

151 FERC ¶ 61,242
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Corporation
Progress Energy, Inc.

Docket Nos. ER12-1338-001

Carolina Power & Light Co.

ER12-1347-002

ORDER ON REHEARING

(Issued June 18, 2015)

1. On June 8, 2012, the Commission issued an order conditionally accepting the Joint Dispatch Agreement (JDA) that Duke Energy Corporation (Duke) and Progress Energy, Inc. (Progress) filed on behalf of Duke Energy Carolinas, LLC (Duke Energy Carolinas) and Carolina Power & Light Company (CP&L) and the Joint Open Access Transmission Tariff (Joint OATT) that Duke and Progress filed on behalf of Duke Energy Carolinas, CP&L, and Florida Power Corporation.¹ On July 9, 2012, the City of Orangeburg, South Carolina (Orangeburg) filed a request for rehearing of that order. For the reasons discussed below, we deny rehearing.

I. Background

2. On April 4, 2011, in Docket No. EC11-60-000, Duke Energy Carolinas' parent, Duke, and CP&L's and Florida Power Corporation's parent, Progress, filed a Federal Power Act (FPA) section 203² merger application under which Progress would become a wholly-owned subsidiary of Duke, and Progress' shareholders would become Duke shareholders. On September 30, 2011, the Commission issued an order that conditionally authorized the merger, subject to Commission approval of market power mitigation

¹ *Duke Energy Corp.*, 139 FERC ¶ 61,193 (2012) (JDA Order).

² 16 U.S.C. § 824b (2012).

measures.³ Duke and Progress filed a compliance filing to the merger order on October 17, 2011. On December 14, 2011, the Commission issued an order rejecting this compliance filing.⁴ On March 26, 2012, Duke and Progress filed a second compliance filing.

3. On March 26, 2012, along with the second compliance filing and in connection with the merger, Duke and Progress filed the JDA on behalf of Duke Energy Carolinas and CP&L in Docket No. ER12-1338-000. In Docket No. ER12-1347-001, Progress filed a concurrence to the JDA on behalf of CP&L. In Docket No. ER12-1343-000, Duke and Progress filed the Joint OATT on behalf of Duke Energy Carolinas, CP&L, and Florida Power Corporation. In Docket Nos. ER12-1345-000 and ER12-1346-000, Progress Energy filed concurrences to the Joint OATT on behalf of Florida Power Corporation and CP&L, respectively.⁵ Orangeburg, among others, filed protests in the JDA proceeding.

4. On June 8, 2012, the Commission accepted the second compliance filing to the merger, subject to certain conditions specified by the Commission.⁶ The Commission also conditionally accepted the JDA and the Joint OATT, subject to certain compliance requirements, to become effective upon consummation of the proposed merger.⁷ Duke and Progress filed the required compliance filing, which was accepted by delegated letter order on July 18, 2013.⁸

³ *Duke Energy Corp.*, 136 FERC ¶ 61,245 (2011), *order rejecting compliance filing*, 137 FERC ¶ 61,210 (2011), *order accepting compliance filing*, 139 FERC ¶ 61,194 (2012), *order on rehearing*, 149 FERC ¶ 61,078 (2014).

⁴ *Duke Energy Corp.*, 137 FERC ¶ 61,210 (2011).

⁵ The issues raised in Orangeburg's rehearing request pertain to the JDA, not the Joint OATT. Consequently, we will terminate the proceedings in Docket Nos. ER12-1343-001, ER12-1345-001, and ER12-1346-001.

⁶ *Duke Energy Corp.*, 139 FERC ¶ 61,194 (2012).

⁷ JDA Order, 139 FERC ¶ 61,193. The Duke-Progress merger closed on July 2, 2012.

⁸ Duke Energy Carolinas LLC, Docket Nos. ER12-1338-002 and ER12-1347-003 (July 18, 2013) (delegated letter order).

II. Request for Rehearing

5. On July 9, 2012, Orangeburg submitted a rehearing request (Rehearing Request) to the JDA Order. It argues that the JDA unlawfully establishes categories of economically favored wholesale native load customers and supports the North Carolina Utilities Commission's (North Carolina Commission) intent to assert control over Duke Energy Carolinas' and CP&L's wholesale sales. Orangeburg contends that for these reasons, the JDA is unjust, unreasonable, and unduly discriminatory and that the JDA Order never addresses the objections expressed in Orangeburg's pleadings in the original proceeding.⁹

6. Orangeburg claims that the JDA's purpose, in conjunction with new state regulatory conditions filed by Duke Energy Carolinas and CP&L at the North Carolina Commission, is to "maintain and further the [North Carolina Commission's] use of its retail ratemaking authority to effect a multistate geographic market allocation of Duke's and Progress's lower-cost power, including purchase and sale at wholesale of average system cost power."¹⁰ To this point, Orangeburg argues that the North Carolina Commission has demonstrated its willingness to rely on its retail authority to control Duke Energy Carolinas' and CP&L's wholesale power sales. More specifically, Orangeburg alleges that, in a 2009 order, the North Carolina Commission stated that, for the purposes of retail ratemaking, it would treat a market-based sale of firm power at average system cost-based prices from Duke Energy Carolinas to Orangeburg as if it were made from Duke Energy Carolinas' highest cost resources.¹¹ Orangeburg asserts, however, that the North Carolina Commission has issued orders favoring Duke Energy

⁹ Rehearing Request at 2-4.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 8 (citing Order on Advance Notice and Joint Petition for Declaratory Ruling, *In re Duke Energy Carolinas, LLC's Advance Notice of Purchase Power Agreement*, Docket No. E-7, Sub 858, slip op. at 36, 42 (N.C. Utils. Comm'n Mar. 30, 2009), *appeal dismissed as moot sub nom. In re Duke Energy Carolinas, LLC's Advance Notice of Purchase Power Agreement with the City of Orangeburg, S.C. and Joint Petition for Declaratory Ruling*, No. COA 09-1273 (N.C. Ct. App. Nov. 16, 2010) (unpublished) *Appeal dismissed*, No. 537P10-1 (N.C. Sup. Ct. June 7, 2011)). Orangeburg and Duke Energy Carolinas terminated their agreement as a result of this order. JDA Order, 139 FERC ¶ 61,193 at P 25. In response to this North Carolina Commission order, Orangeburg filed a petition for declaratory relief with this Commission on July 2, 2009 in Docket No. EL09-63-000. In an order issued concurrently with this order, the Commission dismisses this petition as moot. *City of Orangeburg*, 151 FERC ¶ 61,241 (2015).

Carolinas' and CP&L's sale of average system cost wholesale power to customers that the North Carolina Commission considers "native load," including a wholesale agreement between Duke Energy Carolinas and Greenwood, South Carolina.¹² Orangeburg states that the North Carolina Commission does not consider Orangeburg a native load customer.

7. As a result of the aforementioned events, Orangeburg claims that the North Carolina Commission has "usurped" the Commission's jurisdiction over Duke Energy Carolinas' and CP&L's wholesale sales and has relied on its authority "under the new State Regulatory Conditions (or otherwise)" to do so.¹³ Orangeburg states that new State Regulatory Condition 3.9(a), for example, gives the North Carolina Commission the "right to assign, allocate, impute, and make pro-forma adjustments with respect to the revenues and costs associated with both [Duke Energy Carolinas'] or [CP&L's] wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes."¹⁴

8. Orangeburg argues that the purpose of the JDA is to further perpetuate the North Carolina Commission's effort to prevent the export of Duke Energy Carolinas' and CP&L's low cost "wholesale power outside North Carolina (except in certain limited circumstances to [North Carolina Commission]-favored customers within the companies' balancing authority areas)."¹⁵ It explains that the JDA economically favors inter-affiliate energy sales between Duke Energy Carolinas and CP&L. Orangeburg states that the JDA does so by considering these transactions to be "Native Load Sales" despite the fact that Duke Energy Carolinas' retail customers "are not, and never have been [CP&L's] native load and vice versa."¹⁶

9. Orangeburg argues that, even in the absence of the state regulatory conditions, the JDA is unjust, unreasonable, and unduly discriminatory and that the Commission has failed to meaningfully address why it is permissible to economically favor inter-affiliate wholesale sales to non-native load customers pursuant to the JDA. Additionally, Orangeburg argues that in the JDA Order, the Commission failed to consider Orangeburg's arguments. It notes that the Commission stated that "the allocation of the

¹² Rehearing Request at 8-9.

¹³ *Id.* at 9.

¹⁴ *Id.* at 10.

¹⁵ *Id.* at 12.

¹⁶ *Id.*

lowest cost energy under the JDA to . . . native load customers is not unduly discriminatory” because in “Order No. 2000, the Commission acknowledged that in areas without retail choice, state commissions have the authority to ‘require a utility to sell its lowest cost power to native load, as [they] always [have].’”¹⁷ In response to this finding, Orangeburg states that the Commission’s assertion is contrary to the U.S. Supreme Court’s decision in *New England Power Co. v. New Hampshire*.¹⁸ Additionally, it argues that the Commission’s finding does not justify the North Carolina Commission’s requirement that Duke Energy Carolinas and CP&L sell low cost power at wholesale to one another’s load.

10. Furthermore, Orangeburg argues that to the extent that the JDA Order found that the North Carolina Commission can regulate Duke Energy Carolinas’ and CP&L’s sales, it is “patently unsound.”¹⁹ Additionally, it asserts that the allocation of costs pursuant to the JDA is “unduly discriminatory and otherwise arbitrary and not just and reasonable” because the North Carolina Commission has determined, and will continue to determine, which entities fall into the wholesale native load category.²⁰

11. Moreover, Orangeburg argues that the JDA, in conjunction with the state regulatory regime, violates the Supremacy Clause of the U.S. Constitution. In this regard, Orangeburg cites U.S. Supreme Court precedent finding that a “State . . . must give effect to Congress’ desire to give [the Commission] plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.”²¹ Orangeburg goes on to say that allowing the North Carolina Commission to disregard the terms of market-based rate contracts effectively means that Duke Energy Carolinas and CP&L will not be able to sell power to disfavored customers from “other than their

¹⁷ *Id.* at 14 (citing JDA Order, 139 FERC ¶ 61,193 at P 45 (citing *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff’d sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001)).

¹⁸ *Id.* at 15 (citing *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982)).

¹⁹ *Id.* at 17.

²⁰ *Id.* at 18.

²¹ *Id.* at 21 (citing *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986)).

highest cost resources” unless they are willing to do so at a loss pursuant to the retail ratemaking process.²²

III. Discussion

12. We deny rehearing. On rehearing, Orangeburg has failed to show that the terms of the JDA are unjust and unreasonable. As Duke and Progress explained, the purpose of the JDA is to allow Duke Energy Carolinas and CP&L to achieve efficiencies by jointly dispatching their generation facilities to serve their loads.²³ Duke and Progress stated that Duke Energy Carolinas will act as “Joint Dispatcher” and will conduct merit dispatch of the companies’ generation resources to meet load requirements and contractual commitments subject to reliability and contractual requirements. Under the JDA, Duke Energy Carolinas’ and CP&L’s native load customers will be deemed to have received service from the lowest cost resources, while remaining resources will be deemed to have served off-system sales.²⁴

13. Consistent with our finding in the JDA Order, we find that, under the JDA, the use of the lowest cost resources to serve Duke Energy Carolinas and CP&L’s native loads, while off-system sales are supplied using higher cost resources, results in just and reasonable rates.²⁵ This methodology is an appropriate pricing mechanism and does not unduly discriminate against Orangeburg, which is not a native load customer. The Commission explained in Order No. 2000 that this methodology was appropriate by acknowledging that, in areas without retail choice, state commissions have the authority to “require a utility to sell its lowest cost power to native load, as [they] always [have].”²⁶ Given these findings, we need not reach Orangeburg’s other arguments.

²² *Id.* at 23.

²³ JDA Order, 139 FERC ¶ 61,193 at P 6.

²⁴ *Id.* P 7.

²⁵ *Id.* P 44.

²⁶ *Id.* P 45 (citing *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff’d sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001)).

The Commission orders:

The request for rehearing of Orangeburg is hereby denied, as discussed in the body of this order.

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

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
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Docket Nos. ER12-1338-001

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ER12-1347-002

(Issued June 18, 2015)

MOELLER, Commissioner, *concurring*:

I support the Commission's acceptance of the Joint Dispatch Agreement, as it will allow Duke Energy Carolinas and Carolina Power & Light to achieve efficiencies by jointly dispatching their generation facilities to serve their loads. However, I do so notwithstanding my concerns regarding the North Carolina Utility Commission's treatment of other wholesale agreements for retail ratemaking purposes, as discussed in my dissent in Docket No. EL09-63-000.²⁷

Accordingly, I respectfully concur.

Philip D. Moeller
Commissioner

²⁷ *City of Orangeburg, South Carolina*, 151 FERC ¶ 61,241 (2015) (Moeller, Comm'r, dissenting).