

137 FERC ¶ 61,209
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Duke Energy Corporation	Docket Nos.	ER11-3306-000
Progress Energy, Inc.		ER11-3307-000
		ER12-115-000
		ER12-116-000
Carolina Power & Light Company		ER12-118-000
		ER12-119-000
Florida Power Corporation		ER12-120-000
		(not consolidated)

ORDER ON JOINT OPEN ACCESS TRANSMISSION TARIFF AND JOINT
DISPATCH AGREEMENT

(Issued December 14, 2011)

1. On April 4, 2011, Duke Energy Corporation (Duke Energy) and Progress Energy, Inc. (Progress Energy) (collectively, Applicants) filed a *pro forma* joint open access transmission tariff (*Pro Forma* Joint OATT) and a *pro forma* joint dispatch agreement (*Pro Forma* JDA), which was amended on July 18, 2011.¹ On October 19, 2011, Applicants filed a joint open access transmission tariff (Joint OATT)² pursuant to section 205 of the Federal Power Act (FPA) and Part 35 of the Commission's regulations.³ On October 19, 2011, Applicants also filed a joint dispatch agreement (JDA), executed on October 18, 2011,⁴ pursuant to section 205 of the FPA and Part 35 of

¹ The *Pro Forma* Joint OATT and *Pro Forma* JDA were filed in Docket Nos. ER11-3307-000 and ER11-3306-000, respectively.

² The Joint OATT was filed by Applicants in Docket No. ER12-116-000.

³ 16 U.S.C. § 824d (2006); 18 C.F.R. Part 35 (2011).

⁴ The JDA was filed by Applicants in Docket No. ER12-115-000.

the Commission's regulations. In addition, on October 19, 2011, Carolina Power & Light Company (CP&L) and Florida Power Corporation (Florida Power) filed concurrences to the Joint OATT and the JDA pursuant to section 205 of the FPA and Part 35 of the Commission's regulations.⁵ All of these filings were made in connection with Applicants' proposed merger in Docket No. EC11-60-000.⁶ In this order we reject the Joint OATT filed in Docket No. ER12-116-000 and the JDA filed in Docket No. ER12-115-000. Further, we reject CP&L's and Florida Power's concurrences filed in Docket Nos. ER12-118-000; ER12-119-000; and ER12-120-000. Finally, we reject as moot Applicants' *pro forma* Joint OATT and *pro forma* JDA filed in Docket Nos. ER11-3307-000 and ER11-3306-000, respectively.

I. Applicants' Filings

2. Duke Energy Carolinas, LLC (Duke Energy Carolinas) is a wholly-owned subsidiary of Duke Energy. CP&L and Florida Power are subsidiaries of Progress Energy. Applicants state that the Joint OATT combines the current versions of the OATTs for Duke Energy Carolinas, CP&L, and Florida Power into a single OATT. Applicants also state that the proposed JDA provides for the joint merit dispatch of Duke Energy Carolinas' and CP&L's generation resources in order to permit the more efficient operation of their combined resources.⁷

⁵ Progress Energy, on its own behalf and on behalf of CP&L, filed a concurrence to the JDA in Docket No. ER12-118-000. Progress Energy October 19, 2011 JDA Transmittal Letter (Progress JDA Transmittal). It also filed, on its own behalf and on behalf of CP&L, a concurrence to the Joint OATT in Docket No. ER12-119-000. Progress Energy October 19, 2011 Joint OATT Transmittal on behalf of CP&L. Finally, Progress Energy, on its own behalf and on behalf of Florida Power, filed a concurrence to the Joint OATT in Docket No. ER12-120-000. Progress Energy October 19, 2011 Joint OATT Transmittal Letter on behalf of Florida Power.

⁶ The Commission issued an order on Applicants' proposed merger application on September 30, 2011. *Duke Energy Corp. and Progress Energy, Inc.*, 136 FERC ¶ 61,245 (2011) (Merger Order). On October 17, 2011, Applicants submitted a compliance filing to this order in Docket No. EC11-60-001. As discussed below, in a concurrently issued order in Docket No. EC11-60-001, the Commission is rejecting the October 17, 2011 compliance filing.

⁷ Applicants' April 4, 2011 JDA Transmittal Letter at 1 (*Pro Forma* JDA Transmittal); Applicants' October 19, 2011 JDA Transmittal Letter at 1 (JDA Transmittal); Progress JDA Transmittal at 1.

A. The Joint OATT

3. Applicants state that, in developing the Joint OATT, they started with approved provisions from the CP&L/Florida Power and Duke Energy Carolinas OATTs, including changes that are pending with the Commission. Applicants state that the most significant differences in the Joint OATT, when compared to the three individual OATTs, are: (1) a zonal rate structure that would prevent rate pancaking for transactions involving more than one of the Duke Energy Carolinas, CP&L, or Florida Power systems by only charging transmission customers the zonal rate for the zone where the transaction sinks (i.e., a license plate rate structure); (2) elimination of Recallable Long-Term Firm Point-to-Point Transmission Service from Duke Energy Carolinas' tariff; (3) updating the form of Duke Energy Carolinas' Network Integration Transmission Service Agreement to conform with the form that Duke Energy Carolinas filed in Docket No. ER10-1926-000; and (4) removal of references to the CP&L zone in provisions in the CP&L/Florida Power OATT governing Network Contract Demand transmission service.⁸

4. Applicants request that Section 11 of the Joint OATT become effective on December 18, 2011⁹ and that the remainder of the Joint OATT become effective on the date that the proposed merger is consummated.¹⁰

B. The JDA

5. Applicants state that 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, which they estimate will allow Duke Energy Carolinas and CP&L to achieve approximately \$360 million in fuel costs and operations and maintenance savings

⁸ Applicants April 4, 2011 Joint OATT Transmittal Letter at 4 (*Pro Forma* Joint OATT Transmittal); Applicants October 19, 2011 Joint OATT Transmittal Letter at 5-7 (Joint OATT Transmittal).

⁹ Section 11 of the Joint OATT states that “[t]he Transmission provider will specify its Creditworthiness procedures in Attachment O.” Proposed Joint OATT, Section 11(1.0.0). Section 11 of the Joint OATT is identical to Section 11 of the existing Duke Energy Carolinas OATT. Applicants state that granting the requested effective date for this section permits the Commission’s eTariff software to recognize the sixty-day timeframe in which issuance of an order on the Joint OATT is appropriate. They also state that granting this effective date will have no effect on customers, because Section 11 is identical in both the Joint and the Duke Energy Carolinas OATTs. Joint OATT Transmittal at n.19.

¹⁰ *Id.* at 10.

between 2012 and 2016.¹¹ They state 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. Applicants also explain that the JDA is limited to joint dispatch and is not intended to provide for system integration or combination of any other utility operations. They also note that the JDA does not provide for joint operation of Duke Energy Carolinas’ and CP&L’s transmission systems or balancing authority areas, or provide for joint resource planning.

6. Applicants request that the JDA become effective on December 18, 2011, but acknowledge that transactions contemplated by the JDA cannot begin prior to the date that the proposed merger is consummated.¹²

C. Concurrence Filings

7. In these proceedings, Duke Energy is the “designated” filer, and CP&L and Florida Power are the “non-designated joint filers.” To comply with Order No. 714,¹³ in Docket Nos. ER12-118-000 and ER12-119-000, CP&L filed concurrences for the JDA and the Joint OATT, respectively. CP&L requests that its JDA concurrence filing become effective December 18, 2011. It requests that the effective dates for its Joint OATT concurrence correspond to those requested in the Joint OATT Transmittal. In Docket No. ER12-120-000, Florida Power filed a concurrence to the Joint OATT and requested that its filing’s effective dates correspond to those requested in the Joint OATT Transmittal.

II. Notice of Filing and Responsive Pleadings

8. Notice of Applicants’ filings in Docket Nos. ER11-3306-000 and ER11-3307-000 was published in the *Federal Register*, 76 Fed. Reg. 21,732 (2011), with interventions and protests due on or before June 3, 2011.¹⁴ Notice of the amendment in Docket No. ER11-3306-000 was published in the *Federal Register*, 76 Fed. Reg. 55,372 (2011), with interventions and comments due on or before September 6, 2011. Notice of Applicants’ filings in Docket Nos. ER12-115-000; ER12-116-000; ER12-118-000;

¹¹ Florida Power is not a party to the JDA.

¹² JDA Transmittal at 4.

¹³ *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 63 (2008).

¹⁴ Several intervenors filed joint comments not only in Docket Nos. ER11-3306-000 and ER11-3307-000 but also in Docket No. EC11-60-000.

ER12-119-000; and ER12-120-000 was published in the *Federal Register*, 76 Fed. Reg. 67,163 (2011), with interventions and protests due on or before November 9, 2011. Notices of intervention and motions to intervene were filed by the entities listed in the appendix to this order. The entities that filed protests, comments, and answers are also listed in the appendix. The party abbreviations listed in the appendix will be used throughout this order.

9. In their protests in Docket Nos. ER11-3306-000 and ER11-3307-000, City of Orangeburg and City of New Bern argue that the Commission should consolidate the *pro forma* JDA, *pro forma* Joint OATT, and proposed merger proceedings, because there are common issues of law and fact involved in the three proceedings.¹⁵ On October 19, 2011, Applicants filed motions to consolidate the proceedings related to the JDA in Docket Nos. ER12-115-000 and ER11-3306-000, and the proceedings related to the Joint OATT in Docket Nos. ER12-116-000 and ER11-3307-000. On October 20, 2011, Applicants filed motions to consolidate all of the JDA-related proceedings in Docket Nos. ER12-115-000; ER12-118-000; and ER11-3306-000, and all of the Joint OATT-related proceedings in Docket Nos. ER12-116-000; ER12-119-000; ER12-120-000; and ER11-3307-000.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notices 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) (2011), we will also grant the late-filed motions to intervene given these parties' interests in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers and will, therefore, reject them.

¹⁵ City of Orangeburg June 3, 2011 Protest to *Pro Forma* Joint OATT and *Pro Forma* JDA at 61 (City of Orangeburg Protest to *Pro Forma* Joint OATT and *Pro Forma* JDA).; City of New Bern June 3, 2011 Protest to *Pro Forma* Joint OATT and *Pro Forma* JDA at 8-10 (City of New Bern Protest to *Pro Forma* Joint OATT and *Pro Forma* JDA).

12. The Commission denied City of Orangeburg's and City of New Bern's requests to consolidate Docket Nos. EC11-60-000; ER11-3306-000; and ER11-3307-000 in the Merger Order.¹⁶ We also deny Applicants' requests to consolidate the proceedings in Docket Nos. ER11-3306-000; ER12-115-000; and ER12-118-000 and to consolidate the proceedings in Docket Nos. ER11-3307-000; ER12-116-000; ER12-119-000; and ER12-120-000. In general, the Commission formally consolidates matters only if a trial-type evidentiary hearing is required to resolve common issues of law and fact and consolidation will ultimately result in greater administrative efficiency.¹⁷ We see no need to formally consolidate these proceedings since we are not ordering a hearing. As discussed below, we are rejecting the Joint OATT and JDA.

B. Substantive Matters

1. Pleadings

a. Protests Related to the JDA

13. City of Orangeburg asks the Commission to modify the JDA to afford Duke Energy Carolinas and CP&L the ability to sell wholesale requirements power priced at system average costs to customers of their choosing under their market-based rate authority.¹⁸ It also raises several arguments that it made in a separate proceeding in Docket No. EL09-63-000, including whether certain orders issued by the North Carolina Commission should be preempted by federal law, and contends that section 3.2(c) of the JDA improperly makes the wholesale terms of the JDA subject to the North Carolina Commission's review.¹⁹

14. City of Orangeburg argues that the provisions in Article VII of the JDA are unduly discriminatory because the companies' lower cost power resources are available first to those considered native load by the North Carolina Commission.²⁰ City of Orangeburg

¹⁶ Merger Order, 136 FERC ¶ 61,245 at P 33.

¹⁷ See, e.g., *In re: Terra-Gen Dixie Valley*, 132 FERC ¶ 61,215, at P 44, n.74 (2010); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,253, at P 25 (2008).

¹⁸ City of Orangeburg Protest to *Pro Forma* Joint OATT and *Pro Forma* JDA at 64.

¹⁹ *Id.* at 31; City of Orangeburg November 9, 2011 Protest at 10-12 (City of Orangeburg November Protest).

²⁰ City of Orangeburg Protest to *Pro Forma* Joint OATT and *Pro Forma* JDA at 36; City of Orangeburg November Protest at 6-10.

also asserts that the JDA, contrary to Commission precedent, divides the parties' wholesale customers into the categories of native and non-native load for the purposes of allocating higher and lower cost energy.²¹

15. Nucor Steel-South Carolina requests that the Commission require that the protections specified in sections 3.2(c)(ii) through (iv) of the JDA, which are expressly limited to the North Carolina Commission, be extended to the Public Service Commission of South Carolina. Nucor Steel-South Carolina argues that if these provisions are extended, the JDA will not be unduly discriminatory or preferential.²²

16. Nucor Steel-South Carolina states that if and when Duke Energy Carolinas and CP&L actually merge, there will a single utility, instead of two separate utilities engaging in Commission-jurisdictional wholesale transactions under the JDA. Therefore, Nucor Steel-South Carolina argues that the Commission should require Applicants to modify the JDA to address what will happen under the JDA in the event that Duke Energy Carolinas and CP&L merge into a single operating company.²³

17. Nucor Steel-South Carolina also argues that the filing includes no analysis or workpapers supporting the claimed approximately \$360 million savings from fuel costs and operations and maintenance expenses between 2012 and 2016. Nucor Steel-South Carolina contends that without additional information, it is impossible to determine whether the proposed methodology is just and reasonable and not unduly discriminatory.²⁴

18. City of New Bern argues that the JDA is unduly discriminatory because it forecloses participation by joint generation owners and, thereby, internalizes all benefits from joint dispatch of generating units to the post-merger companies. City of New Bern states that, pursuant to a Power Coordination Agreement entered into in 1981,²⁵ CP&L operates five generating units that it co-owns with NCEMPA, and that City of New Bern

²¹ City of Orangeburg Protest to *Pro Forma* Joint OATT and *Pro Forma* JDA at 37.

²² Nucor Steel-South Carolina June 3, 2011 Protest to *Pro Forma* Joint OATT and *Pro Forma* JDA at 9.

²³ *Id.* at 14-15.

²⁴ *Id.* at 7.

²⁵ CP&L-NCEMPA Power Coordination Agreement (Docket No. ER10-288-001).

is a participant in NCEMPA.²⁶ City of New Bern contends that the JDA is unduly discriminatory because City of New Bern will be responsible for costs associated with these five generating units but will receive no financial benefits from joint dispatch.²⁷

19. City of New Bern also contends that the JDA unduly discriminates against NCEMPA participants, because City of New Bern will be unable to participate directly in savings in reserves. According to City of New Bern, section 6.3 of the JDA authorizes the parties to the JDA to engage in retroactive ratemaking by allowing them to share the costs of new short-term purchases in proportion to the party's native load in the hours for which the purchase is made, but only if the purchase is determined after-the-fact to be economic for both parties or for neither party.

b. Protests Related to the Joint OATT

20. City of New Bern objects to Applicants' proposal to retain the two existing zonal transmission rates in the Carolinas. They complain that Applicants' approach creates a possible means of unduly discriminating between wholesale suppliers and customers in each of the two zones. Additionally, City of New Bern argues that the proposed zonal rate structure provides no incentive for Duke Energy Carolinas to upgrade its transmission network to enable NCEMPA's participants to import power through Duke Energy Carolinas from an alternate supplier.²⁸

2. Commission Determination

21. We reject as moot Applicants' *Pro Forma* Joint OATT and *Pro Forma* JDA filed in Docket Nos. ER11-3307-000 and ER11-3306-000 respectively. These filings have been superseded by the Joint OATT and JDA filings.

22. We reject the Joint OATT and JDA filings in Docket Nos. ER12-115-000; ER12-116-000; ER12-118-000; ER12-119-000; and ER12-120-000. The Joint OATT and JDA are not intended to go into effect until the proposed merger is consummated.²⁹ We note

²⁶ City of New Bern Protest to *Pro Forma* Joint OATT and *Pro Forma* JDA, Ex. NCC-4 at 16.

²⁷ *Id.*, Ex. NCC-4 at 16-17.

²⁸ *Id.*, Ex. NCC-4 at 18.

²⁹ As noted above, Applicants request that the JDA become effective on December 18, 2011, but acknowledge that transactions contemplated by the JDA cannot begin prior to the date that the proposed merger is consummated. In addition, Applicants request that Section 11 of the Joint OATT become effective on December 18, 2011 in order to permit the Commission's eTariff software to recognize the sixty-day timeframe in which

(continued...)

that, concurrently with this order, the Commission is issuing an order in Docket No. EC11-60-001 rejecting Applicants' October 17, 2011 compliance filing containing Applicants' proposal for mitigating the screen failures identified in the Merger Order. Because the JDA and Joint OATT are predicated on the proposed merger application, we find that action on the instant filings would not be appropriate at this time. Therefore, we will reject the filings.³⁰ This action is without prejudice to Applicants re-filing the Joint OATT and JDA.

The Commission orders:

(A) Applicants' Joint OATT and JDA filed in Docket Nos. ER12-116-000 and ER12-115-000, respectively, are hereby rejected, as discussed in the body of this order, without prejudice.

(B) CP&L's and Florida Power's concurrence tariff records filed in Dockets Nos. ER12-118-000, ER12-119-000, and ER12-120-000 are hereby rejected, as discussed in the body of this order, without prejudice.

(C) Applicants' *pro forma* Joint OATT and *pro forma* JDA filed in Docket Nos. ER11-3307-000 and ER11-3306-000, respectively, are hereby rejected as moot, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

issuance of an order on the Joint OATT is appropriate and request that the remainder of the Joint OATT become effective on the date that the proposed merger is consummated.

³⁰ Because we are rejecting the Joint OATT and JDA filings, we will not address the issues raised by protestors in this order.

APPENDIX

Docket Nos. ER11-3306 and ER11-3307

Interventions with Substantive Comments to *Pro Forma* Joint OATT and *Pro Forma* JDA

Blue Ridge Electric Membership Corporation, Rutherford Electric Membership Corporation, Piedmont Electric Membership Corporation, and Haywood Electric Membership Corporation

Blue Ridge Paper Products, Inc.

Cities of New Bern and Rocky Mount, North Carolina (City of New Bern)

City of Orangeburg, South Carolina (City of Orangeburg)

City of Tallahassee, Florida

Electric Power Supply Association

Florida Municipal Power Agency (FMPA)

Florida Public Service Commission (Docket No. ER11-3307 only)

North Carolina Attorney General and North Carolina Utilities Commission Public Staff
(North Carolina Consumer Agencies)

North Carolina Eastern Municipal Power Agency

Nucor Steel-South Carolina

Orlando Utilities Commission (out of time)

Other Interventions to *Pro Forma* Joint OATT and *Pro Forma* JDA

Capital Power Corporation

Central Electric Power Cooperative, Inc.

Duke Wholesale Customer Group

ElectriCities of North Carolina, Inc.

EnergyUnited Electric Membership Corporation

Florida Power & Light Company (out of time)

Midwest Independent Transmission System Operator, Inc. (Docket No. ER11-3307 only)

North Carolina Electric Membership Corporation

North Carolina Municipal Power Agency Number 1

North Carolina Utilities Commission (North Carolina Commission)

Old Dominion Electric Cooperative

Piedmont Municipal Power Agency

Public Works Commission of the City of Fayetteville, North Carolina

Reedy Creek Improvement District (Docket No. ER11-3307 only)

Seminole Electric Cooperative, Inc.

South Carolina Electric & Gas Company

South Carolina Office of Regulatory Staff

South Carolina Public Service Authority

Southern Companies
Tampa Electric Company (out of time)

Answers to *Pro Forma* Joint OATT and *Pro Forma* JDA

Blue Ridge Paper
Applicants (June 17, 2011 and July 7, 2011)
FMPA (July 1, 2011, July 12, 2011 and July 26, 2011)
City of New Bern
North Carolina Consumer Agencies
Nucor Steel-South Carolina
City of Orangeburg (June 30, 2011 and July 22, 2011)

Docket Nos. ER12-115, ER12-116, ER12-118, ER12-119 and ER12-120

Interventions with Substantive Comments to Joint OATT and JDA

City of Orangeburg
FMPA (Docket Nos. ER12-116, ER12-119 and ER12-120 only)

Other Interventions to Joint OATT and JDA

North Carolina Consumer Agencies
North Carolina Electric Membership Corporation
Public Works Commission of the City of Fayetteville, North Carolina
South Carolina Office of Regulatory Staff (Docket Nos. ER12-115, ER12-116, ER12-118
and ER12-119 only)