

151 FERC ¶ 61,241  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
and Tony Clark.

City of Orangeburg, South Carolina

Docket No. EL09-63-000

ORDER DISMISSING  
PETITION FOR DECLARATORY ORDER

(Issued June 18, 2015)

1. On July 2, 2009, the City of Orangeburg, South Carolina (Orangeburg) submitted a petition for a declaratory order (Petition) asking the Commission to either find that a March 30, 2009 order of the North Carolina Utilities Commission (2009 NCUC Order)<sup>1</sup> does not apply to the Orangeburg Department of Public Utilities and other affected electric utilities by reason of federal preemption and the Federal Power Act (FPA), or exempt Orangeburg from the 2009 NCUC Order pursuant to section 205(a) of the Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>2</sup> The 2009 NCUC Order established that, in any future retail ratemaking proceeding, the NCUC would credit the revenues associated with a wholesale, market-based, power purchase and coordination agreement between Duke Energy Carolinas, LLC (Duke) and Orangeburg (the Agreement) based on a rate design utilizing incremental costs rather than the system average costs used in the Agreement.

2. As discussed below, we will dismiss Orangeburg's petition as moot; Duke and Orangeburg voluntarily terminated the Agreement so there is no concrete issue before us.

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<sup>1</sup> *In the Matter of Duke Energy Carolinas, LLC's Advance Notice of Purchase Power Agreement with the City of Orangeburg, South Carolina and Joint Petition for Declaratory Order*, Docket No. E-7, Sub 858 (Mar. 30, 2009) (2009 NCUC Order).

<sup>2</sup> 16 U.S.C. § 824a-1(a) (2006).

## I. Petition

3. Orangeburg is the county seat of Orangeburg County in South Carolina. Orangeburg states that on May 23, 2008, it executed a market-based power sales and coordination agreement with Duke to begin May 1, 2009. Orangeburg explains that, under the Agreement, Duke agreed to supply Orangeburg's power requirements and assume control of scheduling Orangeburg's power supply resources, including any of Orangeburg's demand side management programs. According to Orangeburg, the power to be supplied by Duke was firm, full requirements,<sup>3</sup> native-load-priority service for Orangeburg's 190 MW peak load. Orangeburg states that the charges over the ten-year term of the agreement would have been nearly \$500 million and were based on Duke's system average costs.

4. Orangeburg states that, shortly after execution of the Agreement, Duke filed notice with the NCUC of its intent to extend native load priority to Orangeburg consistent with the terms of the Agreement. At the same time, Orangeburg and Duke sought from the NCUC a declaratory ruling as to the NCUC's planned treatment of Duke's costs and revenues from the Agreement for retail ratemaking purposes. Orangeburg explains that a 2006 NCUC merger order<sup>4</sup> approving Duke's merger with Cinergy Corp. placed conditions on Duke's wholesale sales, including the requirement to inform the NCUC of any planned extensions of native load priority. Orangeburg asserts that, in the NCUC merger order, the NCUC retained the right to allocate and adjust both revenues and costs associated with Duke's wholesale contracts for retail ratemaking and accounting purposes. Orangeburg continues that the NCUC merger order additionally obligated Duke to serve its retail native load customers in North Carolina with the lowest-cost power it can reasonably generate or purchase before selling power to other customers.

5. The 2009 NCUC Order states that "in any future retail ratemaking proceeding, the [NCUC] should allocate the wholesale revenues and costs of the Orangeburg Agreement in the manner that produces the lowest cost power and just and reasonable rates for Duke's retail native load customers."<sup>5</sup> The 2009 NCUC Order also states that "it would be appropriate . . . to allocate the wholesale costs of the Agreement . . . based upon incremental costs in any future retail ratemaking proceeding" and "den[ies] Duke's

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<sup>3</sup> Orangeburg states that it also has its own generating units and a Southeastern Power Administration (SEPA) entitlement.

<sup>4</sup> 2009 NCUC Order Approving Merger Subject to Regulatory Conditions and Code of Conduct, Docket No. E-7, Sub 795 (Mar. 24, 2006).

<sup>5</sup> 2009 NCUC Order at 8.

request to treat the retail native load of Orangeburg as if it were Duke's retail native load.”<sup>6</sup>

6. According to Orangeburg, soon after issuance of the 2009 NCUC Order, Duke notified Orangeburg that it was invoking the Agreement’s “regulatory out” provision, and the Agreement terminated on April 22, 2009.<sup>7</sup> This “regulatory out” provision prohibited the Agreement from taking effect, or permitted early termination, in the event that the NCUC or the Public Service Commission of South Carolina issued an order materially altering the benefits or burdens of the Agreement for either of the parties. In order to meet its future power supply requirements, Orangeburg states that it has extended its current power supply agreement with South Carolina Electric & Gas Company through the end of 2012 and would seek offers for a replacement power agreement in 2010; Orangeburg does not estimate the cost of replacement power as of that date, but states that the Agreement would have saved its customers over \$10 million per year.<sup>8</sup>

7. Orangeburg requests that the Commission find that the 2009 NCUC Order is preempted by this Commission’s exclusive jurisdiction over wholesale power sales and interstate transmission and rates under the FPA,<sup>9</sup> and by the federal policy of open and competitive wholesale power markets. Alternatively, Orangeburg argues that under section 205(a) of PURPA,<sup>10</sup> the Commission can and should exempt Orangeburg and other affected electric utilities from any policies announced in the 2009 NCUC Order.

8. Regarding preemption, Orangeburg contends that in its order, the NCUC oversteps its authority by allocating the costs and revenues of wholesale power agreements in retail ratemaking without regard to the actual terms of those wholesale agreements. Orangeburg contends that the 2009 NCUC Order intrudes upon the Commission’s exclusive jurisdiction over wholesale rates pursuant to the FPA, and violates “[t]he filed rate doctrine[, which] requires ‘that interstate power rates filed with FERC or fixed by

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<sup>6</sup> *Id.* at 8 and 30.

<sup>7</sup> Orangeburg declined Duke’s mandatory offer of short-term contingent service.

<sup>8</sup> Orangeburg ultimately signed a power supply agreement with South Carolina Electric & Gas Company for the period January 1, 2012 until December 31, 2022, which the Commission accepted for filing on May 24, 2011. *See South Carolina Elec. & Gas Co.*, Docket No. ER11-3419-000 (May 24, 2011) (delegated letter order).

<sup>9</sup> Orangeburg Petition at 3 (citing 16 U.S.C. §§ 824(a), 824(b), 824d, 824e) (2006)).

<sup>10</sup> 16 U.S.C. § 824a-1(a) (2006).

FERC must be given binding effect by state utility commissions in determining interstate rates.’’<sup>11</sup> Orangeburg alleges that the 2009 NCUC Order effectively announces the NCUC’s intention of deciding whether and how to give effect to Commission-jurisdictional wholesale rates for purposes of retail ratemaking, and is “clearly preempted by the filed rate doctrine,”<sup>12</sup> which, according to Orangeburg, applies to market-based rates.

9. To that end, Orangeburg asserts that, in the circumstances here, the 2009 NCUC Order would have resulted in Duke failing to recover all of its system costs in the next retail ratemaking proceeding because the NCUC would have imputed to Duke higher “phantom” revenues (based on incremental costs) than Duke would have actually received (based on system average costs) under the Agreement. Orangeburg likens these “phantom” revenues to the “trapped costs” barred by *Nantahala*,<sup>13</sup> and cites for support the partial dissent from the 2009 NCUC Order of NCUC Chairman Edward S. Finley, Jr.: “[I]f . . . the NCUC were to allocate costs [of a system-average priced wholesale agreement] on the basis of incremental costs . . . the future NCUC Order would result in trapped costs in violation of the federal preemption doctrine.”<sup>14</sup> Orangeburg argues that the 2009 NCUC Order reaches beyond the Agreement, preventing all NCUC-regulated utilities from offering power based on system average costs to new wholesale customers, and therefore represents an impediment to the federal policy of encouraging competitive wholesale power markets. According to Orangeburg, the implications of the 2009 NCUC Order extend to potential wholesale power purchasers across the Southeast and effectively remove competitive pressure from the marketplace, because other potential power suppliers will have no incentive to offer power priced at less than North Carolina utilities’ incremental costs.<sup>15</sup>

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<sup>11</sup> *Entergy La., Inc. v. La. Pub. Serv. Comm’n*, 539 U.S. 39, 47 (2003) (citing *Nantahala*, 476 U.S. at 962).

<sup>12</sup> Orangeburg Petition at 35.

<sup>13</sup> *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) (*Nantahala*).

<sup>14</sup> 2009 NCUC Order, Chairman Finley, Concurring in Part and Dissenting in Part, at 2.

<sup>15</sup> For example, Orangeburg states that the Fayetteville, North Carolina Public Works Commission recently opted to enter into a long-term power purchase agreement with its historical power supplier, Progress Energy, instead of Duke, which could have offered power at Duke’s system average costs and saved Fayetteville \$60 million over the course of the contract. Orangeburg states that Duke could not commit to the sale because

(continued...)

10. Consistent with its preemption arguments, Orangeburg further asserts that the Commission can exempt Orangeburg, potential suppliers such as Duke, and other affected electric utilities from the 2009 NCUC Order pursuant to section 205(a) of PURPA.<sup>16</sup> Orangeburg maintains that, in enacting PURPA section 205(a), Congress was acting to promote the coordination of electric utilities by *requiring* the Commission to override state actions interfering with the voluntary coordination of electric utilities that are designed to obtain the economical utilization of facilities or resources in any area.

11. According to Orangeburg, the Commission has made it clear that its authority under PURPA section 205(a) is to be construed broadly<sup>17</sup> to include “*any* agreement for central dispatch or other voluntary coordination of electric utilities.”<sup>18</sup> Orangeburg argues that any long-term, voluntary power supply sale negotiated in a competitive market pursuant to market-based authority falls squarely within the ambit of coordination for purposes of PURPA section 205(a), all the more so in the case of the Agreement, which provided for Duke’s centralized dispatch of Orangeburg’s power resources. Orangeburg argues that the 2009 NCUC Order has prevented the agreed-upon long-term sales under the Agreement and stands as an obstacle to Duke’s contracting with Orangeburg for long-term power sales in the future, and, therefore, is a “state action[] interfering with the voluntary coordination of electric utilities.”<sup>19</sup> Orangeburg further argues that the NCUC’s trapped cost policy is an exercise in economic protectionism, and, accordingly, is not shielded under the savings clause of PURPA section 205(a) as a state action designed to protect public welfare.

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of the 2009 NCUC Order. Orangeburg adds that the 2009 NCUC Order will likely defer the development of renewable power sources in the Southeast.

<sup>16</sup> Section 205(a) of PURPA provides that the Commission “shall . . . exempt electric utilities . . . from any State rule or regulation[] which prohibits or prevents the voluntary coordination of electric utilities, including any agreement for central dispatch, if the Commission determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area.” 16 U.S.C. § 824a-1(a).

<sup>17</sup> Orangeburg Petition at 25 (citing *New PJM Cos.*, 107 FERC ¶ 61,271 (2004) (overriding a Virginia law preventing American Electric Power from integrating into PJM Interconnection, LLC, pursuant to PURPA section 205(a))).

<sup>18</sup> *New PJM Cos.*, 106 FERC ¶ 63,029, at P 38 (2004) (Initial Decision).

<sup>19</sup> Orangeburg Petition at 30.

## II. Notice of Filing and Responsive Filings

12. Notice of Orangeburg's filing was published in the *Federal Register*, 74 Fed. Reg. 35,866 (2009), with protests and interventions due on or before August 3, 2009. Entities that filed a notice of intervention or a timely or untimely motion to intervene, as well as comments and protests, are listed in the Appendix to this order.

13. Answers to comments or protests, or answers to answers, were filed by Orangeburg, the NCUC, Duke, and Fayetteville. On September 11, 2009, Duke filed a notice of withdrawal of its answer to the NCUC's motion.

14. On November 16, 2009, Orangeburg filed a request for expedited decision seeking Commission action on its petition by January 31, 2010 in order to facilitate Orangeburg and Duke's appeal of the 2009 NCUC Order in the Court of Appeals of North Carolina.

15. On January 21, 2011, Orangeburg filed a status report informing the Commission as to the status of the appeal.<sup>20</sup> The NCUC submitted a response to that report, and Orangeburg and Duke each submitted an answer to the NCUC's response.

16. Arguments as set forth in individual pleadings are summarized collectively below.

### A. The NCUC's Position

17. Through its various pleadings, the NCUC argues that Orangeburg's voluntary termination<sup>21</sup> of the Agreement pursuant to its regulatory out clause renders Orangeburg's petition moot, because the 2009 NCUC Order: (1) is unequivocally based solely on the record before it; (2) applies only to the Agreement; and (3) contains no statement that the NCUC intends to apply the Order to any other contracts or cases. The NCUC argues that, in these circumstances, dismissal of the petition as moot is mandated by Commission precedent.<sup>22</sup> According to the NCUC, the fact that Orangeburg was free

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<sup>20</sup> On November 16, 2010, the Court of Appeals of North Carolina dismissed Orangeburg and Duke's appeal as moot. See *In the Matter of Duke Energy Carolinas*, No. COA09-1273, 2010 N.C. App. LEXIS 2089 (N.C. Ct. App. 2010), *aff'd*, 709 S.E.2d 364 (N.C. 2011).

<sup>21</sup> The NCUC asserts that Orangeburg terminated the Agreement, but, according to Orangeburg, it declined Duke's mandatory offer of short-term contingent service after Duke itself invoked the regulatory out clause to terminate the Agreement.

<sup>22</sup> NCUC at 3 (citing *Southern Co. Services, Inc.*, 108 FERC ¶ 61,139 (2004)) (*Southern*).

to take service under the Agreement notwithstanding the 2009 NCUC Order, but “nevertheless chose to terminate the Agreement” supports dismissal based on mootness.

18. The NCUC further states that Orangeburg cannot avail itself of the “capable of repetition, yet evading review” exception to the mootness doctrine,<sup>23</sup> because: (1) Orangeburg has demonstrated no reasonable expectation that the same party will be subject to the same ruling again; and (2) the 2009 NCUC Order was explicit that it addressed only the Agreement and that other contracts would be evaluated on the basis of evidence specific to them.

19. On the merits, the NCUC maintains that the 2009 NCUC Order does not infringe upon federal jurisdiction and instead comports with the Commission policy of protecting native load customers against forced subsidization of uneconomic, market-based sales to off-system, non-native load customers.<sup>24</sup> The NCUC further argues that even assuming the Commission might allocate costs in a different manner, that action would not preclude the NCUC from making its own determination of just and reasonable cost allocation to retail ratepayers. The NCUC submits that it is clearly established that, as long as each jurisdiction, federal and state, allocates costs in the fashion it believes appropriate to ensure just and reasonable rates, there is neither error nor confiscation if costs are allocated differently at the wholesale and retail level.<sup>25</sup> The NCUC asserts that it is within its jurisdiction to hold Duke to the retail ratemaking commitments it made in order to receive approval of its merger with Cinergy. The NCUC likens Duke’s commitment to a retail service provider’s agreement to a retail rate cap, which limits the ability of the retail service provider to raise rates even when wholesale costs rise.

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<sup>23</sup> As explained further below, the referenced exception has been applied where: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

<sup>24</sup> The NCUC cites *Golden Spread Elec. Coop. Inc. v. Southern Public Serv. Co.*, Opinion No. 501, 123 FERC ¶ 61,047 (2008).

<sup>25</sup> The NCUC further distinguishes this case from *Nantahala*, arguing that “trapped costs” only result from state action preventing the recovery of costs incurred in *buying* power under a Commission-approved rate (the factual circumstance of the *Nantahala* case). The NCUC states that here Duke is *selling* power under the Agreement; the only costs at issue here are Duke’s increased variable costs of fuel and O&M expenses to generate more electricity to sell to Orangeburg, not the cost of power Duke purchases under a Commission-approved wholesale rate schedule.

20. The NCUC further posits that the 2009 NCUC Order does not “prohibit[] or prevent[] the voluntary coordination of electric utilities” within the meaning of section 205(a) of PURPA because: (1) neither the plain meaning nor the effect of the 2009 NCUC Order prohibited or prevented either Duke or Orangeburg from implementing the Agreement; instead, the 2009 NCUC Order gave full and binding effect to the Agreement; and (2) Orangeburg voluntarily decided to terminate the Agreement. According to the NCUC, Orangeburg’s PURPA claim also fails because the system-average pricing in the Agreement was not “designed to obtain economical utilization of facilities and resources” and instead would force native load customers to subsidize market-based “off-system” sales.

### **B. Orangeburg’s Response**

21. Through its additional pleadings, Orangeburg disputes any notion that the Petition is moot by reason of the Agreement being terminated. Likening the Agreement’s dissolution to a “shotgun wedding,” Orangeburg posits that the termination was forced, not voluntary, because the NCUC was well aware that its ratemaking treatment of the Agreement would thwart the parties’ intentions.<sup>26</sup> Putting the Agreement aside, Orangeburg asserts that there is still a live controversy, because the 2009 NCUC Order itself announces a broad policy that is not limited to the Agreement but instead reaches all potential sales by NCUC-regulated utilities. Orangeburg posits that the 2009 NCUC Order effectively forbids NCUC-regulated utilities from recovering the full costs of new wholesale agreements priced at system average costs, which will inhibit or prevent them from offering system average pricing to potential new wholesale customers. Orangeburg argues that limiting the prices NCUC-regulated utilities can offer into the Southeast bilateral wholesale power market will undermine the competitive functioning of that market.

22. Moreover, Orangeburg states that the competitive harm caused by the 2009 NCUC Order falls under the well-established exception to the mootness doctrine for disputes “capable of repetition, yet evading review.”<sup>27</sup> Orangeburg states that it is entirely likely that any future contract it signs with Duke would be subject to NCUC review, and would receive the same treatment with respect to cost-based pricing as the terminated Agreement. Orangeburg posits that any future Duke-Orangeburg agreement would have to include the same regulatory out clause in order to protect Duke’s and Orangeburg’s respective economic interests. Thus, according to Orangeburg, unless a future agreement were negotiated many years in advance of commencement of power supplies under that agreement (to allow for review by the NCUC, appeals, and negotiation of a replacement

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<sup>26</sup> Orangeburg’s February 8, 2011 Answer at 2.

<sup>27</sup> Orangeburg Response at 23.

power supply agreement in the event those appeals were unsuccessful), it is also reasonable to conclude that any agreement subject to a ruling like that in the 2009 NCUC Order would be terminated before a challenge to that ruling could be completed.<sup>28</sup>

23. Orangeburg further disputes the NCUC's reliance on *Southern*,<sup>29</sup> in which the Commission found the "capable of repetition, yet evading review" exception did not apply. Orangeburg asserts that *Southern* involved a broad Commission policy that could be addressed in other forums,<sup>30</sup> whereas here, there is no other FERC proceeding in which to challenge the 2009 NCUC Order at issue. Instead, Orangeburg points to *Southwestern Glass Co., Inc. v. Arkla Energy Resources*,<sup>31</sup> where, according to Orangeburg, the Commission found that a party's failure to pursue and consummate a particular transaction in the near term does not moot its claims about its rights to obtain similar service in the future.

### C. Comments and Protests

24. Comments and protests largely reiterate either Orangeburg's or the NCUC's arguments.<sup>32</sup> From a procedural standpoint, Duke adds in support of Orangeburg that administrative agencies are not necessarily bound by the mootness doctrine, and, in any case, the issues posed by the Agreement and the 2009 NCUC Order addressing it remain alive and will affect future full requirements, integrated service wholesale sales to Orangeburg as well as to other wholesale customers. Duke states that the facts giving rise to these issues are fully capable of being repeated in the future, but because the parties involved in any wholesale power purchase agreement must be able to protect themselves against adverse regulatory consequences, those contracts will always contain out clauses leading to their premature termination prior to any ruling challenging their merits by any judicial or regulatory body other than the NCUC itself.

25. On the other hand, NARUC and Public Staff agree with the NCUC that Orangeburg's petition is moot because the Agreement was voluntarily terminated. NARUC agrees that the exception does not apply because Orangeburg has not established

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<sup>28</sup> *Id.* at 24-25.

<sup>29</sup> *Southern Co. Services, Inc.*, 108 FERC ¶ 61,139 at P 6.

<sup>30</sup> *Id.*

<sup>31</sup> *Southwestern Glass Co., Inc. v. Arkla Energy Resources*, 58 FERC ¶ 61,011 (1992) (*Southwestern Glass*).

<sup>32</sup> APPA, Duke, Electricities, Fayetteville and Greenwood support the Petition; Progress, NARUC, Public Staff, Occidental and NC WARN oppose it.

that there is a reasonable expectation that it will be subject to the same action again. Moreover, NARUC adds that Commission precedent requires that Orangeburg also demonstrate that if the issue were somehow to arise in the future, it could not be addressed at that time.

26. On the merits, Greenwood, a South Carolina municipal utility, expresses concern that the NCUC might trap the costs of its recently signed average-cost-based power purchase agreement with Duke by imputing incremental pricing in a future ratemaking proceeding. Fayetteville, a North Carolina municipal utility that recently signed a power purchase agreement with Progress, states that the 2009 NCUC Order has already limited its options in the wholesale market by precluding competition from Duke, its only other competitive option.

27. On the other hand, NC WARN states in support of the NCUC that parties to a wholesale contract cannot arbitrarily bind the state regulatory body and require it to accept whatever provisions the contracting parties deem in their own best self-interests.

### **III. Discussion**

#### **A. Procedural issues**

28. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2014), the Commission will grant the late-filed motions to intervene of Occidental and Public Staff given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed to date, because they have provided information that aided us in the decision-making process.

#### **B. Commission Determination**

29. We find that the Petition is moot and therefore we will dismiss it. The U.S. Supreme Court has stated that "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."<sup>33</sup> We find that Orangeburg and Duke voluntarily terminated the Agreement following the 2009 NCUC Order through Duke invoking the "regulatory out" clause contained in the

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<sup>33</sup> *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

contract. The Commission has discretion as to whether to issue a declaratory order in particular circumstances in order to terminate a controversy and remove uncertainty,<sup>34</sup> and it does not generally adjudicate policy questions outside of concrete cases, especially if the matter becomes moot by the parties' own voluntary actions.<sup>35</sup> In addition, no jurisdictional transactions took place under the Agreement prior to its voluntary termination, and neither party requests that the Agreement be reinstated. Accordingly, there is no concrete issue with respect to the Agreement.

30. While Orangeburg asserts that the 2009 NCUC Order effectively forced the parties to terminate the Agreement, we disagree. Orangeburg asserts that the Agreement and any similar future contract must include a regulatory out clause in order to protect the parties, but there can be any number of ways to address the risks inherent in contracts of this type. Here, Orangeburg and Duke voluntarily chose to incorporate the regulatory out clause in the first place. Neither party asserts that it was subject to undue pressure from the other to include that provision. Further, as Orangeburg itself notes, the parties could have negotiated the contract in advance to allow for time for appeals. Additionally, the parties could have structured the Agreement to remain operative during the period of review by the NCUC and any further appeals.

31. To the extent that Orangeburg argues that the 2009 NCUC Order itself presents a standing, live controversy, we also disagree. The NCUC was clear that its order was intended to apply only to the specific contract at issue, and was not intended to apply to other parties or future contracts.<sup>36</sup> Although Orangeburg argues that the 2009 NCUC Order may affect other parties seeking to purchase power from Duke, we decline to address a hypothetical scenario in this proceeding. The 2009 NCUC Order specifically addressed and was limited to the circumstances relevant to the Agreement, a contract that is now defunct. Accordingly, there is no live issue before us.

32. We next turn to Orangeburg's assertion that, even if moot, the Petition presents issues falling within the exception to mootness, as matters "capable of repetition, but evading review."<sup>37</sup> The Supreme Court has stated that this exception applies where:

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<sup>34</sup> 5 U.S.C. § 554(e) (2000); *Continental Oil Co. v. FPC*, 285 F.2d 527 (5<sup>th</sup> Cir. 1961); *USGen New England, Inc.*, 118 FERC ¶ 61,172 at P 18 (2007).

<sup>35</sup> See *Southern Co. Services, Inc.*, 108 FERC ¶ 61,139 at P 8; *Arcadian Corporation v. Southern Natural Gas Co.*, 77 FERC ¶ 61,210, at 61,860 (1996); see also *PUC v. FERC*, 236 F.3d 708, 713-714 (D.C. Cir. 2001).

<sup>36</sup> 2009 NCUC Order at 32, 36.

<sup>37</sup> *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.<sup>38</sup> Collectively, these two criteria address situations where by nature the relevant circumstance has a short duration or effective period but is likely to be repeated against the same party.<sup>39</sup> The exception is based on the principle that those types of situations should not escape review simply because there is insufficient time for review prior to their expiration. Where there is a reasonable expectation that the same kind of action would be repeated and again expire before the party had a chance to obtain review, review of such action should not be dismissed.<sup>40</sup> This type of situation is not present here.

33. Even assuming, *arguendo*, that there is a reasonable expectation that Orangeburg will be subject to the same action again, its Petition fails the first criteria, requiring that the challenged action is in its duration too short to be fully litigated prior to cessation or expiration. As the Commission stated in *Southern*, “the relevant inquiry is whether a [contract] lasts for so short a time that it *inevitably* expires before review is possible.”<sup>41</sup> No such demonstration has been made here. Here, the Agreement was of a short duration only because the parties voluntarily terminated it pursuant to a regulatory out clause that they included in the Agreement.

34. Although Orangeburg argues that any similar future contract would include a regulatory out clause, which, according to Orangeburg, would make review impossible, that circumstance is not inevitable. Again, any decision to include and invoke a regulatory out clause – instead of any other alternative -- would be voluntary. This is distinguishable from other cases where the “capable of repetition, yet evading review” exception has been applied because there existed a firm deadline beyond control of the parties.<sup>42</sup> No such deadline exists here, and Orangeburg has not shown that any deadline

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<sup>38</sup> *Spencer v. Kemna*, 523 U.S. 1, 17 (1998).

<sup>39</sup> See *Southland Oil Co./VGS Corp.*, 15 FERC ¶ 61,118 (1981) (citing *S.E.C. v. Sloan*, 436 U.S. 103 (1978)).

<sup>40</sup> *Id.*

<sup>41</sup> *Southern Co. Services, Inc.*, 108 FERC ¶ 61,139 at P 7 (quoting *ITT Rayonier Inc. v. U.S.*, 651 F.2d 343, 346 (5<sup>th</sup> Cir. 1981) (emphasis added)).

<sup>42</sup> See, e.g., *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (addressing the application of the “capable of repetition, yet evading review” in cases involving election deadlines).

would apply to future contracts.<sup>43</sup> Accordingly, as we found in *Southern Co. Services*, even if it is possible that the disputed issue will come up again in future agreements, Orangeburg fails to demonstrate that the issue could not be reviewed then, should such review be necessary.<sup>44</sup>

35. We reject Orangeburg's assertion that *Southwestern Glass* is applicable here. That case involved a contractual dispute where one party allegedly engaged in undue discrimination by refusing to enter into a long-term arrangement, then attempted to use that refusal to evade review on the basis of mootness.<sup>45</sup> Here, there is no allegation or evidence of such conduct against any relevant party.

36. Because we find that the Petition is moot, we need not address the substantive arguments therein.

The Commission orders:

Orangeburg's petition for declaratory order is hereby dismissed, as discussed in the body of this order.

By the Commission. Commissioner Moeller is dissenting with a separate statement attached.

Commissioner Honorable is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>43</sup> To the extent that Orangeburg argues that the exception to mootness applies because any similar future agreements between Duke and other electric utilities necessarily will be of short duration because the 2009 NCUC Order will reach those agreements as well, we reject that argument for the same reasons discussed above: the 2009 NCUC Order was limited to the Agreement, and inclusion of the regulatory out clause is not inevitable. Moreover, the exception to mootness requires a reasonable expectation that the same complaining party, not any other entity, will be subject to the same challenged action. *See Spencer v. Kemna*, 523 U.S. at 17.

<sup>44</sup> *Southern Co. Services, Inc.*, 108 FERC ¶ 61,139 at P 7.

<sup>45</sup> *Southwestern Glass*, 58 FERC ¶ 61,011 at 61,020.

## **Appendix**

### **Intervenors**

Duke Energy Carolinas, LLC (Duke)  
National Rural Electric Cooperative Association (NRECA)  
North Carolina Electric Membership Corporation (NCEMC)  
South Carolina Electric & Gas Company (SCE&G)

### **Protestors**

Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc. (Progress)  
National Association of Regulatory Utility Commissioners (NARUC)  
North Carolina Utilities Commission (NCUC)  
North Carolina Waste Awareness and Reduction Network, Inc. (NC WARN)  
Occidental Power Marketing, L.P. (Occidental)  
Public Staff-North Carolina Utilities Commission and Attorney General of North Carolina (Public Staff)

### **Commenters**

American Public Power Association (APPA)  
ElectriCities of North Carolina, Inc. (ElectriCities)  
Greenwood Commissioners of Public Works of the City of Greenwood, South Carolina (Greenwood)  
Public Works Commission of the City of Fayetteville, North Carolina (Fayetteville)

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

City of Orangeburg, South Carolina

Docket No. EL09-63-000

(Issued June 18, 2015)

MOELLER, Commissioner, *dissenting*:

The Commission should have granted Orangeburg's petition for declaratory order years ago. However, the mere passage of time does not render Orangeburg's petition moot, nor does it relieve the Commission of its obligation to defend its exclusive jurisdiction over wholesale rates. Orangeburg, Duke, and other parties have provided compelling reasons for the Commission to exert its authority to preempt the North Carolina Utility Commission's (NCUC) March 2009 order,<sup>1</sup> notwithstanding the termination of the underlying Agreement. Unfortunately, over the six years this case has been pending before the Commission, there have never been three votes in favor of action.

The NCUC Order intruded on the Commission's jurisdiction over wholesale rates by denying an out-of-state wholesale customer (Orangeburg) the benefit of its wholesale Agreement with Duke. By ruling that the associated costs would be allocated on the basis of incremental costs, rather than the lower system average costs contained in the wholesale Agreement, the NCUC made clear that it would require Duke to absorb trapped costs had it proceeded to make sales under the Agreement.<sup>2</sup> Faced with such a prospect, Duke had no choice but to exercise the Agreement's regulatory-out clause, thereby denying Orangeburg its anticipated \$10 million a year in associated savings.

The majority maintains that Orangeburg's petition is moot because Duke voluntarily exercised the regulatory-out clause and the parties need not have included such a clause in the Agreement. To say that the Agreement was terminated voluntarily ignores the NCUC's finding that Duke would suffer trapped costs if it transacted pursuant to the wholesale Agreement. NCUC's actions demonstrate why such regulatory-out clauses are a necessary and frequent feature of such contracts. The majority identifies

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<sup>1</sup> *In the Matter of Duke Energy Carolinas, LLC's Advance Notice of Purchase Power Agreement with the City of Orangeburg, South Carolina and Joint Petition for Declaratory Order*, Docket No. E-7, Sub 858 (Mar. 30, 2009) (NCUC Order).

<sup>2</sup> *Id.* Chairman Finley, Concurring in Part and Dissenting in Part, at 2-3.

only two alternatives to such regulatory-out clauses: negotiating contracts sufficiently far in advance to allow time for appeals or so that the contracts remain operative while such appeals are pending. In light of the six years that this matter has spent pending before the Commission, it is difficult to view these expectations as reasonable ones. Asking parties to negotiate contracts that remain operative while appeals are pending would force parties to design wholesale rates that contemplate the possibility of inappropriate retail rate treatment. Parties should not have to expose themselves to the possible ramifications of trapped costs – or attempt to negotiate contracts many years in advance – simply to create a test case that prompts timely and meaningful review by this Commission.

Moreover, notwithstanding the termination of the Agreement, the NCUC Order itself is an ongoing obstacle to the ability of North Carolina utilities to engage in competitive wholesale transactions and for customers to access least-cost power. As Orangeburg explains:

Potential wholesale power purchasers across the Southeast, including numerous municipal and cooperative utilities, will be operating in a market where NCUC-regulated power suppliers are unable to offer the lowest prices and most favorable terms that the market will bear. The NCUC policy will hamper, and is hampering, the ability of buyers to purchase least-cost power for their customers and to coordinate the most economical use of their resources with power suppliers. Instead, because the NCUC Order specifically targets new wholesale power agreements, customers are likely to become captive to their current suppliers, which are not affected by the NCUC's policy statement.<sup>[3]</sup>

Contrary to the majority's assertion that Orangeburg asks the Commission to consider a hypothetical scenario, Orangeburg explains that the NCUC Order prevented the Fayetteville, North Carolina, Public Works Commission from entering into a long-term power purchase agreement with Duke, rather than its historical power supplier, thereby foregoing \$60 million in savings over the life of the contract.<sup>4</sup> It is unclear how many other agreements have been affected over the last six years, or what the Commission's inaction has meant for wholesale competition and prices in the Southeast. These questions deserve further inquiry by this Commission.

The majority maintains that there is not a live controversy in this proceeding because the NCUC Order was clear that its findings applied only to the specific

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<sup>3</sup> Orangeburg Petition at 19.

<sup>4</sup> Orangeburg September 1, 2009 Answer at 6.

Agreement at issue and not to other parties or future contracts. However, the NCUC Order established precedent by including a broad “ruling or policy statement” applicable to “any future retail ratemaking proceeding” regarding the Agreement, including an explicit finding that the associated costs should be allocated based upon incremental costs, rather than the system-average costs reflected in the wholesale Agreement, because Orangeburg had not been served historically by Duke.<sup>5</sup> The NCUC further concluded that “it would not be preempted by federal law from allocating wholesale revenues and costs in such a manner for retail ratemaking purposes,”<sup>6</sup> and proceeded – in considerable detail – to describe its views on FERC’s filed rate doctrine, relevant FERC precedent, and federal preemption in retail ratemaking.<sup>7</sup> It is difficult to reconcile the majority’s repeated assertions that the NCUC Order was limited in its applicability with the NCUC’s own rulings regarding future retail ratemaking proceedings and related interpretations of federal law.

As the Chairman of the NCUC stated with regard to the NCUC Order, “[the NCUC’s] jurisdiction over wholesale contracts is preempted, and as the issues in this docket make clear, efforts to circumvent FERC’s otherwise exclusive jurisdiction through generic orders and regulatory conditions raise numerous difficulties and concerns.”<sup>8</sup> North Carolina’s utilities should be able to sell wholesale energy at system average prices to willing buyers without suffering adverse retail rate impacts, thereby allowing the largest number of retail ratepayers to receive least-cost energy without regard to their location or their status as historically-served load. To do otherwise is contrary to the public interest and the promotion of a competitive wholesale marketplace.

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<sup>5</sup> In particular, the NCUC ruled that “[i]n any future retail ratemaking proceeding, the [NCUC] should allocate the wholesale revenues and costs of the Orangeburg Agreement in the manner that produces the lowest cost power...for Duke’s retail native load customers” and that applying this policy to the Orangeburg Agreement would entail an allocation “based upon incremental costs in any future retail ratemaking proceeding.” NCUC Order at 33.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 33-36.

<sup>8</sup> *Id.* Chairman Finley, Concurring in Part and Dissenting in Part, at 14.

Accordingly, I respectfully dissent.

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Philip D. Moeller  
Commissioner