156 FERC ¶ 61,201
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Duke Energy Carolinas, LLC
Duke Energy Progress, LLC
Duke Energy Florida, LLC

Docket No. AC15-174-001

ORDER GRANTING MOTION TO LODGE,
DENYING REHEARING, AND
DENYING REQUEST FOR PART 41 PROCEDURE

(Issued September 22, 2016)

1. On March 14, 2016, Duke Energy Carolinas, LLC (Duke Energy Carolinas), Duke Energy Progress, LLC, and Duke Energy Florida, LLC (collectively, Duke Companies) requested rehearing of the February 12, 2015 letter order[1] that granted Duke Companies' request for waiver of certain accounting requirements.[2] Duke Companies seek rehearing concerning the order's statement of Commission policy on the appropriate accounting treatment for the discounts taken on their sales of customer accounts receivable.[3] Duke Companies also move to lodge their supporting affidavit with attachments (Affidavit).

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[1] *Duke Energy Corp.*, Docket No. AC15-174-000 (Feb. 12, 2016) (delegated letter order) (Waiver Order). The Commission delegated authority to act in this matter to the Director of the Office of Enforcement (Enforcement Director), who authorized the Director and Chief Accountant, Division of Audits and Accounting (Chief Accountant) to act for him. *See* 18 C.F.R. § 375.311 (2016).

[2] Duke Companies August 19, 2015 Application for Waiver of Certain Accounting Requirements (Waiver Request).

[3] The terms "accounts receivable" and "receivables" are used interchangeably in this order. The "discount" represents the loss incurred from selling the accounts receivable at less than full face value.

Alternatively, if the Commission were to deny rehearing, Duke Companies request commencement of the shortened procedure provided for in Part 41 of the Commission's regulations,[4] so that their arguments on the proper accounting treatment for the discounts on their accounts receivable sales can be heard.

2. For the reasons discussed below, we will grant Duke Companies' motion to lodge the Affidavit in the record of this proceeding. We will, however, deny rehearing on the treatment of accounts receivable and the request for the Section 41.3 Shortened Procedure. Nevertheless, we have considered, in this order, the arguments that Duke Companies' raised concerning the appropriate accounting treatment for discounts on their accounts receivable sales. In this manner, as shown by the discussion below, we have, in fact, afforded Duke Companies a hearing.

I. **Background**

3. On August 19, 2015, as supplemented on December 18, 2015, Duke Companies asked the Commission to waive the requirement that the three individual Duke Companies use the equity method of accounting for the activities of their respective wholly-owned financing subsidiaries[5] and, instead, allow Duke Companies to account for their subsidiaries' activities on a consolidated basis.[6] Duke Companies also described

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[4] *See* 18 C.F.R. § 41.3 (2016). Section 41.3 provides for an audited person to challenge audit findings or proposed remedies in a "paper hearing." The section also permits the audited person to request a trial-type hearing if new issues are raised (Section 41.3 Shortened Procedure). This section appears in Part 41, Accounts, Records, Memoranda and Disposition of Contested Audit Findings and Proposed Remedies, of the Commission's regulations, 18 C.F.R. §§ 41.1-41.12 (2016) (Part 41).

[5] The three wholly-owned financing subsidiaries are: Duke Energy Receivables Finance Co., LLC, Duke Energy Progress Receivables, LLC, and Duke Energy Florida Receivables, LLC. (collectively, Financing Subsidiaries).

[6] Rehearing Request at 3; Waiver Request at 6. Under the consolidated method of accounting, advocated by Duke Companies, the financial accounts of a subsidiary company are combined with those of the parent company so as to produce financial statements that appear to be of a single company. Intercompany transactions between the subsidiary company and the parent company are eliminated. Under the equity method of accounting, in contrast, the operating accounts of the parent company and the subsidiary company are not combined. The parent company's accounts show the subsidiary company as an investment. This investment account is increased or decreased based on the subsidiary company's financial position. Intercompany transactions are generally not entirely eliminated but recorded, reciprocally, in each company's accounts.

their practice of recording the expenses of factoring (i.e., selling) the receivables in Account 930.2, Miscellaneous General Expenses, but did not expressly request Commission approval of this practice.[7] Duke Companies asserted that the requested waivers would result in lower rates for formula rate power and transmission customers partly because, under consolidation accounting, the expenses of factoring the accounts receivable to the Financing Subsidiaries are offset by the Financing Subsidiaries' corresponding income.[8] Duke Companies explained that collateralization of receivables (i.e., using the receivables as collateral) also enables each Financing Subsidiary to issue debt at a lower interest rate than would be the case for its parent utility, i.e., the respective Duke Company. This, they stated, allows Duke Companies to reduce their overall borrowing costs and thus reduce their cost of service and their charges to customers served under cost-based rates.[9]

4. On December 18, 2015, pursuant to section 205 of the Federal Power Act (FPA),[10] Duke Companies filed proposed tariff amendments and rate schedules providing for each of the three Duke Companies to use the consolidated method of accounting for the operations of its respective Financing Subsidiary. The tariff filings were needed because Duke Companies' formula rates are based on Duke Companies' costs, as recorded. Approval of the consolidated method of accounting would carry through to Duke Companies' formula rates and thus to the calculation of the charges in their wholesale power sales agreements.[11] On February 11, 2016, the Director, Division of Electric Power Regulation – East, accepted the three tariff filings, to be effective January 1 of the year in which each of the respective Financing Subsidiaries was established.[12]

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[7] Waiver Request at 14.

[8] Rehearing Request at 4.

[9] Waiver Request at 9.

[10] 16 U.S.C. § 824d (2012).

[11] Rehearing Request at 4.

[12] *Duke Energy Carolinas, LLC*, Docket No. ER16-577-000 (Feb. 11, 2016); *Duke Energy Florida., LLC*, Docket No. ER16-578-000 (Feb. 11, 2016); *Duke Energy Progress, LLC*, Docket No. ER16-579-000 (Feb. 11, 2016) (delegated letter orders).

II. Waiver Order

5. In the Waiver Order, the Chief Accountant took three actions. *First*, the Chief Accountant granted the requested accounting waivers, "provided that the three Duke Companies' respective tariffs continue to allow consolidation to be used in their [respective] rate making."[13] *Second*, the Chief Accountant referred to a January 29, 2014 letter from the Enforcement Director to Duke Energy Corporation (Duke Energy), in Docket No. PA14-2-000, stating that Enforcement Staff was commencing an audit of Duke Energy, and that the audit would cover, among other matters, compliance by Duke Energy and its public utility subsidiaries,[14] with the Commission's accounting regulations in 18 C.F.R. Part 101[15] for the calendar years 2011 through 2016.[16] The Chief Accountant pointed out that the audit would cover the public utility subsidiaries' compliance with the applicable reporting requirements in the FERC Form No. 1,[17] which would include the accounting for the long-term investments in subsidiaries and the related sales of accounts receivables. Recognizing the substantial overlap between the audit proceeding and the waiver proceeding, the Chief Accountant stated that the

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[13] Waiver Order at 1.

[14] *Id*. In addition to Duke Companies, Duke Energy's other public utility subsidiaries are Duke Energy Indiana, LLC, Duke Energy Ohio, Inc., and Duke Energy Kentucky, Inc.

[15] 18 C.F.R. pt. 101, Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act (2016) (Part 101). The Uniform System of Accounts is the accounting system adopted by the Commission to fulfill its responsibilities under the FPA. *See* Adopting and Promulgating Codification and Reissuance of General Rules, Including Rules of Practice and Procedure, 12 Fed. Reg. 8503, 8506-07 (1947).

[16] *Duke Energy Corp.*, Audit Announcement, Docket No. PA14-2-000 (Jan. 29, 2014). The audit was commenced to evaluate Duke Energy's fulfillment of the Commission's conditions for authorizing the utility's merger with Progress Energy, Inc. For more information on the merger proceeding, see Docket No. EC11-60.

[17] FERC Form No. 1, Annual Report of Major Electric Utilities, Licensees and Others.

approvals granted in the Waiver Order shall not prejudge matters under review in the Duke Energy audit proceeding.[18]

6. *Third*, the Chief Accountant, citing Opinion No. 375,[19] described how the Commission's ruling in that proceeding applies to Duke Companies' recording of sales of customer accounts receivable to their respective financing subsidiaries:

> In regards to the accounting for the [Duke Companies'] sales of customer accounts receivable to their respective financing subsidiaries, [Duke Companies] indicated that under the consolidation method, the losses related to the sales discount (i.e., the difference between the proceeds received and the carrying amount of the customer accounts receivables sold) were recorded as a debit to Account 930.2, Miscellaneous General Expenses. [Duke Companies] explain that the losses recorded in Account 930.2 are offset using the consolidation method. However, [Duke Companies] allege that under the equity method of accounting, [they] would record the losses to Account 930.2, but would not have an offsetting credit in that account. Under Commission Opinion No. 375, the Commission has found that it is improper to record the loss associated with sales of accounts receivables in Account 930.2. Opinion No. 375 provides that such losses are properly recorded in Account 426.5, Other Deductions.[20]

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[18] Waiver Order at 3.

[19] *System Energy Resources, Inc.*, Opinion No. 375, 60 FERC ¶ 61,131, at 61,480-81, *reh'g granted*, 61 FERC ¶ 61,031 (1992) (refund obligation deferred), *settlement approved*, 69 FERC ¶ 61,265 (1994), *clarification of settlement granted*, 70 FERC ¶ 61,187 (1995), *refund plan approved*, 76 FERC ¶ 61,004 (1996) (Opinion No. 375 or *SERI*).

[20] Waiver Order at 3. *See SERI*, 60 FERC at 61,480-81. Expenses recorded in Account 930.2 are considered utility operating expenses and are included in rates as part of cost-of-service. Expenses recorded in Account 426.5 are non-utility expenses and therefore are generally not included in cost-of-service rates. Generally, accounts numbered 900 are considered operating expenses while accounts numbered 400 are considered non-operating expenses.

III. **Audit Report**

7. On April 1, 2016, the Enforcement Director issued the report in the audit proceeding.[21] In Finding No. 5, Accounting for Sales of Accounts Receivable, the Audit Report states:

> [Duke Companies] misclassified an estimated $94.7 million of nonoperating expenses and receivables arising from transactions with their subsidiaries during the audit period. As a result, the wholesale power and transmission customers' revenue requirements were inappropriately overstated by an estimated $61 million.[22]

As pertinent guidance, the Audit Report cited Part 101's descriptions of Accounts 930.2 and 426.5. Account 930.2 states in part:

> This account shall include the cost of labor and expenses incurred in connection with the general management of the utility not provided for elsewhere.[23]

Account 426.5 states in part:

> This account shall include other miscellaneous expenses which are nonoperating in nature, but which are properly deductible before determining total income before interest charges.[24]

As pertinent guidance for Finding No. 5, the Audit Report cited Opinion No. 375.[25]

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[21] Audit of Duke Energy Corporation and its Public Utility Subsidiaries' Compliance with Conditions in Commission Merger Authorization Orders; Transmission Formula Rate Tariff Requirements; and Accounting and Financial Reporting Regulations, Docket No. PA14-2-000 (Mar. 29, 2016) (Audit Report). The Audit Report is included in *Duke Energy Cos.*, Docket No. PA14-2-000 (Apr. 1, 2016) (delegated letter order approving the Audit Report). Beginning on February 19, 2016, and based on continuing discussions with Duke Energy, Enforcement Staff sent Duke Energy several drafts of the Audit Report. The latest draft was sent on March 29, 2016 (March 29 Draft Audit Report).

[22] Audit Report at 41.

[23] 18 C.F.R. pt. 101, Account 930.2 (2016).

[24] 18 C.F.R. pt. 101, Account 426.5 (2016).

8. In Recommendation No. 17, the Audit Report advised Duke Companies to "[r]evise procedures to ensure that all costs and account balances associated with the sale of accounts receivable are accounted for in accordance with Commission accounting regulations."[26] The Audit Report added that, "[a]mong other things, the corrected accounting should ensure that all losses associated with receivable sales are recorded in Account 426.5." [27]

9. In Recommendation No. 18, the Audit Report advised Duke Companies to provide the revised procedure to the Office of Enforcement, Division of Audits and Accounting, for review within 60 days of receiving the Audit Report. Cognizant of Duke Companies' pending rehearing request in this proceeding, the Audit Report stated that, "the portions of [Finding No. 5] that relate to the losses issues, including Recommendations [Nos.] 17 and 18, shall be held in abeyance and shall be subject to the outcome of the Rehearing Request and any subsequent petitions for court review."[28]

10. Duke Energy responded to Finding No. 5, based on the March 29 Draft Audit Report, in a March 30, 2016 letter to the Chief Accountant.[29] Duke Energy stated that it disagreed with the portion of Finding No. 5 that concerned accounting for losses on the sale of accounts receivable. Duke Energy stated that, despite its disagreement:

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[25] Audit Report at 41 (quoting Opinion No. 375, 60 FERC at 61,480) ("From an accounting standpoint, we find that the record supports the staff and intervenors' position – which the initial decision adopted – that the loss on the sale of accounts receivable was erroneously recorded by SERI in Account 930.2.").

[26] *Id.* at 44.

[27] *Id.*

[28] *Id.*

[29] Audit Report, Appendix, Duke Energy's Comments on Audit Report (Mar. 30, 2016). Duke Energy stated that it was responding to the March 29, 2016 revision of the draft audit report. Appendix at 1. In the issued Audit Report, Finding No. 5 remained unchanged.

> Duke Energy will not contest this finding under 18 CFR Part 41 because the portion of this finding that relates to accounting for losses on the sale of receivables, including [R]ecommendations [Nos.] 17 and 18, will be held in abeyance and will be subject to the outcome of Duke Energy's request for rehearing in Docket No. AC15-174-001 pursuant to the draft audit report.[30]

IV. Rehearing Request

11. In their request for rehearing of the Waiver Order, Duke Companies assert that the Chief Accountant erred in finding that the discount associated with the accounts receivable sales should be recorded in Account 426.5. In support of their position, Duke Companies move to lodge the Affidavit.[31] Duke Companies also assert that the Chief Accountant violated Duke Companies' due process rights by not giving them notice or an opportunity to be heard regarding the appropriate accounting for the accounts receivable discount. Duke Companies assert that the Chief Accountant's ruling on the proper accounting for the discounted accounts receivable violates section 301 of the FPA[32] and Part 41 of the Commission's regulations. Duke Companies assert that, if the Commission does not grant rehearing and reverse the Chief Accountant's ruling, it should commence the Section 41.3 Shortened Procedure in order to comply with the FPA, and give the Duke Companies the opportunity to be heard.[33]

V. Discussion

A. Procedural Matter

12. We will grant Duke Companies' Motion to Lodge because the Affidavit has assisted our evaluation of their rehearing request.

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[30] *Id.* at 5.

[31] The Affidavit was prepared by Stephen Michael Covington and David L. Doss, Jr., who are responsible for financial reporting and accounting for Duke Companies' regulated operations.

[32] 16 U.S.C. § 825(a) (2012).

[33] Rehearing Request at 4-6. As noted above, *see supra* note 4, section 41.3 provides for an audited person to challenge audit findings or proposed remedies in a "paper hearing." The section also permits the audited person to request a trial-type hearing if new issues are raised.

B. Substantive Matters

13. As discussed below, we will deny Duke Companies' request for rehearing of the Waiver Order on the issue of the proper accounting for the discounts on their sales of accounts receivable. While we will also deny Duke Companies' request for the Section 41.3 Shortened Procedure, we will nevertheless address, in this order, their arguments concerning the appropriate accounting treatment for their discounted sales of accounts receivable.

1. Recording the Discount on Accounts Receivable Sales

a. Duke Companies' Arguments

14. On rehearing, Duke Companies contend that the Chief Accountant erred in finding that the entire discount associated with accounts receivable sales should be recorded in Account 426.5. They assert that Commission precedent post-*SERI* demonstrates that *SERI* is inapplicable, and that the Commission should look to the nature of accounts receivables transactions in determining their accounting treatment.[34] They also argue that the discounts should be subdivided into their separate components and accounted for accordingly, i.e., that the portion of the discount that represents uncollectible accounts should be recorded in Account 904, Uncollectible Accounts,[35] that the portion that represents financing costs and profit to the accounts receivable buyer should be recorded in Account 431, Other Interest Expenses, and that the portion that represents servicing costs should be recorded in Account 903, Customer Records and Collection Expenses.[36]

15. Duke Companies state that they use Receivables Purchase Agreements to sell their accounts receivable to their Financing Subsidiaries at a discount.[37] Next, they argue that the Chief Accountant's reliance on *SERI* as the basis for concluding that Duke Companies should record their accounts receivable discounts in Account 426.5 is inapplicable to them. Rather, they contend, more recent Commission precedent demonstrates that the Commission should not apply a "one size fits all" accounting

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[34] *Id.* at 11.

[35] Rehearing Request at 13. *See* 18 C.F.R. pt. 101, Account 904 (2016).

[36] Rehearing Request at 6. *See* 18 C.F.R. pt. 101, Accounts 431, 903 (2016).

[37] Rehearing Request at 7-9.

treatment for accounts receivable, but should look instead to the substance of the accounts receivable in determining the proper accounting treatment.[38]

16. Duke Companies acknowledge that, in *SERI*, the Commission held that such losses, i.e., the accounts receivable discount, are properly recorded in Account 426.5. They nevertheless contend that *SERI's* conclusions were based on a set of facts unique to SERI's financial situation. According to Duke Companies, the utility was in deep economic trouble and could not meet its expenses without some extraordinary source of cash. As a result, the utility obtained emergency cash in a one-time, non-recurring sale of accounts receivable at a loss. Duke Companies urge that, unlike *SERI*, in which the accounts receivable transaction was a one-shot, "extraordinary" transaction to ward off insolvency, Duke Companies' accounts receivable discounts are not extraordinary. Rather, they are the typical result of Duke Companies' daily operations. Therefore, Duke Companies claim, the use of Account 426.5, as applied in *SERI*, does not comport with the nature of the Duke Companies' accounts receivable transactions.[39]

17. Duke Companies highlight the Commission's subsequent decisions in *Central Louisiana Electric Co.*[40] and *Public Service Co. of Colorado*.[41] Duke Companies assert that these cases, which, according to Duke Companies, involved non-extraordinary accounts receivable transactions that were done on a daily basis, demonstrate that the Commission looks to the nature of accounts receivable transactions in determining their appropriate accounting treatment.[42] Duke Companies point out that, in *Central Louisiana*, the Commission examined whether the costs associated with the sales of accounts receivable should be reflected as operating or non-operating expenses for accounting treatment, and agreed with the utility that, "for income statement purposes, the nature of the activity should determine whether the activity is recorded as part of utility operations – that is, part of the costs incurred in providing utility services – or as

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[38] *Id.* at 10.

[39] *Id.*

[40] *Central La. Elec. Co., Inc.*, Opinion No. 394, 71 FERC ¶ 61,225 (1995), *order on reh'g*, Opinion No. 394-A, 80 FERC ¶ 61,314 (1997) (*Central Louisiana*).

[41] *Pub. Serv. Co. of Colo.*, 84 FERC ¶ 61,156 (1998) (*Public Service*).

[42] Rehearing Request at 11.

non-operating, below-the-line expenses." [43] Duke Companies cite the Commission's ruling that the utility must exclude from operating expenses the costs that would not have been incurred absent the sales of accounts receivable, and then state that, if any of the costs associated with the sold accounts receivable are the same as those typically incurred by a utility in servicing its accounts receivable, i.e., are the types of costs incurred in the ordinary course of business as part of the collection of accounts receivable that are not sold, the utility may include them in Account 903.[44]

18. Duke Companies cite the Commission's determination, in *Central Louisiana*, that the utility "should classify the costs that would *not* have been incurred *absent* the sales of its receivables as non-operating expenses."[45] Duke Companies refer to the Commission's observation that the utility's practice of selling receivables is really a means of financing utility operations, and they contend that the Commission's decision was based on assessing the "true nature" of the utility's receivables charges.[46]

19. Duke Companies next refer to *Public Service* for its conclusion that "the nature of an activity . . . determines its account classification and whether it is recorded as a utility operating expense."[47] Duke Companies state that, while the Commission determined,

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[43] *Id.* (quoting *Central Louisiana*, 80 FERC ¶ 61,314 at 62,074). Operating expenses are "above-the-line" expenses and non-operating expenses are "below-the-line" expenses. Costs included in "above-the-line" accounts are generally presumed to be recoverable in rates, while costs included in "below-the-line" accounts are generally presumed not recoverable in rates. The "line" is the demarcation point between "Net Utility Operating Income" and "Other Income and Deductions" on a utility's income statement. *See* FERC Form No. 1, http://www.ferc.gov/docs-filing/forms/form-1/form-1.pdf, at 114-117.

[44] Rehearing Request at 11 (quoting *Central Louisiana,* 80 FERC at 62,074-75) (emphasis in original).

[45] *Id.* at 11-12 (quoting *Central Louisiana*, 80 FERC at 62,075) (emphasis in original).

[46] *Id.* In *Central Louisiana*, the Commission held that the utility's costs incurred in the ordinary course of business as part of the collection of *unsold* accounts receivable may be included in Account 903, but the costs that the utility incurred because it sold the accounts receivable were to be included in Account 431. The Commission also discussed when costs associated with sold accounts receivables are the same as costs typically incurred by a utility in servicing its receivables. *See infra* P 38.

[47] *Id.* at 12 (citing *Public Service*, 84 FERC at 61,857).

consistent with *Central Louisiana*, that the utility's receivables should be recorded as financing costs, the Commission also noted that "costs that were typically incurred by a utility in servicing its receivables were properly recorded in Account 903."[48]

20. Duke Companies argue that, under *Central Louisiana* and *Public Service*, the Commission must examine the nature of Duke Companies' accounts receivable in order to determine the appropriate accounting. They argue that consistent with this precedent, as shown in the Affidavit, only a portion of the costs involved are financing costs that should be recorded in a non-operating account. Duke Companies describe their accounts receivable discount as having four components: (1) Loss Reserve Percentage; (2) Carrying Cost Percentage; (3) Servicing Fee Percentage; and (4) Profit to Financing Subsidiary. Duke Companies state that, together, the four components account for about one-half of one percent of the entire accounts receivables sales.[49]

21. The Loss Reserve Percentage, according to Duke Companies, represents a twelve-month historical level of uncollectible receivables (bad debts) and averages approximately 39 percent to 42 percent of the total discount, depending on the respective utility. This component should be recorded, according to Duke Companies, in Account 904 because the accounts receivable buyer is responsible for all uncollectibles. The accounts receivable buyer thus pays a discounted price to reflect the cost to the buyer of the uncollectibles. While acknowledging that bad debts are not ordinarily included in wholesale rates, Duke Companies state that this cost is ordinarily included in retail rates as an above-the-line expense.[50] They state that the Waiver Order would force Duke Companies to record an above-the-line cost as below-the-line and thereby misrecord the uncollectibles' cost. Because Duke Companies would have incurred this cost absent the sales of their receivables, they urge that, under the *Public Service* "nature of the activity" standard, this cost should be treated as an operating expense. They contend that Account 904 is the proper account because the discount is given to the buyer for having to bear the risk of uncollectibles.[51]

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[48] *Id.* (citing *Public Service*, 84 FERC at 61,856). In *Public Service*, the Commission held that the utility's sale of receivables generated costs in addition to those typically incurred in servicing receivables, and that these costs were financing costs, to be recorded in Account 431. *See Public Service*, 84 FERC at 61,856-57.

[49] Rehearing Request at 8; Affidavit at 6:14.

[50] *See supra* note 43.

[51] Rehearing Request at 9, 13.

22. Duke Companies propose in the Affidavit that, with consolidation, in addition to each Duke Company recording the Loss Reserve Percentage in Account 904, their respective Financing Subsidiaries record the credit for this portion of the discount in Account 904 as well, thus canceling one another out and leaving only the actual bad debts. Duke Companies state that, were they to employ the equity method of accounting in the future (instead of using consolidation), this component of the Discount Percentage would continue to reflect a twelve-month historical measure of bad debt expenses for inclusion as a retail cost-of-service component. Duke Companies point out that Account 904 is not included in formula rate components of its wholesale power or transmission customers.[52]

23. The Carrying Cost Percentage portion of the Accounts Receivable discount, according to Duke Companies, represents the working capital allowance associated with the acceleration of cash received on sale versus collection by the Financing Subsidiary. It ranges from 10 percent to 18 percent of the total discount, depending on the respective utility. Duke Companies propose to record this expense in Account 431 because this portion is the “financing” cost discussed in *Central Louisiana* and *Public Service.* They state that this expense would not have been incurred but for the underlying financing of the accounts receivable.[53] In the Affidavit, Duke Companies state that the Financing Subsidiaries will record the corresponding credits in Account 431, which will eliminate any impact upon consolidation. Duke Companies state that were they to change to the equity method of accounting, this component would be reflected as a financing cost, as would be the case if this activity were transacted with a third party, without the offset in consolidation.[54]

24. The Servicing Fee Percentage, according to Duke Companies, represents the shift in servicing responsibility to the Financing Subsidiary and makes up approximately

[52] Affidavit at Item 9, Loss Reserve Percentage, 10:13-11:13.

[53] Rehearing Request at 9, 13-14. In *Central Louisiana,* the Commission stated that the practice of selling receivables is really a means of financing utility operations and has many of the same characteristics as loans collateralized by receivables. The Commission concluded that Account 431 was the appropriate account to use. *See Central Louisiana*, 80 FERC at 62,075. In *Public Service,* the Commission reiterated that the sales of accounts receivable have many of the same characteristics as loans collateralized by receivables. It concluded that the utility should record the discount on the sale of accounts receivable to Account 431. *See Public Service*, 84 FERC at 61,856.

[54] Affidavit at Item 10, Carrying Cost Percentage, 11:14-12:2.

13 percent to 17 percent of the total discount, depending on the respective utility.[55] Duke Companies propose to record this expense in Account 903. They state that the accounts receivable buyer is responsible for the servicing costs of the accounts receivable and thus pays a discounted price to reflect that cost. This cost, while not ordinarily included in wholesale rates, is included in retail rates. Duke Companies object that the Waiver Order forces them to record this above-the-line cost as below-the-line, which, in their view, erroneously records the cost. Duke Companies state that they would have incurred this cost absent the sales of their receivables and claim that, under the standard in *Public Service,* the costs should be treated as an operating expense, in Account 903, consistent with the nature of the activity.[56]

25. Duke Companies state that each of the Duke Companies and its respective Financing Subsidiary will enter into a Servicing Agreement, under which each Duke Company will service, administer, and collect its respective receivables.[57] They state that because Duke Companies provide these services, all current procedures relating to billing, collections, service maintenance and cutoffs and other customer interface will remain unchanged.[58] Duke Companies state that this element of the accounts receivable discount, i.e., the Servicing Fee Percentage, is entirely offset by the compensation that flows to Duke Companies as the servicers of their customer accounts receivable under their respective Servicing Agreements. According to Duke Companies, this offset entirely eliminates the impact of the discount portion that represents a Servicing Fee Percentage and leaves, in Account 903, only the original costs to service such accounts receivable. These are costs, they state, that Duke Companies would have incurred without the financing activity. Duke Companies propose to record the Servicing Fee Percentage in Account 903 as an expense to each Duke Company and as revenue by each Financing Subsidiary, also in Account 903. Additionally, each Duke Company would record, in Account 903, the receipt of the Service Agreement compensation from its

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[55] Rehearing Request at 9. Duke Companies state that, in order to comply with state regulatory requirements, this responsibility is shifted back to the utility pursuant to a separate agreement. *Id.* n.5.

[56] *Id.* at 14.

[57] Duke Energy Carolinas states that an order from the North Carolina Utilities Commission requires it to act, at all times, as the servicer of its accounts receivable. Affidavit at Item 11, Servicing Fee Percentage, 12:7-9.

[58] *Id.* at 12:3-13:10.

Financing Subsidiary, thus ensuring that, at the utility level, only the original service cost of the accounts remains in Account 903.[59]

26. The Profit to Financing Subsidiary, according to Duke Companies, represents the “profit” to the financing company purchasing the receivables. Duke Companies state that this profit averages approximately 30 percent to 31 percent of the total discount, depending on the respective utility.[60] Duke Companies propose to record this component in Account 431 because it would not have been incurred but for the underlying financing of the accounts receivable. Duke Companies urge that, like the Carrying Cost Percentage, this is a “financing” cost as discussed in *Central Louisiana* and *Public Service.*[61] They propose also that their Financing Subsidiaries likewise record a corresponding credit in Account 431, and state that doing so will completely eliminate this impact upon consolidation. They state that, were Duke Companies to employ the equity method of accounting in the future, this component would be reflected as a financing cost, as would be the case if this activity were transacted with a third party, without the offset in consolidation.[62]

b. Commission Determination

27. At the outset, we note that, on rehearing, Duke Companies accept the Chief Accountant’s conclusion that discounts related to the sale of accounts receivable should not be recorded in Account 930.2, the account that Duke Companies had originally designated for the entirety of these discounts in their Waiver Request.[63] Rather, Duke Companies now urge the Commission to permit the discounts to be broken into component parts and to record these components in Accounts 431, 903, and 904. As discussed below, we find that the entirety of the discounts associated with Duke Companies’ sales of accounts receivable are appropriately recorded in Account 426.5. Under the Commission’s accounting regulations, the loss that Duke Companies incurred

[59] Rehearing Request at 13-14.

[60] *Id.* at 9; Affidavit at Item 6, 7:16-18.

[61] Rehearing Request at 13-14.

[62] Affidavit at Item 12, Additional Percentage, 14:11-20.

[63] Waiver Request at 14-15.

from sales of its accounts receivable at a discount from book value, without recourse,[64] may not be recorded as a utility operating expense.

i. **Precedent: Nature of Discount**

28. We first address Duke Companies' argument that in *SERI* the sale of accounts receivable was an extraordinary transaction to ward off insolvency and thus the Commission's determination in that order, i.e., that Account 426.5 is the appropriate account for discounts on accounts receivable sales, is restricted to the situation of extraordinary circumstances. Duke Companies state that, for them, unlike the utility in *SERI*, the practice of discounting the sales of accounts receivable is typical of daily operations. Thus, Duke Companies contend, their accounts receivable sales have a very different nature from the accounts receivable sales in *SERI* so that *SERI's* holding is inapplicable to Duke Companies' situation.

29. Duke Companies' argument fails to take into account the Commission's subsequent elucidation, in *Central Louisiana* and *Public Service*, of the determination in *SERI* concerning the appropriate treatment of accounts receivable. In those proceedings, the utilities presented the same argument that Duke Companies make here, to wit, that their accounts receivable sales were not the result of extraordinary circumstances but rather were part of the general management of the utility and, therefore, costs associated with such sales should be recorded in operating expense accounts.[65] The Commission rejected their arguments and nevertheless required the utilities to record such costs in non-operating expense accounts.[66] We do the same here.

30. In *Central Louisiana*, the Commission reasoned that, because accounts receivable are a form of investment, therefore, sales of receivables are sales of investments and must be treated accordingly.[67] The Commission explained that the Uniform System of Accounts requires gains or losses on sales of investments to be recorded in non-operating

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[64] In sales "without recourse," the buyer accepts the risk associated with the sold assets. The seller is under no obligation to refund the purchase price paid by the buyer who has agreed to accept the possibility of non-performance as a potential outcome of the transaction.

[65] *See Central Louisiana*, 71 FERC at 61,803; *Public Service*, 84 FERC at 61,855.

[66] *Central Louisiana*, 71 FERC at 61,807, *order on reh'g*, 80 FERC at 62,074; *Public Service*, 84 FERC at 61,857.

[67] *Central Louisiana*, 71 FERC at 61,807 & n.16

accounts and specified Account 421, Miscellaneous Nonoperating Income, and Account 426.5. It found that the utility was routinely selling receivables. Importantly, the Commission also found that the determinative factor "is *not* whether the costs were or were not extraordinary, but rather that the costs of the program were related to the sales of assets (investments) and not to utility operations (such as the servicing of the utility's receivables."[68] The Commission concluded that costs associated with sales of accounts receivable were non-operating in nature and should be charged to non-operating, "below-the-line" accounts.[69]

31. On rehearing, the Commission affirmed its earlier determination that the costs that would *not* have been incurred *absent* the sales of receivables should be reflected as non-operating expenses. The Commission stated that the utility's practice of selling receivables was really a means of financing utility operations, similar to loans collateralized by accounts receivable, and was therefore similar to more traditional forms of financing. The Commission held that, to be representative of their nature, such costs should be included in the "Interest Charges" section of the income statement and accounted for in Account 431, Other Interest Expenses, a non-operating, below-the-line account. The Commission also distinguished such costs from costs that are typically incurred by a utility in the ordinary course of business in collecting those accounts receivable that are *not* sold, which costs may be included in Account 903.[70]

32. In *Public Service*, the Commission reaffirmed *Central Louisiana*'s conclusions, that the costs that would *not* have been incurred *absent* the sales of receivables must be classified in Account 431, and that the nature of an activity determines the account classification.[71] Applying these conclusions, the Commission then found, in *Public Service*, that the utility's sales of accounts receivable, which were on a daily basis and as part of general management of the utility, generate costs *in addition* to those typically incurred by a utility in servicing its accounts receivable. The Commission stated that the underlying reason for a utility to sell its accounts receivable is to increase cash flow and thereby decrease its costs of financing. The Commission concluded that, but for the sales, the utility would not have incurred the costs in question, and determined that the

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[68] *Id.* at 61,807 (emphasis added).

[69] *Id.* at 61,807 & n.18.

[70] *Central Louisiana*, 80 FERC at 62,074 & n.9 (emphasis in original).

[71] *Public Service*, 84 FERC at 61,856 n.34 (citing *Central Louisiana*, 80 FERC at 62,074-75).

most appropriate account for the costs was Account 431,[72] which, as noted above, is a below-the-line account.

33. In sum, *Central Louisiana* and *Public Service* support the Chief Accountant's statement of Commission precedent in the Waiver Order. Namely, under Opinion No. 375 (*SERI*), it is inappropriate to record the discount (loss) associated with the sales of accounts receivable in Account 930.2.[73] As the Chief Accountant stated, "Order No. 375 provides that such losses are properly recorded in Account 426.5, Other Deductions."[74] We affirm that Duke Companies' discounts on sold accounts receivable may not be recorded as operating expenses, regardless of whether they are routine or extraordinary. These discounts are properly recorded in a non-operating, below-the-line account, which we find to be Account 426.5. Accordingly, we affirm the Chief Accountant.

ii. <u>Division of Discount Costs</u>

34. We turn now to Duke Companies' arguments seeking to persuade the Commission to change its policy of treating the discount associated with the sale of receivables as a single item to be recorded in Account 426.5. Duke Companies argue that the Commission should instead permit the division of this discount into four component parts, and to treat each component separately, allowing them to be recorded in different accounts, based on what Duke Companies perceive to be the nature of the particular component.

35. Duke Companies do not provide any Commission precedent that, for accounting purposes under the Uniform System of Accounts, permits the division of this discount into components. Nor are we aware of any such precedent. Additionally, as discussed below, we find that, despite Duke Companies' attempt to divide the discount into component parts, the nature of each particular component is that the component is still fundamentally related to the sale of the accounts receivable assets. As stated in *Central Louisiana*, such costs (the accounts receivable discount) are investment costs, not utility operation costs.[75]

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[72] *Id*. at 61,857 (emphasis in original).

[73] Waiver Order at 3 (citing *SERI*, 60 FERC at 61,480-81).

[74] *Id.* at 3.

[75] *Central Louisiana*, 71 FERC at 61,807. *See supra* PP 30-31.

36. The Commission has a dual responsibility, to customers as well as to utilities. And, while we balance these interests,[76] our primary purpose under the FPA is to protect customers.[77] Our guiding legal and accounting principles are to be read in light of the FPA' s primary purpose of protecting the utility's customers.[78] Therefore, we are not persuaded to change our policy of requiring that the entire discount on sales of Duke Companies' accounts receivable should be recorded in a non-operating account, such as Account 426.5, the account designated by the Chief Accountant, pursuant to *SERI.*

37. Even were we inclined to permit the division of Duke Companies' discount into components, we would still deny rehearing because we would find Duke Companies' proposed recording of the components in various accounts to be incorrect. As explained below, no component qualifies as an operating expense.

38. The Commission stated in *Central Louisiana* that, if any of the costs associated with sales of accounts receivables are the same as those typically incurred by a utility in servicing its accounts receivable, i.e., are the types of costs incurred in the ordinary course of business as part of the collection of accounts receivable that are not sold, these costs may be included in Account 903.[79]

39. Relying on *Central Louisiana* and *Public Service*, Duke Companies propose to record the components Carrying Costs Percentage and Profit to Financing Subsidiary in Account 431, as financing costs. However, in the cited cases, the utilities sold their accounts receivable *with recourse*.[80] In a sale of accounts receivable, with recourse, the

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[76] *See, e.g.*, *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (the fixing of just and reasonable rates involves a balancing of the investor and the consumer interests).

[77] *See, e.g.*, *Potomac Elec. Power Co.*, 83 FERC ¶ 61,112, at 61,690 (1998).

[78] *See Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 492-93 (D.C. Cir. 1985) (when fixing a rate under the FPA, the Commission prescribes the legal and accounting principles that yield the rate, and the rate must be read in light of the FPA's primary purpose of protecting the utility's customers); *Town of Alexandria, Minn., v. FPC*, 555 F.2d 1020, 1028 & n.42 (D.C. Cir. 1977).

[79] *Central Louisiana*, 80 FERC at 62,074. The Commission did not make a determination whether that utility's costs conformed to that standard. *Id.*

[80] *Central Louisiana*, 71 FERC at 61,801-804, 80 FERC at 62,071; *Public Service*, 84 FERC at 61,854. In *Central Louisiana,* the utility entered into a sales agreement with an unrelated finance company to sell its accrued receivables and accrued but unbilled receivables at book value, subject to limited recourse. Also, the utility paid the finance

(continued ...)

utility remains at risk because it is responsible to the buyer for the full amount of the accounts receivable, either through payments to the buyer by the customer, or by the utility when the amounts due cannot be collected from the customer. Under this arrangement, any cost incurred by the utility associated with the sales of its accounts receivable is truly to accelerate the receipt of cash and is similar in nature to collateralized financing.

40. Here, however, Duke Companies acknowledge that their sales of accounts receivable are *without recourse*.[81] Under this arrangement, Duke Companies have no obligation to the buyer of their receivables to ensure that the buyer can collect fully. Accounts receivable sales without recourse are therefore treated as a sale of assets, and the discount on the sale should be recorded below the line. Consistent with *SERI*, which also involved sales of accounts receivable without recourse, Account 426.5 is the appropriate account in which to record the components Carrying Cost Percentage and Profit to Financing Subsidiary.

41. Concerning Account 904, in which Duke Companies propose to record the Loss Reserve Percentage, this account is inappropriate because, as discussed above, Duke Companies' sales of their receivables are without recourse. Any expense related to the uncollectible accounts is, therefore, the responsibility of the buyer, once the receivables have been transferred, and not the responsibility of Duke Companies. The appropriate account for this component is Account 426.5.

42. Concerning Account 903, in which Duke Companies propose to record the Servicing Fee Percentage, the collection expenses that a utility may properly record in this account include those costs that the utility actually incurred to collect the amounts due for services rendered. Duke Companies argue that the Servicing Fee Percentage is

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company funding costs (commercial paper discount plus margin) and various fees. Central Louisiana, Initial Brief, Docket No. FA92-9-000, at 2 (filed May 17, 1993). In *Public Service*, the utility sold its accounts receivable to its financing subsidiary on a daily basis and remitted the total amount of funds collected from its customers on a given business day. The financing subsidiary charged the utility a discount in administrative costs that provided for the recovery of the financing subsidiary's monthly costs. Public Service of Colorado, Initial Brief, Docket No. FA91-47-000, at 10 (filed May 24, 1998).

[81] Rehearing Request at 8 (citing Waiver Request at 10-11); Affidavit at Item 6, 5:16-6:2 (stating that the Financing Subsidiary assumes any risk of collection and incurs any bad debt expense associated with any related charge-offs; it also incurs any charges associated with the debt, including interest and deferred debt extension and related amortization).

offset by the compensation that flows to them as the servicers of their accounts receivable under the separate Servicing Agreements with their respective Financing Subsidiaries. Thus, they claim that this offset eliminates the impact of the Servicing Fee Percentage and leaves in Account 903 only the original costs to service the accounts receivable, which are costs that the utilities would have incurred without the financing activity.[82]

43. We disagree. Incurring actual costs to service the accounts receivable and selling the accounts receivable are two separate and distinct events. Thus, we are not persuaded by Duke Companies' contention that the actual servicing costs they incur, pursuant to the separate Service Agreements and subsequent to the receivables sale, should enable them to record a portion of the accounts receivable discount as a collection expense. In our view, when selling accounts receivable and recognizing the discount on those sales, Duke Companies have not actually incurred any servicing costs, such as payroll expense, etc., related to collecting unpaid balances. Any servicing costs associated with the accounts receivable (discounted or not) will not occur until after the sale. This proposal is also inconsistent with the instructions to Account 903.[83] While these instructions permit, at Item 23, the inclusion of "[c]ommissions or fees to others for collecting," Duke Companies' *future* servicing costs on accounts receivable (that have already been sold) do not fall within this category.

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[82] In other words, in step 1, Duke Companies sell the accounts receivable to their respective Financing Subsidiaries at a discount and transfer the collection responsibilities to those subsidiaries. In step 2, the Financing Subsidiaries, pursuant to their Servicing Agreements, transfer the collection responsibility back to Duke Companies. In step 3, Duke Companies incur the actual costs to service the receivables. Duke Companies argue that steps 1 and 2 offset each other, such that the amounts remaining in step 3, recorded in Account 903, are the actual incurred costs (in Duke Companies' parlance, the "original costs") related to servicing the receivables. Duke Companies argue that, since they are selling the accounts receivable at a discount (in step 1), and because eventually they have to service these discounted accounts receivables (in step 3), then the servicing expenses that they will eventually incur to service the discounted accounts receivables should be attributed to, or rather carved out of, the accounts receivable discount at the outset.

[83] *See* 18 C.F.R. pt. 101, Account 903 (2016). Duke Companies do not specify which of the Items in this account that they want to use. Indeed, none of the Items apply to Duke Companies' receivables that are sold without recourse. For example, post-sale, Duke Companies have no further need to keep records of the "uncollectible accounts written off" (Item 2), nor will they collect further revenue beyond the discounted sales (Item 10), or post collections to customer accounts or extend unpaid balances (Item 12).

2. Section 41.3 Shortened Procedure

a. Duke Companies' Arguments

44. Duke Companies assert that the Chief Accountant's determination of the appropriate accounts to be used in connection with their sales of accounts receivable was tangential to Duke Companies' waiver requests. They contend that this *sua sponte* determination violates due process because Duke Companies did not have an opportunity to present facts or arguments on this issue. The FPA and the Commission's regulations, they argue, require a hearing in which Duke Companies can present arguments and relevant facts, even if not a full, trial-type evidentiary hearing, before this kind of determination can be made.[84]

45. Duke Companies thus claim a right to a hearing held under Part 41. They assert that the Chief Accountant's determination is indistinguishable from an audit finding but without the benefit of the audit procedures. His determination, they claim, plainly meets the definition of an audit because it was a formal examination of Duke Companies' accounting records and whether these records conformed to the standards under the Uniform System of Accounts, including the standards for including amounts in Account 426.5. They contend that making this determination in a proceeding that does not have a "PA" docket number does not alter the fact that an audit was made.[85]

46. Duke Companies argue that Part 41 provides procedures that apply to all audits conducted by the Commission or its staff, except audits of reliability organizations. They state that Part 41 entitles a company that receives a Commission order with an audit finding or proposed remedy to formal processes when the company disagrees with any of the findings or proposed remedies.[86] Should the Commission not grant Duke Companies' rehearing request in full, Duke Companies claim what they contend is their Part 41 right to an opportunity to challenge the audit finding and the proposed remedy set forth in the

[84] Rehearing Request at 15-17 (citing 18 C.F.R. pt. 41 and quoting a portion of section 301(a) of the FPA, 16 U.S.C. § 825(a) (2012) ("The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited.")).

[85] *Id*. at 18. The Commission uses the docket number prefix PA for audits other than financial audits by the Chief Accountant. The Audit Report was generated in Docket No. PA14-2-000.

[86] Rehearing Request at 19 (citing 18 C.F.R. § 41.2, Response to Notification (2016)).

Waiver Order with respect to Duke Companies' accounts. While Duke Companies state that they believe that the Section 41.3 Shortened Procedure would be appropriate, they also reserve their right to file a motion requesting a trial-type hearing if new issues are raised during the course of the Section 41.3 Shortened Procedure.[87]

b. Commission Determination

47. We deny Duke Companies' request to use the Section 41.3 Shortened Procedure.[88] The salient issue is whether the Chief Accountant's statement of existing Commission policy on discounts for accounts receivable sales, made in the context of a waiver proceeding, is equivalent to a determination in an audit proceeding, and therefore eligible for the Section 41.3 Shortened Procedure for contested audit findings and proposed remedies. As explained below, we conclude that the answer is "no." Although we deny Duke Companies' specific request, we nevertheless consider in this order the arguments that they raise in their request for rehearing and Affidavit.[89]

48. Section 41.1 of the Commission's regulations expressly limits the applicability of Part 41 to "audits."[90] Section 41.3 limits the scope of the Section 41.3 Shortened Procedure to an audited person subject to a Commission order described in section 41.1,

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[87] *Id.* (citing 18 C.F.R. § 41.3 (2016)).

[88] As noted above, *see supra* note 4, the Section 41.3 Shortened Procedure is typically a paper hearing consisting of filing written memoranda unless a new issue is raised, in which case a party may request a trial-type hearing. *See Procedures for Disposition of Contested Audit Matters*, Order No. 675, FERC Stats. & Regs. ¶ 31,209, at P 12 (Order No. 675), *order on reh'g and clarification*, Order No. 675-A, FERC Stats. & Regs. ¶ 31,217 (2006); 18 C.F.R. § 41.3 (2016).

[89] *See State of Cal. ex rel. Lockyer v. FERC*, 329 F.3d 700, 711 (9th Cir. 2003) (*Lockyer*) (Carefully considering all evidence and arguments offered in petitions for rehearing and motions to intervene provides all the procedural protections required by the Fifth Amendment and the FPA); *Boston Edison Co. v.* FERC, 885 F.2d 962, 966 (1st Cir. 1989) (*Boston Edison*) (Commission satisfies due process by giving opportunity to argue a matter fully on rehearing).

[90] 18 C.F.R. § 41.1, Notice to Audited Person (2016).

and is for the limited purpose of challenging one or more audit findings, or proposed remedies, or both, by written memoranda.[91]

49. Duke Companies' assertion that the Chief Accountant's statement of Commission policy in the Waiver Order subjected Duke Companies to an audit by the Chief Accountant in this proceeding is incorrect. Duke Companies initiated this proceeding by filing a request for waiver of the requirement to use the equity method of accounting. In their Waiver Request, Duke Companies also described their use of Account 930.2.[92] Accordingly, in granting the waiver, the Chief Accountant reasonably pointed out that Duke Companies' use of Account 930.2 conflicts with the Commission's existing policy.[93] The Waiver Request and the Chief Accountant's response did not constitute an audit proceeding; the Chief Accountant merely acted, pursuant to his delegated authority, upon Duke Companies' proposed accounting. An audit of a public utility, in contrast, is commenced by the Commission, pursuant to section 301 of the FPA, to ensure, among other things, compliance with the Commission's statutes, rules, regulations, and orders, and may result in findings of noncompliance and recommendations. Nothing related to Duke Companies' Waiver Request or the Chief Accountant's response, including his statement of existing Commission policy, constituted an audit or an audit finding.

50. Additionally, this proceeding concerns only the Chief Accountant's approval of Duke Companies' request for waiver of the Commission's accounting regulations. It is not consolidated with the Duke Energy audit proceeding, Docket No. PA14-2-000.[94]

51. Duke Energy chose not to contest Finding No. 5 and Recommendation Nos. 17 and 18 in the Duke Energy audit proceeding, Docket No. PA14-2-000, [95] where it would

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[91] *See* Order No. 675, FERC Stats. & Regs. ¶ 31,209 at 1 (Summary) ("In this Final Rule, the Federal Energy Regulatory Commission (Commission) is amending its regulations to expand due process for certain audited persons who dispute findings or proposed remedies contained in draft audit reports.").

[92] Waiver Request at 14.

[93] Waiver Order at 3. Moreover, "[d]ue process does not require the Commission to issue prior notice of an action it intends to take on an application, even if that action was not requested by the applicant (or any other party)." *Pacific Gas and Elec. Co.*, 99 FERC ¶ 61,045, at P 7 n.11 (2002).

[94] The Chief Accountant expressly stated that the approval granted in this waiver proceeding "shall not prejudge matters under review in the Duke Energy Audit." Waiver Order at 3. *See supra* P 5.

have been eligible for the Section 41.3 Shortened Procedure. Instead, Duke Companies requested the Section 41.3 Shortened Procedure in this waiver proceeding to which Part 41 does not apply. Hence, Duke Companies (and Duke Energy) may not avail themselves here of Part 41 provisions to resolve their concerns over accounting for discounts on accounts receivables. Nevertheless, through this rehearing process, we have fully considered Duke Companies' arguments, and have thus afforded Duke Companies a hearing, to which they claim entitlement, to resolve their concerns.[96] Although Duke Companies' contend that the Chief Accountant's *sua sponte* statement of policy violates due process because Duke Companies did not have an opportunity to present facts or arguments on the accounts receivables issue, Duke Companies' ability to seek rehearing, and their filing of a rehearing request (with an accompanying Affidavit) resolves any possible due process concerns.[97]

3. <u>Section 301 of the FPA</u>

a. <u>Duke Companies' Arguments</u>

52. Duke Companies focus on the statement in the Waiver Order that losses associated with sales of accounts receivable "are properly recorded in Account 426.5."[98] Duke Companies contend that this statement is a "determination of the proper accounting for sales of accounts receivable in the Duke Companies' accounts."[99] Duke Companies

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[95] *See supra* P 10 & n.30.

[96] *See Lockyer*, 329 F.3d at 711; *Boston Edison*, 885 F.2d at 966.

[97] *Blumenthal v. FERC*, 613 F.3d 1142, at 1146 (D.C. Cir. 2010) (*Blumenthal*) (rejecting party's due process claim that it lacked the opportunity to respond to supplemental filing before Commission issued its initial decision because the party had the opportunity to respond, and did respond, by filing a rehearing request); *see also Cross-Subsidization Restrictions on Affiliate Transactions*, 124 FERC ¶ 61,047, at P 67 (2008) ("parties' ability to seek rehearing resolves any due process issues"); *Regulations Governing the Conduct of Open Seasons for Alaska Natural Gas Transportation Projects*, 111 FERC ¶ 61,332, at P 37 (2005) (same).

[98] Rehearing Request at 17. *See also* Waiver Order at 3.

[99] Rehearing Request at 17.

assert that section 301 of the FPA[100] and the Commission's regulations require notice and an opportunity for a hearing when the Commission makes this kind of determination.[101]

b. Commission Determination

53. We deny rehearing. Contrary to Duke Companies' contention, they received notice and an opportunity to address the appropriate treatment of discounts on sales of accounts receivable, as discussed below. Moreover, we have provided Duke Companies a further hearing through the rehearing process. Thus, due process is satisfied.

54. The Waiver Order responded to Duke Companies' request for waiver of the Commission's accounting requirements, in a filing that also described their practice of recording the discount on sales of accounts receivable in Account 930.2. Prior to the Waiver Order's issuance, Duke Companies, as regulated public utilities, had notice that Account 426.5 is the appropriate account to use to record the discount (loss) associated with sales of accounts receivable. Duke Companies should have been aware of the Commission's *SERI* policy, further elucidated in *Central Louisiana and Public Service*.[102] Moreover, Duke Companies brought this issue to the Chief Accountant's attention in the Waiver Request, by describing their existing, but incorrect, practice.[103] Therefore, it was reasonable, and even foreseeable, that the Chief Accountant would

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[100] 16 U.S.C. § 825(a) (2012). Section 301(a) provides, in pertinent part:

> The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and may prescribe a system of accounts for each class. The Commission, *after notice and opportunity for hearing*, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry.

Id. (emphasis added).

[101] Rehearing Request at 17.

[102] *See, e.g.*, *San Diego Gas & Elec. Co.*, 112 FERC ¶ 61,330, at P 8 & n.7 (2005) ("[E]ntities appearing before the Commission [are] held responsible for being familiar with the agency's regulations.").

[103] Waiver Request at 11, 14.

comment on their non-compliant accounting practice.[104] Indeed, this is what the Chief Accountant's responsibilities expressly include.[105]

55. As stated above, Duke Companies had the opportunity to make their case and indeed have received a hearing through the rehearing process in this proceeding.[106] We have considered the facts and arguments presented in Duke Companies' rehearing request and Affidavit.[107] As shown by the above discussion, we have afforded Duke Companies due process.[108]

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[104] Significantly, "[d]ue process does not require the Commission to issue prior notice of an action it intends to take on an application, even if that action was not requested by the applicant (or any other party)." *Pacific Gas and Elec. Co.*, 99 FERC ¶ 61,045 at P 7 n.11.

[105] *See* 18 C.F.R. § 375.311(o) (2016) (issue interpretations of the Uniform System of Accounts for public utilities).

[106] *See supra* note 89. Moreover, to insist on another hearing, in addition to the hearing provided via this rehearing process, would put form over substance and cause administrative waste. *See, e.g., La. Pub. Serv. Comm'n v. Entergy Corp.*, 149 FERC ¶ 61,245 (2014), *reh'g denied*, 153 FERC ¶ 61,304 (2015) (commencing hearing procedures on same issues already litigated is duplicative and unnecessary); *SFPP, L.P.*, 121 FERC ¶ 61,162 (2007) (unreasonable waste of Commission's and SFPP's resources to undertake duplicative litigation).

[107] *See Nat'l Fuel Gas Supply Corp.*, 71 FERC ¶ 61,029 at 61,133 & n.23 (1995) ("It is well settled that the Commission . . . is generally master of its own calendar and procedures.") (quoting *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001 (1984)); *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 (2006) (In many instances issues in dispute can be resolved fairly and expeditiously by means of paper hearing procedures). *See also Blumenthal*, 613 F.3d 1142, 1144-45) ("FERC's choice to hold an evidentiary hearing is 'generally discretionary' . . . . Even when there are disputed factual issues, FERC does not need to conduct an evidentiary hearing if it can adequately resolve the issues on a written record.") (citations omitted).

[108] *See supra* note 89; *see also Matthews v. Eldridge*, 424 U.S. 319, 348 (1976) ("[A]n evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it'").

56. We also note that, while we have afforded Duke Companies due process, the form of due process they received was the direct result of decisions they made. When Duke Companies disagreed with the Chief Accountant's statement of policy in the Waiver Order and also with Finding No. 5 and Recommendation Nos. 17 and 18 in the Audit Report, they could have both requested rehearing in this waiver proceeding and also challenged Finding No. 5 and Recommendation Nos. 17 and 18 in the audit proceeding. Additionally, they could have filed a petition for a declaratory order that the stated accounting policy should not apply to them. Duke Companies elected solely to request rehearing. By their own election, therefore, Duke Companies are entitled only to the rehearing procedures afforded pursuant to Rule No. 713 of the Commission's Rules of Practice and Procedure,[109] and not to the audit proceeding procedures that they now belatedly seek.[110] To hold otherwise would encourage regulated entities to disregard the requirements of our regulations and undo our orderly administration of the FPA.[111]

The Commission orders:

(A) Duke Companies' motion to lodge its Affidavit is hereby granted.

(B) Duke Companies' requests for rehearing and for the shortened procedure provided for in Part 41 of the Commission's regulations are hereby denied, as discussed in the body of this order.

By the Commission. Chairman Bay is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[109] 18 C.F.R. § 385.713 (2016).

[110] *See* 18 C.F.R. pt. 41 (2016).

[111] *See supra* notes 106-07.