission adopted a set of standard provisions that must be included in a seller's market-based rate tariff to the extent that they are applicable.²² In Order No. 697-A, the Commission also required that each seller include in its market based rate tariff a provision identifying which category of seller it qualifies as in each region.²³

26. Duke Energy Carolinas states that the Commission previously accepted for filing tariff changes required by Order No. 697.²⁴ With this filing, Duke Energy Carolinas is revising its market based rate tariffs to: (1) delete language not required by Order No. 697; (2) conform the format of its tariff to the format of other tariffs filed by Duke Energy Carolinas affiliates; and (3) make other modifications required by Order No. 697-A, including provisions regarding the sale of ancillary services. Duke Energy Carolinas' also includes a list of assets as required by Order No. 697.²⁵ Duke Energy Carolinas' revised market-based tariff therefore satisfies the Commission's requirements set forth in Order No. 697 and Order No. 697-A. Accordingly, we will accept Duke Energy Carolinas revised market-based rate tariff, effective September 1, 2008, as requested.²⁶

C. Reporting Requirements

27. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric

²¹ *Id.* P 914.

²² *Id.* P 917.

²³ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 391-393.

²⁴ *Duke Energy Carolinas, LLC*, Docket No. ER07-1022-001 (Nov. 28, 2007) (unpublished letter order).

²⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 894-895.

²⁶ FERC Electric Tariff, Sixth Revised Volume No. 3, Original Sheet Nos. 1-2 (superseding FERC Electric Tariff, Fifth Revised Volume No. 3). FERC Electric Tariff, Fourth Revised Volume No. 5, Original Sheet Nos. 1-2 (superseding FERC Electric Tariff, Third Revised Volume No. 5).

Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or longer) market-based power sales during the most recent calendar quarter.²⁷ Public utilities must file Electric Quarterly Reports no later than 30 days after the end of the reporting quarter.²⁸

28. Duke Energy Carolinas must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.²⁹

29. Additionally, in Order No. 697, the Commission created two categories of sellers.³⁰ Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888³¹); that are not affiliated with

²⁷ *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit Electric Quarterly Report to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

²⁸ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2007). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

²⁹ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42 (2008).

³⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

³¹ *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*

anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.³² Sellers that do not fall into Category 1 are designated as Category 2 and are required to file regularly scheduled updated market power analysis.³³

30. Based on Duke Energy Carolinas's representations, we find that Duke Energy Carolinas meets the criteria for a Category 2 seller and is so designated. Thus, Duke Energy Carolinas must file an updated market power analysis in compliance with the regional reporting schedule adopted in Order No. 697.³⁴ The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) Duke Energy Carolinas's updated market power analysis is hereby accepted for filing, as discussed in the body of this order.

(B) Duke Energy Carolinas's revisions to its market-based rate tariffs are hereby accepted effective September 1, 2008, as discussed in the body of this order.

(C) Duke Energy Carolinas is hereby directed to file an updated market analysis according to the regional reporting schedule adopted in Order No. 697.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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).

³² 18 C.F.R. § 35.36(a)(2) (2008).

³³ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

³⁴ *Id.* P 882.