**ORAL ARGUMENT NOT SCHEDULED**

# In the United States Court of Appeals for the District of Columbia Circuit

No. 15-1274

ORANGEBURG, SOUTH CAROLINA,
*Petitioner*,

*v.*

FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent*.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

## BRIEF OF RESPONDENT
## FEDERAL ENERGY REGULATORY COMMISSION


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FINAL BRIEF: June 21, 2016

## CIRCUIT RULE 28(a)(1) CERTIFICATE

**A. Parties:**

To counsel's knowledge, the parties before this Court and before the Federal Energy Regulatory Commission in the underlying agency proceedings are as listed in Petitioner's brief.

**B. Rulings Under Review:**

1. Order on Joint Dispatch Agreement and Joint Open Access Transmission Tariff, *Duke Energy Corp.*, 139 FERC ¶ 61,193 (June 8, 2012) ("Initial Order"), R. 20, JA 118; and

2. Order on Rehearing, *Duke Energy Corp.*, 151 FERC ¶ 61,242 (June 18, 2015) ("Rehearing Order"), R. 34, JA 179.

**C. Related Cases:**

Counsel is not aware of any related cases pending before this or any other court.

*/s/ Karin L. Larson*
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June 21, 2016

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## GLOSSARY

| | |
|---|---|
| 2008 Contract | The 2008 power purchase agreement between Orangeburg and Duke |
| 2009 North Carolina Order | *In the Matter of Duke Energy Carolinas, LLC's Advance Notice of Purchase Power Agreement and Joint Petition for Declaratory Order*, No. COA09-1273, 2009 WL 904943 (Mar. 30, 2009), JA 188 |
| Br. | Petitioner's Opening Brief |
| Commission or FERC | Federal Energy Regulatory Commission |
| Declaratory Order | *City of Orangeburg*, 151 FERC ¶ 61,241 (2015), JA 223 |
| Duke | Duke Energy Carolinas, LLC, a utility subsidiary of Duke Energy Corp. |
| Duke Energy | Duke Energy Corp. |
| Initial Order | *Duke Energy Corp.*, 139 FERC ¶ 61,193 (2012), R. 20, JA 118 |
| JA | Joint Appendix |
| Merger Order | *Duke Energy Corp. and Progress Energy, Inc.*, 136 FERC ¶ 61,245 (2011) |
| North Carolina Commission | North Carolina Utilities Commission |
| Orangeburg | Petitioner, Orangeburg, South Carolina |
| P | The paragraph number within a FERC order |
| Progress | Carolina Power & Light Co., d/b/a/ Progress Energy Carolinas |
| Progress Energy | Progress Energy, Inc. |
| R. | Record item |
| Rehearing Order | *Duke Energy Corp.*, 151 FERC ¶ 61,242 (2015), R. 34, JA 179 |

# In the United States Court of Appeals for the District of Columbia Circuit

No. 15-1274

ORANGEBURG, SOUTH CAROLINA,
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v.

FEDERAL ENERGY REGULATORY COMMISSION,
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ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

**BRIEF OF RESPONDENT**
**FEDERAL ENERGY REGULATORY COMMISSION**

## COUNTER-STATEMENT OF JURISDICTION

To obtain judicial review of orders of the Federal Energy Regulatory Commission ("Commission" or "FERC"), a petitioner must satisfy the requirements of both Article III of the United States Constitution and section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). *See, e.g., N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011) (party is not "aggrieved" within the meaning of Federal Power Act § 313(b) unless it can establish constitutional and prudential standing).

This case concerns Commission orders that accepted a joint dispatch agreement between two utility companies, designed to take advantage of synergies made possible by the recent merger of the utilities' parent holding companies. As discussed in Argument § I, Petitioner Orangeburg, South Carolina ("Orangeburg"), a would-be customer of those utilities, has not established standing to challenge the orders presented for review. In particular, Orangeburg fails to demonstrate that it has or will imminently suffer a concrete and particularized injury that is traceable to the challenged orders; its claimed injury is more attributable to the actions of the North Carolina regulatory commission than any actions or inactions of the FERC.

## STATEMENT OF ISSUES

The challenged FERC proceeding concerns the Commission's approval of a bilateral joint dispatch agreement between Duke Energy Carolinas, LLC ("Duke") and Carolina Power & Light Co., d/b/a/ Progress Energy Carolinas ("Progress"). The Joint Dispatch Agreement calls for the joint dispatch of Duke and Progress' generation facilities to serve their customers' loads in order to achieve efficiencies and cost savings. Orangeburg, which is not a customer of either Duke or Progress, filed a protest, arguing that the Agreement gave effect to an existing state regulatory practice and discriminated between the utilities' customer classes. Assuming jurisdiction, the issues presented for review are:

1. Whether the Commission reasonably determined that the distinction between native and non-native load customer classes in the Joint Dispatch

Agreement was not unduly discriminatory under section 205 of the Federal Power Act, 16 U.S.C. § 824d.

2. Whether the Commission had any obligation to rule, in the agency proceeding governing the Joint Dispatch Agreement, on the constitutional arguments challenging existing state regulatory conditions contained in orders of the North Carolina Utilities Commission ("North Carolina Commission").

## STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are set out in the attached Addendum.

## STATEMENT OF FACTS

### I. STATUTORY AND REGULATORY BACKGROUND

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). Although the scope of the Commission's authority under the Federal Power Act is broad, it "is meant 'to extend only to those matters which are not subject to regulation by the States.'" *Metro. Edison Co. v. Pa. Pub. Util. Comm'n,* 767 F.3d 335 (3d Cir. 2014) (quoting 16 U.S.C. § 824(a)). As the Supreme Court recently explained, under the Federal Power Act, "FERC has exclusive authority to regulate the sale of electric energy at wholesale in interstate commerce," but "the law places beyond FERC's power, and leaves to the States alone, the regulation of 'any other sale' – most notably, any retail sale – of electricity." *Hughes v. Talen Energy Mktg., LLC*, No. 14-614, slip op. at 2 (S. Ct. Apr. 19, 2016) (affirming the preemption of a state program by the Federal Power Act).

All rates for or in connection with FERC-jurisdictional sales and transmission services are subject to the Commission's review to assure they are just and reasonable, and not unduly discriminatory or preferential. Federal Power Act § 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e); *see also* 18 C.F.R. § 35.1(a) and *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 246 (D.C. Cir. 2007) (explaining the filing requirements under section 205 of the Act).

## II. NORTH CAROLINA COMMISSION'S "REGULATORY CONDITIONS" AND ORANGEBURG'S CHALLENGES

In 2006, Duke sought authorization from the North Carolina Commission to merge with another power company, Cinergy Corp. The North Carolina Commission approved the merger subject to Duke's acceptance of certain regulatory conditions. *See City of Orangeburg*, 151 FERC ¶ 61,241, at P 4 (2015), JA 224 ("Declaratory Order") (providing history of the "regulatory conditions" and citing [2006] North Carolina Utilities Commission Order Approving Merger Subject to Regulatory Conditions and Code of Conduct, Docket No. E-7, Sub 795 (Mar. 24, 2006)). These regulatory conditions mandated, in part, that Duke:

(1) would continue to serve its retail native load[1] customers in North Carolina with the lowest-cost power it can reasonably generate or purchase from other sources before making power available for sales to customers that are not retail native load customers; and (2) must provide advance notice to the North Carolina Commission before granting native load priority to a wholesale customer. *See* Br. 13-14 (detailing North Carolina Commission's 2006 merger order and the "regulatory conditions").

### A. 2009 North Carolina Commission Order On Duke/Orangeburg Contract

Orangeburg's dispute with the North Carolina Commission arose from a short-lived 2008 wholesale energy contract between Orangeburg and Duke for native-load-priority service at a price based on Duke's average system cost of power (the "2008 Contract").[2] *See* Br. 15; *see also* Declaratory Order P 3, JA 224. Under the 2008 Contract, Duke agreed to charge Orangeburg, a municipality for

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[1] "Native load" is an industry term that generally refers to a utility's existing customers whose power needs the utility is bound by franchise or contract to meet. *See Ne. Utils. Serv. Co. v. FERC*, 993 F.2d 937, 953 (1st Cir. 1993). The Commission's regulations governing electric utility mergers define "native load commitments" as "commitments to serve wholesale and retail power customers on whose behalf the potential supplier, by statute, franchise, regulatory requirement, or contract, has undertaken an obligation to construct and operate its system to meet their reliable electricity needs." 18 C.F.R. § 33.3(d)(4)(i).

[2] Orangeburg is not a native load customer of Duke. Rather, Orangeburg has been a wholesale customer of South Carolina Electric & Gas Company since 1919. *See* Br. 26.

which it had never before supplied power, the same rates and same level and guarantee of service, as Duke provides its current retail native load customers. Declaratory Order P 3, JA 224 (detailing the 2008 Contract). The 2008 Contract was conditioned upon Duke providing the North Carolina Commission advance notice of the contract and not obtaining any adverse ruling or order from the state commission. *See id.* P 6, JA 225. Accordingly, Duke provided the North Carolina Commission the required advance notice of its intent to extend native load priority service to Orangeburg, a non-native load customer. *See* Request for Rehearing of the City of Orangeburg, Attachment A p. 10-11, Docket Nos. ER12-1338 *et al.* (July 9, 2012) R. 22, JA 171-72 (excerpt from Orangeburg's Protest filed in Duke/Progress FERC merger proceeding). In addition, Duke and Orangeburg filed with the North Carolina Commission a joint petition for a declaratory ruling regarding the state commission's future treatment of the contract rates in Duke's retail ratemaking. *See id.*

After holding an evidentiary hearing on the Duke/Orangeburg Petition, the North Carolina Commission issued an order. *In the Matter of Duke Energy Carolinas, LLC's Advance Notice of Purchase Power Agreement with the City of Orangeburg, South Carolina and Joint Petition for Declaratory Order*, slip op. at 2, No. COA09-1273, 2009 WL 904943 (Mar. 30, 2009), JA 189 ("2009 North Carolina Order"). Relevant to this case, the state commission found that:

(1) Orangeburg is not in Duke's control area, has never been a customer of Duke before, and is not committed to be a Duke customer for any longer than the ten-year term of the contract; and (2) Duke is not committed to plan its system so as to be able to provide service to Orangeburg beyond the ten-year contract. *Id.* at slip. op. 3, Finding of Fact No. 6, JA 190. Ruling on Duke's and Orangeburg's petition, the North Carolina Commission declared that "it would be appropriate . . . to allocate the wholesale costs of the Agreement . . . based upon incremental costs in any future retail ratemaking proceeding," and denied Duke's request to treat the retail native load of Orangeburg as if it were Duke's retail native load.[3] *Id.* at slip. op. 5, Finding of Fact No. 23; slip. op. 18, JA 192; 205; *see also* Declaratory Order PP 3-5, JA 224-25 (summarizing history associated with 2008 Contract). In other words, the state commission held that in a future retail ratemaking proceeding, it would treat Duke's power sales to Orangeburg as having been made from Duke's highest cost (i.e., incremental) resources. *See* Orangeburg Motion to Intervene and Protest at 5, FERC Docket No. ER12-1338 *et al.* (Apr. 16, 2012), R. 11, JA 36 (describing 2009 North Carolina Order).

As a result of the adverse 2009 North Carolina Order, Duke and Orangeburg voluntarily terminated the 2008 Contract. Declaratory Order P 6, JA 225. For

[3] The North Carolina Commission also addressed Orangeburg's federal preemption and Commerce Clause arguments in its 2009 Order. *See id.* at slip op. 20-22, JA 207-09.

replacement power, Orangeburg extended its then-current power supply agreement with South Carolina Electric & Gas Company and ultimately entered into a new, full-requirements power supply agreement with South Carolina Electric & Gas Company, with an initial delivery period that extends through December 31, 2022. *Id.* at P 6 & n. 8, JA 225. Orangeburg's replacement contract continues in effect for additional five-year periods until a party terminates the Agreement.

### B. Appeal To State Court

Orangeburg appealed the 2009 North Carolina Order to the North Carolina Court of Appeals. Orangeburg argued to the court that its appeal challenged the North Carolina Commission's "wide-reaching, ongoing, and unconstitutional impacts on interstate commerce and Duke's right to make wholesale power sales." *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, 208 N.C. App. 278 at *3 (N.C. Ct. App. Nov. 16, 2010) (unpublished) (copy included in Addendum), *appeal dismissed*, No. 537P10-1 (N.C. Sup. Ct. June 7, 2011)). The state court dismissed Orangeburg's appeal as moot after rejecting Orangeburg's argument that the 2009 North Carolina Order was a broad policy statement. *Id.* at *4. Accordingly, because the state commission order was limited to the facts before the North Carolina Commission, *i.e.* the terms of the 2008 Contract, once the contract was terminated by

Orangeburg, "the basis for [the] appeal dissolved." *Id.*

### C. FERC Declaratory Order

Pursuing a multi-front litigation strategy, on July 2, 2009, Orangeburg filed at FERC a petition for a declaratory order regarding the 2009 North Carolina Order and the North Carolina Commission's retail ratemaking policies. *See City of Orangeburg*, Application and Petition for Declaratory Order and Request for Expedition and Summary Disposition, FERC Docket No. EL09-63-000 (July 2, 2009) ("Petition for Declaratory Order"); *see also* Br. 25. Orangeburg requested that the Commission find that the 2009 North Carolina Order is preempted by FERC's exclusive jurisdiction over wholesale power sales under the Federal Power Act. *See* Petition for Declaratory Order at 2-3.

In 2015, the Commission dismissed the declaratory petition as moot because Orangeburg and Duke Energy had invoked various "regulatory out" contract clauses and terminated their 2008 Contract following the 2009 North Carolina Order. *See* Declaratory Order P 29, JA 232-33. It, admittedly, took six years for the Commission to act on Orangeburg's declaratory petition because, as Commissioner Moeller explained in his dissent, "over the six years this case [was] pending before the Commission, there have never been three [Commissioner] votes in favor of action." Declaratory Order, at p. 62,603 (Moeller, Comm'r, dissenting), JA 237 (asserting his position that the 2009 North Carolina Order was preempted).

Orangeburg did not seek agency rehearing of the Declaratory Order, and thus is foreclosed from seeking judicial review of the Declaratory Order. *See* Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b) (limiting the Court's appellate jurisdiction to challenges that were first "urged before the Commission" in an "application for rehearing").

**D. The Duke Energy And Progress Energy Merger**

In 2011, Duke Energy Corp. ("Duke Energy") and Progress Energy, Inc. ("Progress Energy"), both utility holding companies, filed a merger application with FERC under which Progress Energy would become a wholly-owned subsidiary of Duke Energy. *Duke Energy Corp. and Progress Energy, Inc*., 136 FERC ¶ 61,245 (2011) ("Merger Order"); *see also* 16 U.S.C. § 824b (merger authority). Relevant to this case, Duke Energy is the parent company of Duke. Merger Order, 136 FERC ¶ 61,245 at P 4. Duke is a vertically-integrated electric utility that generates, transmits, distributes, and sells electricity to 2.4 million retail customers within its franchised service territory in North Carolina and South Carolina, subject to the jurisdiction of the North Carolina Commission and the Public Service Commission of South Carolina. Neither state has deregulated its retail electric markets. *Id.* P 5. Duke is authorized by FERC to sell energy at market-based rates outside of Duke's balancing authority area.[4] *Id.* Similarly,

[4] A "balancing authority area" – also called a "control area" – refers to the

Progress Energy is the parent company to the regulated electric utility operating company Progress. *Id.* P 15. Progress is a vertically-integrated electric utility with a retail service area that generally covers the eastern half of North Carolina and a portion of northeast South Carolina. *Id.* P 16. Like Duke, Progress is authorized by FERC to sell power at market-based rates outside of its balancing authority area. *Id.* P 15.

Both utilities "have exclusive retail franchises under North Carolina law, and pursuant to those franchises the companies have constructed generation, transmission, and distribution facilities, and are required by law to operate those facilities to furnish electricity service on an integrated, least-cost basis to their North Carolina retail customers." *Id.* P 177. As such, Duke and Progress own overlapping generation in the Carolinas, which is "almost exclusively devoted to serving the retail and wholesale requirements customers in their respective [balancing authority areas]." *Id.* P 37. Both utilities use only "a small percentage" of their total generated energy "to make wholesale sales to customers other than their native load wholesale requirements customers." *Id.*

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collection of generation, transmission, and end-users within a certain area, with respect to which a specific utility is responsible for maintaining a reliable balance of supply and demand. *See Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 524 n.2 (D.C. Cir. 2010) (defining balancing authority). Orangeburg is located within South Carolina Electric & Gas Company's balancing authority area. Br. 26.

Orangeburg protested the proposed merger, arguing that the "North Carolina Commission's post-merger control of Duke's and Progress' wholesale power sales and 'attendant determination of favored and disfavored wholesale customers' is anticompetitive under the [Federal Power Act] and Commission policy." *Id.* P 59. On September 30, 2011, the Commission conditionally approved the merger. *Id.* P 1. FERC rejected Orangeburg's arguments, finding that the alleged harm to competition did not stem from the proposed merger but rather from "existing [North Carolina] regulatory policies that will continue in effect irrespective of whether the [merger] is consummated." *Id.* P 147; *see also id.* PP 183-84 (rejecting Orangeburg's claims regarding negative impacts on FERC's jurisdiction); *Duke Energy Corp. and Progress Energy, Inc*., 149 FERC ¶ 61,078, P 42 (2014) (order denying Orangeburg's rehearing request regarding same issue).

The Duke Energy-Progress Energy merger also required the North Carolina Commision's approval. The state commission, in approving the merger, carried forward the existing regulatory conditions applied to Duke in its prior 2006 merger. *See* Answer of the Public Staff-North Carolina Utilities Commission to Protest of City of Orangeburg at 10, FERC Docket No. ER12-1338 (May 1, 2012), R. 18, JA 70 ("N.C. Public Staff Answer") (explaining that the "regulatory conditions" were agreed to in a settlement agreement in the North Carolina Commission merger proceeding). Orangeburg mischaracterizes the "regulatory conditions" attached to the 2012 merger as "new." *See* Br. 13; *see also id.* at 25, 27. In fact, the regulatory conditions accepted as part of the 2012 Duke Energy–Progress Energy merger were substantively identical to the regulatory conditions applied to Duke since the 2006 merger. *See* N.C. Public Staff Answer at 5-7, JA 65-67.

Duke Energy and Progress Energy merged on July 2, 2012.

## III. THE CHALLENGED FERC PROCEEDING

### A. The 2012 Joint Dispatch Agreement

In connection with the merger, on March 26, 2012, Duke Energy and Progress Energy executed a Joint Dispatch Agreement on behalf of their respective subsidiary utilities Duke and Progress, which provides for the joint dispatch of the utilities' respective generation fleets after the merger is completed. Answer of Duke and Progress at 2, FERC Docket No. ER12-1338 (May 1, 2012), R. 17, JA 52. The Joint Dispatch Agreement requires the two utilities to dispatch their generating units on a joint basis to serve the loads of both companies. *See Duke Energy Corp. et al.*, Application filing Joint Dispatch Agreement at 3-4, Docket No. ER12-1338 (Mar. 26, 2012), R. 2, JA 3-4.

Under the Joint Dispatch Agreement, Duke serves as the "joint dispatcher" to call-upon or dispatch the companies' generation resources to meet both companies' respective loads and contractual commitments. *Id.* at 4. Cost savings realized from the joint dispatch is allocated after the fact between Duke and Progress – savings that then automatically flow to retail and wholesale customers of Duke and Progress. The Agreement attributes the lowest cost generators to have served each company's "native load" customers, which are defined as both: (1) Duke's and Progress' retail customers for which either utility has an obligation under North Carolina or South Carolina law to supply all generation, transmission and distribution service; and (2) Duke's and Progress' wholesale customers for which either utility is obligated by contract to serve that wholesale customer's retail load. The utilities' remaining generation resources are deemed to have served other customers, i.e. non-native load customers. The Joint Dispatch Agreement does not provide for sales to any wholesale customers, nor does it establish rates for Duke's or Progress' sales to wholesale customers.

Duke and Progress filed the Joint Dispatch Agreement for the Commission's review under section 205 of the Federal Power Act, 16 U.S.C. § 824d. Orangeburg was the sole party that protested the Joint Dispatch Agreement.

### B. Initial Order

On June 8, 2012, the Commission conditionally approved the Joint Dispatch Agreement subject, in part, to the removal of certain provisions that the Commission found pertain to retail ratemaking. *See Duke Energy Corp.*, 139 FERC ¶ 61,193, at P 21 (2012), R. 20, JA 124 ("Initial Order"). Specifically, in response to Orangeburg's claim that section 3.2(c) of the Agreement effectively results in the North Carolina Commission's usurpation of the Commission's exclusive jurisdiction over wholesale sales (*id.* P 26, JA 127), the Commission found that section pertains fundamentally to retail ratemaking and therefore is inappropriate to include in a FERC-jurisdictional wholesale agreement. *Id.* P 37, JA 130.

With respect to the treatment of non-native load customers, the Commission found that the Agreement's allocation of different cost levels to native and non-native load customers is not unduly discriminatory. *Id.* P 45, JA 133. FERC determined that its conclusion was consistent with its past precedent. *Id.* (citing its rulemaking in *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999) ("Order No. 2000"), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *petitions dismissed Pub. Util. Dist. No. 1 of Snohomish Cty., Wash. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001)). However, with respect to the distinction in the Agreement between existing and new non-native-load customers, the Commission found that there was no meaningful difference between the two classes of non-native load customers that would justify disparate treatment. *Id.* P 46, JA 134.

### C. Rehearing Order

Orangeburg filed a request for rehearing. *See* Orangeburg Rehearing

Request, JA 138-177. On June 18, 2015, the Commission issued an order denying rehearing. *See Duke Energy Corp.*, 151 FERC ¶ 61,242 (2015), R. 34, JA 179 ("Rehearing Order"). The Rehearing Order issued concurrently with the Declaratory Order, described *supra* at pp. 9-10. *Id.* n.11, JA 181. The Commission found that the Joint Dispatch Agreement requirement that the lowest cost resources be deemed to be used to serve Duke's and Progress' native loads, while off-system sales (non-native load) are deemed supplied using higher cost resources, results in just and reasonable rates. *Id.* P 13, JA 184. The Commission reiterated 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].'" *Id.* (quoting Initial Order P 45, JA 133). Based on FERC's affirmation of the state commission's authority, the Commission found Orangeburg's constitutional arguments did not merit further discussion. *See id.* P 13, JA 184.

Commissioner Moeller concurred in FERC's approval of the Joint Dispatch Agreement, notwithstanding his "concerns" regarding the North Carolina Commission's "treatment of other wholesale agreements for retail ratemaking purposes" at issue in the Declaratory Order proceeding. *Id.* at p. 62,606 (Moeller, Comm'r, concurring), JA 186.

This appeal followed.

## SUMMARY OF ARGUMENT

Since 2009, Orangeburg has pursued a multi-front legal attack against the North Carolina Commission's "regulatory regime" (Br. 2). Orangeburg asserts that regime has been codified into "regulatory conditions" that the state commission has made part of past merger approvals of utilities subject to its jurisdiction. Orangeburg has failed in state court and in two other FERC proceedings – resulting in the Merger Order and the Declaratory Order – to have its challenge to North Carolina Commission's regulatory conditions resolved to its satisfaction. Now, Orangeburg inappropriately attempts to relitigate its complaint about state action in the context of FERC's review of a bilateral contract between two utilities with which Orangeburg does not have any contractual or other relationship. Although Orangeburg attempts to couch some of its arguments as a challenge to the justness and reasonableness of the FERC-jurisdictional Joint Dispatch Agreement (*e.g.*, Br. 2-3 (Statement of Issues nos. 1 & 5)), all of Orangeburg's merits arguments concern what the North Carolina Commission has done.

Accordingly, Orangeburg lacks standing to challenge the Commission's approval of the Joint Dispatch Agreement. Orangeburg fails to establish a concrete or imminent injury as either a competitor or potential customer. Orangeburg's bare assertions in its brief are inadequate to establish harm sufficient to satisfy Article

III standing. Moreover, Orangeburg's alleged injury stems from the North Carolina Commission's actions and orders – not FERC's. Indeed, the vast majority of Orangeburg's brief is an attack on the state "regulatory conditions." Thus, there is no causal connection between Orangeburg's alleged harm and the challenged FERC orders.

On the merits, the Commission did not "abdicate" (Br. 3) any of its statutory responsibilities. FERC fully reviewed the Joint Dispatch Agreement under section 205 of the Federal Power Act, 16 U.S.C. § 824d. Taking into consideration Orangeburg's comments, the Commission ordered the removal of several provisions that were either discriminatory or outside the scope of a FERC-jurisdictional contract. The Commission also analyzed the Joint Dispatch Agreement's disparate treatment of native and non-native load customers and reasonably concluded, based on FERC precedent, that the differing treatment was not unduly discriminatory.

Last, contrary to Orangeburg's repeated suggestions, the Commission is not compelled as a matter of law to determine whether the North Carolina regulatory conditions are preempted by the Federal Power Act or otherwise unconstitutional. There is no such mandate. Further, the Commission reasonably concluded that the preemption question was outside the scope of the Joint Dispatch Agreement proceeding once FERC excised the "retail-related" provisions and determined that the Agreement's native load classification was permissible. FERC's exercise of its discretion here to order its proceedings as it deems appropriate is underscored by the Commission's concurrent issuance of the Declaratory Order (not on review), on Orangeburg's simultaneously pending petition for a declaratory order, regarding the validity of the North Carolina Commission's "regulatory conditions."

## ARGUMENT

### I. ORANGEBURG FAILS TO SATISFY CONSTITUTIONAL STANDING REQUIREMENTS

Section 313 of the Federal Power Act limits judicial review to those parties who have been "aggrieved by an order issued by the Commission." 16 U.S.C. § 825*l*(b). Additionally, a party must meet the constitutional standing requirements of injury-in-fact, redressability, and causation. *See Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009). The "irreducible constitutional minimum" for standing requires the petitioner to have suffered (1) an "injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" to the challenged agency action, and (3) that likely "will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted); *see also, e.g.*, *NO Gas Pipeline v. FERC*, 756 F.3d 764, 767-68 (D.C. Cir. 2014) (applying *Lujan* standard). The burden of establishing standing falls on the petitioner, and Orangeburg has yet to establish it here. *See Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). Where, as here, the party is not the object of the challenged government action, standing is “substantially more difficult” to establish. *Lujan*, 504 U.S. at 562 (citations omitted).

### A. Orangeburg Has Not Established An Injury-In-Fact

Orangeburg has not established that it is injured – as either a competitor or wholesale customer – by the challenged FERC orders. Orangeburg contends that the North Carolina Commission has “used its retail ratemaking authority to effect a geographic market allocation of Duke’s and Progress’ lower-cost power,” making Orangeburg a “[North Carolina Commission]-disfavored wholesale customer.” Br. 6. Orangeburg further claims that its attempts to “avail itself of FERC’s . . . competitive markets . . . has been thwarted by the NCUC’s orders and FERC’s inaction” (Br. 15), and that the North Carolina Commission “prevents other potential wholesale sales in the Carolinas.” Br. 17. But, even assuming Orangeburg is correct, it has not established an injury-in-fact.

#### 1. No Competitive Injury

Orangeburg’s bare assertion, without any supporting evidence, that Orangeburg is “discriminatorily denied access” to low-cost wholesale power as a native load customer “to its competitive detriment” (Br. 26) is insufficient to establish standing. *See Ala. Mun. Distribs. Grp. v. FERC*, 312 F.3d 470, 472 (D.C.

Cir. 2002) ("mere invocation" of a competitive injury "is not an adequate basis for standing"). Nowhere in Orangeburg's brief or in the agency record is any additional information that might support an assertion of a competitive injury. *See* Br. 26 n.72 (citing Orangeburg's Protest to FERC, which merely repeats the same unadorned claim of competitive injury); *see also New World Radio, Inc. v. FCC*, 294 F.3d 164, 170 (D.C. Cir. 2002) ("burden is on the party seeking judicial review clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute"); and *Advanced Mgmt. Tech., Inc. v. FAA*, 211 F.3d 633, 636 (D.C. Cir. 2000) ("Standing cannot be inferred argumentatively but rather must affirmatively appear in the record.").

Orangeburg has not shown that the Joint Dispatch Agreement provides some benefit to Duke and Progress that will give them a clear and immediate potential to compete with Orangeburg for "new industrial load" (Br. 26). *See New World Radio*, 294 F.3d at 172 (no competitor standing where agency action is at most "the first step in the direction of future competition"); *see also Mich. Gas Co. v. FERC*, 115 F.3d 1266, 1270-71 (6th Cir. 1997) (local gas distribution company did not have standing to challenge FERC order authorizing construction of gas delivery tap where alleged competitive threat was supported by nothing but the petitioner's own assertions). The basic requirement for competitor standing "is that complainant show an actual or imminent increase in competition, which increase [the Court] recognize[s] will almost certainly cause an injury in fact." *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010). *Compare La. Energy and Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998) (finding competitor standing when the injury was "imminent") *with DEK Energy Co. v. FERC*, 248 F.3d 1192, 1196 (D.C. Cir. 2001) (no competitor standing when there was only "some vague probability" of increased competition and "a still lower probability" of injury to plaintiff stemming from that competition).

Put slightly differently, to demonstrate a constitutionally sufficient competitive injury, Orangeburg must show that the approval of the Joint Dispatch Agreement has "the clear and immediate potential" to cause competitive harm. *Associated Gas Distribs. v. FERC*, 899 F.2d 1250, 1259 (D.C. Cir. 1990) (petitioner must show "that the challenged action authorizes allegedly illegal transactions that have the clear and immediate potential to compete with petitioners' own sales"); *see also New Eng. Pub. Commc'ns Council, Inc. v. FCC*, 334 F.3d 69, 74 (D.C. Cir. 2003) (finding competitor standing only when the "injury [was] both clear and immediate"). Orangeburg fails to show that "FERC's decision 'will almost surely cause' [it] 'to lose business,' or to cut prices in order to preserve business." *DEK Energy*, 248 F.3d at 1196 (quoting *El Paso Nat. Gas, Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995)).

The competitive injury case Orangeburg relies on, *Louisiana Energy and*

*Power Authority v. FERC*, 141 F.3d 364 (D.C. Cir. 1998), is distinguishable. In that case, the court found that the petitioner, an electric utility that was an existing customer and competitor of a utility seeking authority from FERC to charge market-based rates, had standing to challenge FERC's grant of market-based rate authority to the petitioner's supplier/competitor. *See id.* at 367 (finding that FERC's lifting of a regulatory restriction – authorizing the utility to price at market-based rates instead of traditional cost-based rates – poses a clear and immediate potential to compete with the petitioner's own sales). Here, Orangeburg is not a demonstrated competitor of Duke or Progress. Moreover, FERC's approval of the Joint Dispatch Agreement did not change or modify Duke's or Progress' wholesale rates or the scope of either utility's market-based rate authority, or impact the existing state regulatory conditions. Thus, the challenged FERC orders did not alter Duke's or Progress' ability to compete against Orangeburg.

### 2. No Injury Where Orangeburg Is Not A Wholesale Customer

Orangeburg's alleged injury as a "wholesale customer" (Br. 26) fails because Orangeburg is not a customer of either Duke or Progress, nor will it be in near future. *See, e.g., City of Orrville v. FERC*, 147 F.3d 979, 985 (D.C. Cir. 1998) (aggrievement requirement distinguishes a "'direct stake'" from a "'mere interest'"); *see also Hydro Inv'rs., Inc. v. FERC*, 351 F.3d 1192 (D.C. Cir. 2003)

(Absent a concrete interest in receiving the relief requested before the agency, the petitioner had no right to seek judicial review of an agency's decision to deny relief).

Orangeburg's alleged injury – an inability to successfully contract with Duke for wholesale power in 2008 – pre-dates by four years the Joint Dispatch Agreement. Orangeburg currently is – and has been since 1919 – a customer of South Carolina Electric & Gas Company. Their current wholesale power sale agreement will first expire in December 2022. *See supra* p. 8. The fact that "in time" (Br. 28) – presumably in 2023 – Orangeburg may seek to purchase power from either Duke or Progress is not sufficiently concrete or imminent to satisfy the injury-in-fact requirement. *See N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011) (party which does not have an active application for a transmission project, rather might someday wish to build a high-voltage transmission line, lacks standing to challenge transmission planning process). In *New York Regional Interconnect*, the Court held that even if the challenged FERC orders create a "practical obstacle" to the party's future development of hypothetical projects, "a practical obstacle is not necessarily coterminous with a cognizable injury-in-fact that is necessary to support Article III standing." *Id.* at 588. *See also El Paso Nat. Gas Co.*, 50 F.3d at 24 (petitioner failed to show "a likelihood of imminent injury under the challenged rulings"). Further, "the potential for future economic injury, is not enough to show the requisite injury for Article III standing." *PNGTS Shippers' Grp. v. FERC*, 592 F.3d 132, 137 (D.C. Cir. 2010).

### B. Orangeburg's Alleged Injury Arises From The North Carolina Commission's Actions, Not FERC's

Even if Orangeburg's alleged injury rises to Article III levels, Orangeburg fails to establish a nexus between FERC's approval of the Joint Dispatch Agreement and the harm Orangeburg alleges. *See generally Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012) ("It must also be 'substantially probable' that the challenged agency action caused that injury."). Orangeburg's target is not the FERC-jurisdictional and FERC-approved Joint Dispatch Agreement. Rather, Orangeburg uses the Joint Dispatch Agreement proceeding as another avenue to attack the existing North Carolina Commission "regulatory conditions" to which Duke and Progress are subject. *See* Br. 2 (three of five issues explicitly challenge the North Carolina Commission's "regime," "regulatory conditions," or "export control policy"); *see also* Br. 30-32 (focus of its Summary of Argument – indeed the entire Argument section – is the North Carolina Commission's actions).

The challenged FERC orders were limited to reviewing the Joint Dispatch Agreement. That Agreement, between Duke and Progress, does not impact Orangeburg because it is not a current or reasonably foreseeable future customer of

Duke or Progress. Instead, Orangeburg's alleged harms stem from North Carolina's pre-existing – not "new" – regulatory conditions, which will continue in effect regardless of whether the Commission approves the Joint Dispatch Agreement. Orangeburg's entire brief, and its underlying argument in FERC's Joint Dispatch Agreement proceeding, is tied to the North Carolina Commission's "regulatory conditions," which allegedly blocked and remain a barrier to Orangeburg's ability to purchase power from Duke at the rates desired by Orangeburg. Because any economic harm Orangeburg may suffer arises from the North Carolina Commission's regulatory policies, its injury is not directly traceable to the challenged FERC orders. *See Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 739 (D.C. Cir. 2008) (dismissing petition where the alleged injury arose from rate decisions of state commissions, and could be redressed only by those commissions, not FERC).

## II. THE STANDARD OF REVIEW IS DEFERENTIAL

Should the Court reach the merits, its review of the Commission's orders is governed by the arbitrary and capricious standard of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A); *see also, e.g., Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 809 (D.C. Cir. 2007) (applying arbitrary and capricious review to FERC's conclusion that utility did not violate filed rate doctrine). The "scope of review under [that] standard is narrow." *FERC v. Elec. Power Supply*

*Ass'n*, 136 S. Ct. 760, 782 (2016) (citation omitted). The Court must affirm the Commission's orders so long as the Commission examined the relevant data and articulated a rational connection between the facts found and the choice made. *Keyspan-Ravenswood*, 474 F.3d at 809.

The Commission's decisions regarding rate issues are entitled to judicial respect because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 532 (2008) (same). Additionally, this Court gives substantial deference to FERC's interpretation if its own orders and regulations. *See, e.g.*, *Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 740 (D.C. Cir. 2011); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007).

## III. THE COMMISSION REASONABLY DETERMINED THAT THE JOINT DISPATCH AGREEMENT DOES NOT UNDULY DISCRIMINATE AGAINST ORANGEBURG

Orangeburg contends that the distinction between native and non-native load sales in the Joint Dispatch Agreement is unduly discriminatory. *See* Br. 34. Specifically, Orangeburg argues that, through the Joint Dispatch Agreement, Duke and Progress offer lower cost energy to "favored customers." Br. 30, 34. But, "[a] rate is not 'unduly' preferential or 'unreasonably' discriminatory if the utility can justify the disparate effect." *Ark. Elec. Energy Consumers v. FERC*, 290 F.3d 362, 367 (D.C. Cir. 2002). And, as Orangeburg recognizes (Br. 58), differing rates or service terms are not unduly discriminatory if the entity claiming discrimination is not "similarly situated" to others. *See Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 239 (D.C. Cir. 2013) (FERC reasonably determined that virtual marketers are not similarly situated to load-serving entities); *see also Sacramento Mun. Util. Dist. v. FERC*, 474 F.3d 797, 802 (D.C. Cir. 2007) (no undue discrimination where customers were not similarly situated); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1139-40 (D.C. Cir. 1984) (rate disparity between two classes of utility customers not unduly discriminatory where customers not similarly situated because one set entered into settlement agreement); and *Consol. Edison Co. v. FERC*, 676 F.2d 763, 773 & n.31 (D.C. Cir. 1982) (gas pipeline's curtailment plan that funneled gas supplies to the class of customers for whom curtailment created the greatest hardship is not unduly discrimatory because customers are not similarly situated). Orangeburg's claim (Br. 58) that it is similarly situated to Duke's and Progress' native-load wholesale customers is meritless.

As the Commission noted, under the Joint Dispatch Agreement, the native load customer class includes wholesale customers to which Duke or Progress is obligated to "engage in [generation resource] planning and to sell and deliver electric capacity and energy in a manner comparable to" the utility's obligation to its Retail Native Load Customers. *See* Initial Order P 38, JA 130-31 (quoting Joint

Dispatch Agreement Article I, JA 13). A "Retail Native Load Customer" is a retail customer for which either Duke or Progress "has an obligation under [state] law to engage in long-term planning and to supply all generation, transmission, distribution, delivery and sales, and other related services . . . needed to provide adequate and reliable service." Duke Application, Attachment A, Joint Dispatch Agreement, Article I, JA 14; *see also* N.C. Public Staff Answer at 16-17, JA 76-77 (distinguishing between native and non-native load customers). A non-native load customer is any wholesale customer to which the utility does not have a legal obligation to engage in long-term resource planning to ensure adequate generation resources to guarantee full-requirements service. Here, native load customers enjoy rights established by state law that non-native load customers do not.

As the Commission explained, this is a permissible distinction between native and non-native load customers that is consistent with past precedent. *See* Initial Order P 45, JA 133-34 (citing its Order No. 2000 rulemaking, *supra* p. 15); *see also* Rehearing Order P 13, JA 184 (citing same). Through its Order No. 2000 rule, FERC encouraged the formation of Regional Transmission Organizations as a means to promote efficiency in the wholesale electricity markets and "to ensure that electricity consumers pay the lowest price possible for reliable service." Order No. 2000, ¶ 31,089 at 30,991 (summary of rule). FERC, in addressing states' concerns that the creation of Regional Transmission Organizations could result in exports of their low cost power out of state, acknowledged that it was permissible for native load customers to be treated differently than other customers. Specifically, the Commission held that "[w]here there is no retail choice, our Final Rule does not affect a state commission's authority to require a utility to sell its lowest cost power to native load, as it always has."[5] *Id.* at 31,210. The Commission further explained: "[I]f the utility's transmission is operated by an [Regional Transmission Organization] and its higher cost power can be sold more readily to new, more distant customers, this will lead to recovery of more capital costs and lower retail rates." *Id.*

Thus, in Order No. 2000, the Commission anticipated that, in states like North Carolina, utilities such as Duke and Progress may sell their lower cost power to their wholesale and retail native load customers while selling higher cost power to non-native load customers. Given this recognized permissible distinction between native and non-native load customers, there is nothing arbitrary or discriminatory about FERC's decision here.

The Commission has previously found that classes of customers that face differing state regulatory risks are not similarly situated. *See Columbia Gas Transmission Corp.*, 103 FERC ¶ 61,388 at PP 4-6, 12 (2003), *on reh'g*, 105 FERC

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[5] North Carolina is a state with no retail choice and relatively low-cost power. *See* Order No. 2000, ¶ 31,089 at 31,209 (summarizing Duke's comments, which note that both North Carolina and South Carolina enjoy low-cost electricity).

¶ 61,373 (2003) (permissible for a gas pipeline to allow certain customers to reduce their contract demand quantities, in light of a specific regulatory risk faced by those customers). In that case, the Commission found no undue discrimination, stating that "Columbia Gas can reasonably limit such reductions to regulated entities whose need for capacity may be affected by the actions of a [state] regulatory agency. Since industrial end-users are not so regulated, they are not subject to the same degree of regulatory risk and are not similarly situated." *Id.* P 12. Similarly, here, the two different classes of customers under the Joint Dispatch Agreement reflect differing legal obligations Duke and Progress bear under state law toward each class.

Similar to FERC's holding in *Columbia Gas*, here FERC's determination struck a reasonable balance between the competing interests of native load requirements customers and those wholesale customers (like Orangeburg) to which neither Duke nor Progress has a legal obligation to engage in long-term planning and to serve. Deference is especially appropriate here where the agency is construing whether any discrimination is "undue" and worthy of redress. *See FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("[N]ot our job," when presented with a disputed question within the "technical understanding and policy judgment" of FERC, "to render that judgment, on which reasonable minds can differ"); *see also Cities of Newark v. FERC*, 763 F.2d 533, 547 (3d Cir. 1985)

("[T]he notion of undue discrimination itself gives rise to flexibility in interpretation by the Commission.").

Orangeburg's facial challenges to Order No. 2000 are meritless. Orangeburg baldly claims that "FERC's reliance upon Order 2000 is unsound as a matter of law" (Br. 46) and "inapposite" (Br. 55), but fails to point to anything in Order No. 2000 or subsequent precedent that undermines the Commission's finding that there is a recognized and permissible distinction between native load customers and other customers. Instead, Orangeburg turns its argument into an attack against the North Carolina Commission. *See* Br. 47-48, 56-58 (arguing the North Carolina Commission "cannot lawfully pick favorites"). Further, Orangeburg erroneously argues that the term "native load" as used in FERC rulemakings excludes wholesale customers and thus is distinct from the term's use in the Joint Dispatch Agreement. *See* Br. 57 & n.161. In its Order No. 2000 rulemaking, FERC recognized that franchised monopoly service providers (like Duke and Progress) own and operate electric generation facilities "to serve requirements customers *at wholesale and retail*." Order No. 2000, ¶ 31,089 at 31,015. The term "requirements customers" is generally used synonymously with native load and, as used in Order No. 2000 and elsewhere, encompasses both retail and wholesale customers. *See e.g.*, Merger Order, 136 FERC ¶ 61,245 at P 37 (using "requirements customers" and "native load customers" interchangeably);

and Duke/Progress Joint Dispatch Agreement Application at 4, JA 4 (same).

## IV. FERC REASONABLY DECLINED TO ADDRESS ORANGEBURG'S CHALLENGES TO THE STATE COMMISSION'S ACTIONS

The vast majority of Orangeburg's arguments – its constitutional challenges to the North Carolina Commission's actions, orders and policy – are outside the scope of the Joint Dispatch Agreement. Having excised from the Agreement the four provisions that fundamentally "pertain to retail ratemaking," the Commission reasonably declined to rule on the North Carolina Commission's authority to impose those retail-related requirements. *See* Initial Order PP 21, 37, JA 124, 130 (requiring removal of the section 3.2(c) provisions which the North Carolina Commission had required Duke and Progress to include in the Agreement); *see also id.* P 23, JA 125 (setting forth the four retail-related provisions). On rehearing, the Commission again declined to reach Orangeburg's "other arguments" regarding the scope of North Carolina Commission's authority. Rehearing Order P 13, JA 184; *see also id.* at PP 5-11, JA 181-83 (summarizing Orangeburg's rehearing arguments, the predominant one being that North Carolina's regulatory regime violates the Supremacy Clause of the U.S. Constitution). Nothing more is required.

The Commission is not compelled to address preemption issues. *See Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009) (holding that agencies have "no special authority to pronounce on preemption absent delegation by Congress"); *see also*

*Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 95 (2d Cir. 2012) (Federal Power Act does not have an express preemption clause). Although the Commission "may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area," ultimately it is the "agency's choice to pre-empt." *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1156 (D.C. Cir. 1996) (quoting *City of New York v. FCC*, 486 U.S. 57, 64 (1988)).

Orangeburg fails to point to any statute, regulation, or case law mandating that the Commission resolve a preemption or any other Constitutional law claim.[6] *See* Br. 58-59 (urging the Court to remand for FERC to rule on preemption claim). The sole case Orangeburg cites is inapposite. *See* Br. 59, n.166 (citing *Ohio Power Co. v. FERC*, 954 F.2d 779 (D.C. Cir. 1992)). *Ohio Power* involved a challenge to FERC's exercise of its rate-setting authority in an area where FERC shares overlapping authority with another federal – not state – agency, the Securities and Exchange Commission. Far from finding that FERC must resolve whether the SEC's coal price was preempted, this Court noted that the Supreme Court "left for us . . . the task of deciding how to reconcile the conflict, if any, created by FERC's attempt to allow only a market-based price" for coal. *Ohio Power*, 954 F.2d at 784

[6] Even federal courts have some discretion to abstain from exercising its jurisdiction to hear a preemption claim. *See, e.g., New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358 (1989).

(“when a conflict arises between specific and general provisions of the same legislation, the courts should give voice to Congress’ specific articulation of its policies and preferences”). Moreover, the three Supreme Court preemption cases Orangeburg cites all arose on direct review from state – not federal – agency decisions. *See Entergy La., Inc. v. La. Pub. Serv. Comm’n*, 539 U.S. 39, 49-50 (2003); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 356-57, 373-75 (1988); *Nantahala Power and Light Co. v. Utils. Comm’n of N.C.*, 476 U.S. 953, 955, 970-72 (1986); *see also Hughes v. Talen Energy Mktg., LLC*, No. 14-614 (S. Ct. Apr. 19, 2016) (state action held to be preempted by FERC’s wholesale rate setting authority in challenge generators brought directly to federal court).

Orangeburg’s claim that FERC must act is similar to one rejected by the Supreme Court in *New York v. FERC*, 535 U.S. 1, 26-28 (2002). In that case, a petitioner argued that the Commission should have applied its rulemaking’s requirements not only to wholesale, but also to bundled retail, transmission. *New York*, 535 U.S. at 26. The Court found that the Federal Power Act did not require FERC to provide retail-market remedies. *Id.* at 27. In addition, the Court stated that FERC “had discretion to decline to assert such jurisdiction in this proceeding in part because of the complicated nature of the jurisdictional issues.” *Id.* at 28. Similarly here, because the Federal Power Act does not expressly preempt states’ retail rate authority, the Commission appropriately exercised its discretion and declined to "offer [its] view on the North Carolina Commission's authority to impose or apply [the retail-related] requirements . . . ." Initial Order P 37, JA 130.

The Commission's actions are consistent with its decision in the Duke/Progress merger proceeding, in which FERC also declined to address the same preemption claim and challenge to the North Carolina Commission's "regulatory conditions." *See* Merger Order, 136 FERC ¶ 61,245 at PP 183-84. As Orangeburg points out, the Commission can, and has, ruled that actions by a state utility regulator are preempted by the Federal Power Act. *See* Br. 29-30 (citing *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 (2010)).

But the Commission may also exercise its discretion not to do so. An entity that believes it is harmed by a state's action that conflicts with the Federal Power Act may pursue its claim in state or federal court, just as Orangeburg did in its state court litigation against the North Carolina Commission. *See supra* at p. 8 (describing Orangeburg's complaint to the North Carolina Court of Appeals); *see also, e.g., Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84 (2d Cir. 2012) (energy utility brought action arguing that the Federal Power Act preempted New York's actions); *AEP Tex. N. Co. v. Tex. Indus. Energy Consumers*, 473 F.3d 581 (5th Cir. 2006) (electric utility brought action against Texas Utility Commission, arguing state regulator's order was preempted by the Federal Power Act); *N. Nat. Gas Co., v. Iowa Utils. Bd.*, 377 F.3d 817 (8th

Cir. 2004) (suit seeking declaratory judgement that Iowa statutes regulating natural gas pipelines were preempted by federal law); *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 911 F.2d 993 (5th Cir. 1990) (electric utility sought declaratory relief from order of local retail ratemaking body that the utility claimed was preempted by FERC's wholesale rate order); *Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600 (2d Cir. 1988) (utility brought constitutional challenge to state regulatory scheme).

Moreover, as Orangeburg noted, its preemption claim was already pending before the Commission in Orangeburg's declaratory order proceeding, FERC Docket No. EL09-63. *See* Br. 59; *see also* Orangeburg Protest at 5, JA 36. In the declaratory proceeding, multiple interested parties had intervened and created a substantial record by filing protests, answers and comments. *See* Declaratory Order PP 13-27, JA 228-32 (detailing the filed pleadings). Accordingly, FERC reasonably chose the Declaratory Order proceeding as the vehicle to address Orangeburg's preemption and other challenges to the North Carolina Commission's "regulatory conditions." *See* Rehearing Order P 6 n.11, JA 181 (noting that Orangeburg's arguments regarding the North Carolina Commission are the subject of Orangeburg's petition for declaratory relief); *see also* Rehearing Order at p. 62,606 (Moeller, Comm'r, concurring), JA 186 (supporting the acceptance of the Joint Dispatch Agreement, "notwithstanding my concerns" regarding the North Carolina Commission's actions "discussed in my dissent in [the Declaratory Order]"). FERC is free to treat a particular issue in a different proceeding where that "proceeding would generate more appropriate information and where the agency was addressing the question." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 81 (D.C. Cir. 2014); *see also Mobil Oil Explor. & Prod. Se. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991) (Commission need not solve all problems at one time in one proceeding; "agency enjoys broad discretion in determining how best to handle related, yet discrete issues") (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 543-44 (1978)).

## CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of standing. If the Court proceeds to the merits, the petition should be denied and the Commission's orders should be affirmed.

Respectfully submitted,

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FINAL BRIEF June 21, 2016

***Orangeburg, South Carolina v. FERC*** **Docket Nos. ER12-1338 *et al.***
**D.C. Cir. No. 15-1274**

## CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 2010, in 14-point Times New Roman) and contains 8,627 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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June 21, 2016

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### § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 5 U.S.C. 1009(e). | June 11, 1946, ch. 324, §10(e), 60 Stat. 243. |

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

## CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.
801. Congressional review.
802. Congressional disapproval procedure.
803. Special rule on statutory, regulatory, and judicial deadlines.
804. Definitions.
805. Judicial review.
806. Applicability; severability.
807. Exemption for monetary policy.
808. Effective date of certain rules.

### § 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by oper-

with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the reservation. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

**(b) Alternative prescriptions**

(1) Whenever the Secretary of the Interior or the Secretary of Commerce prescribes a fishway under section 811 of this title, the license applicant or any other party to the license proceeding may propose an alternative to such prescription to construct, maintain, or operate a fishway.

(2) Notwithstanding section 811 of this title, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall accept and prescribe, and the Commission shall require, the proposed alternative referred to in paragraph (1), if the Secretary of the appropriate department determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative—

(A) will be no less protective than the fishway initially prescribed by the Secretary; and

(B) will either, as compared to the fishway initially prescribed by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any prescription under section 811 of this title or alternative prescription it accepts under this section, a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(June 10, 1920, ch. 285, pt. I, § 33, as added Pub. L. 109–58, title II, § 241(c), Aug. 8, 2005, 119 Stat. 675.)

## SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

### § 824. Declaration of policy; application of subchapter

**(a) Federal regulation of transmission and sale of electric energy**

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

**(b) Use or sale of electric energy in interstate commerce**

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with re-

spect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

**(c) Electric energy in interstate commerce**

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

**(d) "Sale of electric energy at wholesale" defined**

The term ''sale of electric energy at wholesale'' when used in this subchapter, means a sale of electric energy to any person for resale.

**(e) "Public utility" defined**

The term ''public utility'' when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),[1] 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

**(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt**

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

**(g) Books and records**

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms ''affiliate'', ''associate company'', ''electric utility company'', ''holding company'', ''subsidiary company'', and ''exempt wholesale generator'' shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

(June 10, 1920, ch. 285, pt. II, § 201, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 847; amended Pub. L. 95–617, title II, § 204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102–486, title VII, § 714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109–58, title XII, §§ 1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985.)

REFERENCES IN TEXT

The Rural Electrification Act of 1936, referred to in subsec. (f), is act May 20, 1936, ch. 432, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (§ 901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Public Utility Holding Company Act of 2005, referred to in subsec. (g)(5), is subtitle F of title XII of Pub. L. 109–58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (§ 16451 et seq.) of subchapter XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

AMENDMENTS

2005—Subsec. (b)(2). Pub. L. 109–58, § 1295(a)(1), substituted ''Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title'' for ''The provisions of sections 824i, 824j, and 824k of this title'' and ''Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''Compliance with any order of the Commis-sion under the provisions of section 824i or 824j of this title''.

Subsec. (e). Pub. L. 109–58, § 1295(a)(2), substituted ''section 824e(e), 824e(f), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''sec-tion 824i, 824j, or 824k of this title''.

Subsec. (f). Pub. L. 109–58, § 1291(c), which directed amendment of subsec. (f) by substituting ''political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year,'' for ''political subdivision of a state,'', was executed by making the substitution for ''political subdivision of a State,'' to reflect the probable intent of Congress.

[1] So in original. Section 824e of this title does not contain a subsec. (f).

such person before acquiring a property interest to be transferred to such person under this section.

(2) If no payment is made by a permit holder under paragraph (1), within a reasonable time, the Secretary shall offer such rights-of-way to the original owner for reacquisition at the original price paid by the Secretary. If such original owner refuses to reacquire such property after a reasonable period, the Secretary shall dispose of such property in accordance with applicable provisions of law governing disposal of property of the United States.

### (e) Federal law governing Federal lands

This section shall not affect any Federal law governing Federal lands.

(Pub. L. 95–617, title VI, § 602, Nov. 9, 1978, 92 Stat. 3164.)

CODIFICATION

Subsection (f), which required the Secretary to report annually to Congress on actions taken pursuant to this section, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, page 90 of House Document No. 103–7.

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

DEFINITIONS

For definitions of terms used in this section, see section 2602 of this title.

## § 824b. Disposition of property; consolidations; purchase of securities

### (a) Authorization

(1) No public utility shall, without first having secured an order of the Commission authorizing it to do so—

(A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10,000,000;

(B) merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;

(C) purchase, acquire, or take any security with a value in excess of $10,000,000 of any other public utility; or

(D) purchase, lease, or otherwise acquire an existing generation facility—

(i) that has a value in excess of $10,000,000; and

(ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes.

(2) No holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of $10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of $10,000,000 without first having secured an order of the Commission authorizing it to do so.

(3) Upon receipt of an application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable.

(4) After notice and opportunity for hearing, the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

(5) The Commission shall, by rule, adopt procedures for the expeditious consideration of applications for the approval of dispositions, consolidations, or acquisitions, under this section. Such rules shall identify classes of transactions, or specify criteria for transactions, that normally meet the standards established in paragraph (4). The Commission shall provide expedited review for such transactions. The Commission shall grant or deny any other application for approval of a transaction not later than 180 days after the application is filed. If the Commission does not act within 180 days, such application shall be deemed granted unless the Commission finds, based on good cause, that further consideration is required to determine whether the proposed transaction meets the standards of paragraph (4) and issues an order tolling the time for acting on the application for not more than 180 days, at the end of which additional period the Commission shall grant or deny the application.

(6) For purposes of this subsection, the terms ‘‘associate company’’, ‘‘holding company’’, and ‘‘holding company system’’ have the meaning given those terms in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

### (b) Orders of Commission

The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

(June 10, 1920, ch. 285, pt. II, § 203, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 849; amended Pub. L. 109–58, title XII, § 1289(a), Aug. 8, 2005, 119 Stat. 982.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 2005, referred to in subsec. (a)(6), is subtitle F of title XII of Pub. L. 109–58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (§ 16451 et seq.) of subchapter

XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: ''No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.''

EFFECTIVE DATE OF 2005 AMENDMENT

Pub. L. 109–58, title XII, §1289(b), (c), Aug. 8, 2005, 119 Stat. 983, provided that:

''(b) EFFECTIVE DATE.—The amendments made by this section [amending this section] shall take effect 6 months after the date of enactment of this Act [Aug. 8, 2005].

''(c) TRANSITION PROVISION.—The amendments made by subsection (a) [amending this section] shall not apply to any application under section 203 of the Federal Power Act (16 U.S.C. 824b) that was filed on or before the date of enactment of this Act [Aug. 8, 2005].''

## § 824c. Issuance of securities; assumption of liabilities

### (a) Authorization by Commission

No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after August 26, 1935.

### (b) Application approval or modification; supplemental orders

The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

### (c) Compliance with order of Commission

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

### (d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

### (e) Notes or drafts maturing less than one year after issuance

Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

### (f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

### (g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

### (h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78*l*, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, §204, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 850.)

for such purpose in such order, or otherwise in contravention of such order.

**(d) Authorization of capitalization not to exceed amount paid**

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

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(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

## § 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

**(a) Just and reasonable rates**

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

**(b) Preference or advantage unlawful**

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

**(c) Schedules**

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

**(d) Notice required for rate changes**

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

**(e) Suspension of new rates; hearings; five-month period**

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

**(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined**

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

1978—Subsec. (d). Pub. L. 95–617, § 207(a), substituted "sixty" for "thirty" in two places.

Subsec. (f). Pub. L. 95–617, § 208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95–617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

**§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission**

**(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues**

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

### § 825*l*. Review of orders

#### (a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

#### (b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

#### (c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

### § 825m. Enforcement provisions

#### (a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this proposed transaction after the date of filing with the Commission, and before the date of final Commission action, the applicant must supplement its Commission application promptly with a copy of these orders.

(j) An explanation, with appropriate evidentiary support for such explanation (to be identified as Exhibit M to this application):

(1) Of how applicants are providing assurance, *based on facts and circumstances known to them or that are reasonably foreseeable*, that the proposed transaction will not result in, *at the time of the transaction or in the future*, cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, including:

(i) Disclosure of existing pledges and/or encumbrances of utility assets; and

(ii) A detailed showing that the transaction will not result in:

(A) Any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company;

(B) Any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company;

(C) Any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or

(D) Any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the Federal Power Act; or

(2) If no such assurance can be provided, an explanation of how such cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

[Order 642, 65 FR 71014, Nov. 28, 2000, as amended by Order 669–A, 71 FR 28446, May 16, 2006; Order 669–B, 71 FR 42586, July 27, 2006; Order 659–B, 71 FR 45736, Aug. 10, 2006]

### §33.3 Additional information requirements for applications involving horizontal competitive impacts.

(a)(1) The applicant must file the horizontal Competitive Analysis Screen described in paragraphs (b) through (f) of this section if, as a result of the proposed transaction, a single corporate entity obtains ownership or control over the generating facilities of previously unaffiliated merging entities (for purposes of this section, merging entities means any party to the proposed transaction or its parent companies, energy subsidiaries or energy affiliates).

(2) A horizontal Competitive Analysis Screen need not be filed if the applicant:

(i) Affirmatively demonstrates that the merging entities do not currently conduct business in the same geographic markets or that the extent of the business transactions in the same geographic markets is *de minimis;* and

(ii) No intervenor has alleged that one of the merging entities is a perceived potential competitor in the same geographic market as the other.

(b) All data, assumptions, techniques and conclusions in the horizontal Competitive Analysis Screen must be accompanied by appropriate documentation and support.

(1) If the applicant is unable to provide any specific data required in this section, it must identify and explain how the data requirement was satisfied and the suitability of the substitute data.

(2) The applicant may provide other analyses for defining relevant markets (*e.g.* the Hypothetical Monopolist Test with or without the assumption of price discrimination) in addition to the delivered price test under the horizontal Competitive Analysis Screen.

(3) The applicant may use a computer model to complete one or more steps in the horizontal Competitive Analysis Screen. The applicant must fully explain, justify and document any model

used and provide descriptions of model formulation, mathematical specifications, solution algorithms, as well as the annotated model code in executable form, and specify the software needed to execute the model. The applicant must explain and document how inputs were developed, the assumptions underlying such inputs and any adjustments made to published data that are used as inputs. The applicant must also explain how it tested the predictive value of the model, for example, using historical data.

(c) The horizontal Competitive Analysis Screen must be completed using the following steps:

(1) *Define relevant products.* Identify and define all wholesale electricity products sold by the merging entities during the two years prior to the date of the application, including, but not limited to, non-firm energy, short-term capacity (or firm energy), long-term capacity (a contractual commitment of more than one year), and ancillary services (specifically spinning reserves, non-spinning reserves, and imbalance energy, identified and defined separately). Because demand and supply conditions for a product can vary substantially over the year, periods corresponding to those distinct conditions must be identified by load level, and analyzed as separate products.

(2) *Identify destination markets.* Identify each wholesale power sales customer or set of customers (destination market) affected by the proposed transaction. Affected customers are, at a minimum, those entities directly interconnected to any of the merging entities and entities that have purchased electricity at wholesale from any of the merging entities during the two years prior to the date of the application. If the applicant does not identify an entity to whom the merging entities have sold electricity during the last two years as an affected customer, the applicant must provide a full explanation for each exclusion.

(3) *Identify potential suppliers.* The applicant must identify potential suppliers to each destination market using the delivered price test described in paragraph (c)(4) of this section. A seller may be included in a geographic market to the extent that it can economically and physically deliver generation services to the destination market.

(4) *Perform delivered price test.* For each destination market, the applicant must calculate the amount of relevant product a potential supplier could deliver to the destination market from owned or controlled capacity at a price, including applicable transmission prices, loss factors and ancillary services costs, that is no more than five (5) percent above the pre-transaction market clearing price in the destination market.

(i) *Supplier's presence.* The applicant must measure each potential supplier's presence in the destination market in terms of generating capacity, using economic capacity and available economic capacity measures. Additional adjustments to supplier presence may be presented; applicants must support any such adjustment.

(A) *Economic capacity* means the amount of generating capacity owned or controlled by a potential supplier with variable costs low enough that energy from such capacity could be economically delivered to the destination market. Prior to applying the delivered price test, the generating capacity meeting this definition must be adjusted by subtracting capacity committed under long-term firm sales contracts and adding capacity acquired under long-term firm purchase contracts (*i.e.*, contracts with a remaining commitment of more than one year). The capacity associated with any such adjustments must be attributed to the party that has authority to decide when generating resources are available for operation. Other generating capacity may also be attributed to another supplier based on operational control criteria as deemed necessary, but the applicant must explain the reasons for doing so.

(B) *Available economic capacity* means the amount of generating capacity meeting the definition of economic capacity less the amount of generating capacity needed to serve the potential supplier's native load commitments, as described in paragraph (d)(4)(i) of this section.

(C) *Available transmission capacity.* Each potential supplier's economic capacity and available economic capacity (and any other measure used to determine the amount of relevant product that could be delivered to a destination market) must be adjusted to reflect available transmission capability to deliver each relevant product. The allocation to a potential supplier of limited capability of constrained transmission paths internal to the merging entities' systems or interconnecting the systems with other control areas must recognize both the transmission capability not subject to firm reservations by others and any firm transmission rights held by the potential supplier that are not committed to long-term transactions. For each such instance where limited transmission capability must be allocated among potential suppliers, the applicant must explain the method used and show the results of such allocation.

(D) *Internal interface*. If the proposed transaction would cause an interface that interconnects the transmission systems of the merging entities to become transmission facilities for which the merging entities would have a ''native load'' priority under their open access transmission tariff (*i.e.*, where the merging entities may reserve existing transmission capacity needed for native load growth and network transmission customer load growth reasonable forecasted within the utility's current planning horizon), all of the unreserved capability of the interface must be allocated to the merging entities for purposes of the horizontal Competitive Analysis Screen, unless the applicant demonstrates one of the following:

(*1*) The merging entities would not have adequate economic capacity to fully use such unreserved transmission capability;

(*2*) The merging entities have committed a portion of the interface capability to third parties; or

(*3*) Suppliers other than the merging entities have purchased a portion of the interface capability.

(ii) [Reserved]

(5) *Calculate market concentration*. The applicant must calculate the market share, both pre- and post-merger, for each potential supplier, the Herfindahl-Hirschman Index (HHI) statistic for the market, and the change in the HHI statistic. (The HHI statistic is a measure of market concentration and is a function of the number of firms in a market and their respective market shares. The HHI statistic is calculated by summing the squares of the individual market shares, expressed as percentages, of all potential suppliers to the destination market.) To make these calculations, the applicant must use the amounts of generating capacity (*i.e.*, economic capacity and available economic capacity, and any other relevant measure) determined in paragraph (c)(4)(i) of this section, for each product in each destination market.

(6) *Provide historical transaction data*. The applicant must provide historical trade data and historical transmission data to corroborate the results of the horizontal Competitive Analysis Screen. The data must cover the two-year period preceding the filing of the application. The applicant may adjust the results of the horizontal Competitive Analysis Screen, if supported by historical trade data or historical transmission service data. Any adjusted results must be shown separately, along with an explanation of all adjustments to the results of the horizontal Competitive Analysis Screen. The applicant must also provide an explanation of any significant differences between results obtained by the horizontal Competitive Analysis Screen and trade patterns in the last two years.

(d) In support of the delivered price test required by paragraph (c)(4) of this section, the applicant must provide the following data and information used in calculating the economic capacity and available economic capacity that a potential supplier could deliver to a destination market. The transmission data required by paragraphs (d)(7) through (d)(9) of this section must be supplied for the merging entities' systems. The transmission data must also be supplied for other relevant systems, to the extent data are publicly available.

(1) *Generation capacity*. For each generating plant or unit owned or controlled by each potential supplier, the applicant must provide:

(i) Supplier name;

(ii) Name of the plant or unit;

(iii) Primary and secondary fuel-types;

(iv) Nameplate capacity;

(v) Summer and winter total capacity; and

(vi) Summer and winter capacity adjusted to reflect planned and forced outages and other factors, such as fuel supply and environmental restrictions.

(2) *Variable cost.* For each generating plant or unit owned or controlled by each potential supplier, the applicant must also provide variable cost components.

(i) These cost components must include at a minimum:

(A) Variable operation and maintenance, including both fuel and non-fuel operation and maintenance; and

(B) Environmental compliance.

(ii) To the extent costs described in paragraph (d)(2)(i) of this section are allocated among units at the same plant, allocation methods must be fully described.

(3) *Long-term purchase and sales data.* For each sale and purchase of capacity, the applicant must provide the following information:

(i) Purchasing entity name;

(ii) Selling entity name;

(iii) Duration of the contract;

(iv) Remaining contract term and any evergreen provisions;

(v) Provisions regarding renewal of the contract;

(vi) Priority or degree of interruptibility;

(vii) FERC rate schedule number, if applicable;

(viii) Quantity and price of capacity and/or energy purchased or sold under the contract; and

(ix) Information on provisions of contracts which confer operational control over generation resources to the purchaser.

(4) *Native load commitments.* (i) Native load commitments are commitments to serve wholesale and retail power customers on whose behalf the potential supplier, by statute, franchise, regulatory requirement, or contract, has undertaken an obligation to construct and operate its system to meet their reliable electricity needs.

(ii) The applicant must provide supplier name and hourly native load commitments for the most recent two years. In addition, the applicant must provide this information for each load level, if load-differentiated relevant products are analyzed.

(iii) If data on native load commitments are not available, the applicant must fully explain and justify any estimates of these commitments.

(5) *Transmission and ancillary service prices, and loss factors.* (i) The applicant must use in the horizontal Competitive Analysis Screen the maximum rates stated in the transmission providers' tariffs. If necessary, those rates should be converted to a dollars-per-megawatt hour basis and the conversion method explained.

(ii) If a regional transmission pricing regime is in effect that departs from system-specific transmission rates, the horizontal Competitive Analysis Screen must reflect the regional pricing regime.

(iii) The following data must be provided for each transmission system that would be used to deliver energy from each potential supplier to a destination market:

(A) Supplier name;

(B) Name of transmission system;

(C) Firm point-to-point rate;

(D) Non-firm point-to-point rate;

(E) Scheduling, system control and dispatch rate;

(F) Reactive power/voltage control rate;

(G) Transmission loss factor; and

(H) Estimated cost of supplying energy losses.

(iv) The applicant may present additional alternative analysis using discount prices if the applicant can support it with evidence that discounting is and will be available.

(6) *Destination market price.* The applicant must provide, for each relevant product and destination market, market prices for the most recent two years. The applicant may provide suitable proxies for market prices if actual market prices are unavailable. Estimated prices or price ranges must be supported and the data and approach used to estimate the prices must be included with the application. If the applicant relies on price ranges in the analysis, such ranges must be reconciled with any actual market prices that are supplied in the application.

Applicants must demonstrate that the results of the analysis do not vary significantly in response to small variations in actual and/or estimated prices.

(7) *Transmission capability*. (i) The applicant must provide simultaneous transfer capability data, if available, for each of the transmission paths, interfaces, or other facilities used by suppliers to deliver to the destination markets on an hourly basis for the most recent two years.

(ii) Transmission capability data must include the following information:

(A) Transmission path, interface, or facility name;

(B) Total transfer capability (TTC); and

(C) Firm available transmission capability (ATC).

(iii) Any estimated transmission capability must be supported and the data and approach used to make the estimates must be included with the application.

(8) *Transmission constraints*. (i) For each existing transmission facility that affects supplies to the destination markets and that has been constrained during the most recent two years or is expected to be constrained within the planning horizon, the applicant must provide the following information:

(A) Name of all paths, interfaces, or facilities affected by the constraint;

(B) Locations of the constraint and all paths, interfaces, or facilities affected by the constraint;

(C) Hours of the year when the transmission constraint is binding; and

(D) The system conditions under which the constraint is binding.

(ii) The applicant must include information regarding expected changes in loadings on transmission facilities due to the proposed transaction and the consequent effect on transfer capability.

(iii) To the extent possible, the applicant must provide system maps showing the location of transmission facilities where binding constraints have been known or are expected to occur.

(9) *Firm transmission rights (Physical and Financial)*. For each potential supplier to a destination market that holds firm transmission rights necessary to directly or indirectly deliver energy to that market, or that holds transmission congestion contracts, the applicant must provide the following information:

(i) Supplier name;

(ii) Name of transmission path interface, or facility;

(iii) The FERC rate schedule number, if applicable, under which transmission service is provided; and

(iv) A description of the firm transmission rights held (including, at a minimum, quantity and remaining time the rights will be held, and any relevant time restrictions on transmission use, such as peak or off-peak rights).

(10) *Summary table of potential suppliers' presence*. (i) The applicant must provide a summary table with the following information for each potential supplier for each destination market:

(A) Potential supplier name;

(B) The potential supplier's total amount of economic capacity (not subject to transmission constraints); and

(C) The potential supplier's amount of economic capacity from which energy can be delivered to the destination market (after adjusting for transmission availability).

(ii) A similar table must be provided for available economic capacity, and for any other generating capacity measure used by the applicant.

(11) *Historical trade data*. (i) The applicant must provide data identifying all of the merging entities' wholesale sales and purchases of electric energy for the most recent two years.

(ii) The applicant must include the following information for each transition:

(A) Type of transaction (such as non-firm, short-term firm, long-term firm, peak, off-peak, etc.);

(B) Name of purchaser;

(C) Name of seller;

(D) Date, duration and time period of the transaction;

(E) Quantity of energy purchased or sold;

(F) Energy charge per unit;

(G) Megawatt hours purchased or sold;

(H) Price; and

(I) The delivery points used to effect the sale or purchase.

(12) *Historical transmission data.* The applicant must provide information concerning any transmission service denials, interruptions and curtailments on the merging entities' systems, for the most recent two years, to the extent the information is available from OASIS data, including the following information:

(i) Name of the customer denied, interrupted or curtailed;

(ii) Type, quantity and duration of service at issue;

(iii) The date and period of time involved;

(iv) Reason given for the denial, interruption or curtailment;

(v) The transmission path; and

(vi) The reservations or other use anticipated on the affected transmission path at the time of the service denial, curtailment or interruption.

(e) *Mitigation.* Any mitigation measures proposed by the applicant (including, for example, divestiture or participation in a regional transmission organization) which are intended to mitigate the adverse effect of the proposed transaction must, to the extent possible, be factored into the horizontal Competitive Analysis Screen as an additional post-transaction analysis. Any mitigation commitments that involve facilities (*e.g.*, in connection with divestiture of generation) must identify the facilities affected by the commitment, along with a timetable for implementing the commitments.

(f) *Additional factors.* If the applicant does not propose mitigation, the applicant must address:

(1) The potential adverse competitive effects of the transaction.

(2) The potential for entry in the market and the role that entry could play in mitigating adverse competitive effects of the transaction;

(3) The efficiency gains that reasonably could not be achieved by other means; and

(4) Whether, but for the transaction, one or more of the merging entities would be likely to fail, causing its assets to exit the market.

[65 FR 71014, Nov. 28, 2000; 65 FR 76005, Dec. 5, 2000]

### § 33.4 Additional information requirements for applications involving vertical competitive impacts.

(a)(1) The applicant must file the vertical Competitive Analysis described in paragraphs (b) through (e) of this section if, as a result of the proposed transaction, a single corporate entity has ownership or control over one or more merging entities that provides inputs to electricity products and one or more merging entities that provides electric generation products (for purposes of this section, merging entities means any party to the proposed transaction or its parent companies, energy subsidiaries or energy affiliates).

(2) A vertical Competitive Analysis need not be filed if the applicant can affirmatively demonstrate that:

(i) The merging entities currently do not provide inputs to electricity products (*i.e.*, upstream relevant products) and electricity products (*i.e.*, downstream relevant products) in the same geographic markets or that the extent of the business transactions in the same geographic market is *de minimis*; and no intervenor has alleged that one of the merging entities is a perceived potential competitor in the same geo-graphic market as the other.

(ii) The extent of the upstream relevant products currently provided by the merging entities is used to produce a *de minimis* amount of the relevant downstream products in the relevant destination markets, as defined in paragraph (c)(2) of § 33.3.

(b) All data, assumptions, techniques and conclusions in the vertical Competitive Analysis must be accompanied by appropriate documentation and support.

(c) The vertical Competitive Analysis must be completed using the following steps:

(1) *Define relevant products*—(i) *Downstream relevant products.* The applicant must identify and define as downstream relevant products all products sold by merging entities in relevant downstream geographic markets, as outlined in paragraph (c)(1) of § 33.3.

(ii) *Upstream relevant products.* The applicant must identify and define as upstream relevant products all inputs

208 N.C.App. 278
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of North Carolina.

In the Matter of DUKE ENERGY CAROLINAS, LLC's Advance Notice of Purchase Power Agreement with the City of Orangeburg, South Carolina and Joint Petition for Declaratory Ruling.

No. COA09-1273.
|
Nov. 16, 2010.

West KeySummary

1 **Electricity**
Contract Rates

Appeal of an order of the North Carolina Utilities Commission regarding a ratemaking agreement between an electrical power supplier and recipient was moot. The recipient argued that its appeal was not moot because it concerned the order's wide-reaching, ongoing, and unconstitutional impacts on interstate commerce and the supplier's right to make wholesale power sales, rather than the parties' rights under the agreement. However, the order expressly limited its effect to the parties and facts of the case, and was not binding on future ratemaking decisions of the Commission. As a result, when recipient terminated the agreement, the basis for its appeal dissolved.

Cases that cite this headnote

**Opinion**

***1** Appeal by Duke Energy Carolinas, LLC and City of Orangeburg, South Carolina from order on advance notice and joint petition for declaratory ruling dated 30 March 2009 by the North Carolina Utilities Commission. Heard in the Court of Appeals 12 May 2010.

**Attorneys and Law Firms**

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West Law Offices, P.C., by James P. West, for Intervenor-Appellee Public Works Commission of the City of Fayetteville, North Carolina.

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McGEE, Judge.

This action was initiated when Duke Energy Carolinas, LLC (Duke) and the City of Orangeburg, South Carolina (Orangeburg) filed a joint petition for a declaratory ruling and an advance notice with the North Carolina Utilities Commission (Commission), on 20 June 2008. Duke and Orangeburg had negotiated a wholesale energy contract (the agreement) dated 23 May 2008 in which Duke agreed to supply Orangeburg with electrical power at native load priority. This meant that Duke agreed to charge Orangeburg, a municipality for which it had never supplied power, the same rates, and provide Orangeburg the same level and guarantee of service, as Duke charged and provided to its current retail native load customers. As defined by the Commission in Docket No. E-7, Sub 858, Order on Advance Notice and Joint Petition for Declaratory Ruling, 30 March 2009 (the order), retail native load customers are "the captive retail customers that Duke is obligated to serve under North Carolina Law." Retail native load customers-and some specific wholesale customers-are afforded certain protections and benefits by the Commission because they "have been on-system for years and have contributed to paying for [Duke's] present system facilities." Prior to entering into the agreement and initiating this action, Duke had sought authorization from the Commission for a merger with another power company, Cinergy Corp. The Commission approved the merger, but made its approval contingent on Duke's acceptance of certain regulatory conditions. Pursuant to Docket No. E-7, Sub 795, Relevant Definition and Regulatory Conditions (Regulatory Conditions), Duke agreed that it would "continue to serve its Retail Native Load Customers in North Carolina with the lowest-cost power it can reasonably generate or purchase from other sources before making power available for sales to customers that are not Retail Native Load Customers." The regulatory conditions further mandated that "[b]efore granting native load priority to a wholesale customer ... [Duke] must provide 30 days' advance notice of its intent to grant native load priority and to treat the retail native load of a proposed wholesale customer as if it were [Duke's] retail native load pursuant to [other regulatory conditions]."

***2** Because the agreement contemplated that Duke would provide Orangeburg native load priority rates, Duke was required to provide the Commission with thirty days' notice in order to allow the Commission an opportunity to review the agreement and determine if it was in compliance with North Carolina law and the rules and regulations of the Commission. Duke filed the advance notice required on 20 June 2008, and Duke and Orangeburg simultaneously filed their joint petition for declaratory ruling (the petition) with the Commission. In the petition, Duke and Orangeburg asked the Commission to approve Duke's agreement to provide Orangeburg with native load priority. Duke and Orangeburg expanded the scope of their petition in their joint proposed order and in their oral arguments, and requested the Commission to also issue a declaratory ruling allowing all "native load priority wholesale contracts [for terms of five years or more] entered into subsequent to March 24, 2006," whether or not they involved Duke or Orangeburg, to apply system average costs regardless of whether or not the purchaser had been a native load priority customer in the past. Duke and Orangeburg also argued that the Commission did not have authority to alter the rates Duke and Orangeburg had agreed upon in the agreement. Duke and Orangeburg contended that these rates were under the exclusive jurisdiction of the Federal Regulatory Energy Commission (FERC).

In the order, the Commission first stated that it would "not issue any declaratory ruling that purports to revise Duke's regulatory conditions or to apply to contracts beyond this docket[.]" In rejecting the request of Duke and Orangeburg for a sweeping declaratory ruling concerning future wholesale contracts, the Commission stated: "As the Commission has ruled before, a declaratory ruling should not be used as a substitute for another proceeding that must be filed in the future."

Concerning the agreement between Duke and Orangeburg, the Commission ruled that the Commission was not pre-empted by federal law from making its ruling. The Commission then ruled:

> Given the evidence ..., allocating the costs of the [agreement] on a system average basis would be contrary to the lowest-cost power requirement of [certain regulatory conditions applicable to Duke] and to the least-cost and just-and-reasonable-rate responsibilities of this Commission. The Commission must act on the basis of the present evidentiary record in making this ruling. Any future ratemaking decision will of course be based upon the evidence presented in that future proceeding and upon what produces the lowest cost power and just and reasonable rates for retail native load customers.

The Commission ultimately ordered that: "Duke may proceed with the [agreement] at its own risk subject to the retail ratemaking ruling given in this [o]rder, but Duke may not treat the retail native load of Orangeburg as [Duke's] native load for purposes of Duke's" regulatory conditions. Duke and Orangeburg appealed by notice filed 29 April 2009. However, subsequent to the filing of the order, and prior to the filing of the notice of appeal in this matter, Orangeburg voluntarily withdrew from the agreement. Orangeburg entered into an agreement with its then current power supplier, South Carolina Electric & Gas Company (SCE & G), to obtain power from SCE & G through 31 December 2010. By an Orangeburg City Council resolution adopted 18 August 2009, Orangeburg was granted authority to further extend the SCE & G agreement through 31 December 2012.

I.

***3** We must first determine whether this appeal is properly before us. Because we find that the issues argued on appeal are moot, we dismiss the appeal.

" '[T]he inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations.' " *Angell v. Raleigh,* 267 N.C. 387, 389-90, 148 S.E.2d 233, 235 (1966) (citation omitted).

> "[W]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law."

*J.S.W. v. Lee Cty. Bd. of Educ.,* 167 N.C.App. 101, 104, 604 S.E.2d 336, 337-38 (2004) (citation omitted); *see also Pearson v. Martin,* 319 N.C. 449, 451-52, 355 S.E.2d 496, 497-98 (1987).

> "When no genuine controversy presently exists between the parties," the courts cannot and should not intervene. *Angell v. City of Raleigh,* 267 N.C. 387, 391, 148 S.E.2d 233, 236 (1966); *see also Gaston Board of Realtors v. Harrison,* 311 N.C. 230, 234-35, 316 S.E.2d 59, 62 (1984). The rule applies with special force to prevent the premature litigation of constitutional issues. *City of Greensboro v. Wall,* 247 N.C. 516, 520, 101 S.E.2d 413, 416-17 (1958).

*Granville Co. Bd. of Comrs. v. N.C. Haz. Waste Mgmt. Comm.,* 329 N.C. 615, 625, 407 S.E.2d 785, 791 (1991). "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Assn.,* 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citing Black's Law Dictionary 1008 (6th ed.1990)).

> Although it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable. Mere apprehension or the mere threat of an action or a suit is not enough. Thus the Declaratory Judgment Act does not "require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise."

*Gaston Bd. of Realtors v. Harrison,* 311 N.C. 230, 234, 316 S.E.2d 59, 61-62 (1984) (internal citations omitted); *see also Calabria v. N.C. State Bd. of Elections,* --- N.C.App. ----, ----, 680 S.E.2d 738, 743 (2009).

II.

Appellants first argue this case is not moot. Orangeburg states in its reply brief that it "clearly and repeatedly establishes that [the present] proceeding is not about the parties' rights under the [agreement], but about the [o]rder's wide-reaching, ongoing, and unconstitutional impacts on interstate commerce and Duke's right to make wholesale power sales" pursuant to its rights granted by FERC. Orangeburg further states in its reply brief that this "unconstitutional policy established in the [o] rder ... presents an ongoing harm to the wholesale power sales market in the Carolinas and participants in that market, such as Orangeburg." The order, however, specifically limits its effect to the parties and facts in the present case. The Commission stated: "Although Duke and Orangeburg request a ruling applicable to all utilities under the Commission's jurisdiction, Progress [Energy] opposes the request." The Commission then stated that it was refusing to make any broad statement of policy, and that it had

> ***4** concluded that, although it will not issue any declaratory ruling that purports to revise Duke's regulatory conditions or to apply to contracts beyond this docket, the Commission will give Duke and Orangeburg a declaratory ruling or policy statement regarding retail ratemaking applicable to this docket and to this Agreement, and based upon the present evidentiary record.
>
> The Commission emphasizes ... important qualifications. [T]he present Commission cannot bind future Commissioners making ratemaking decisions in particular cases. Both Duke and Orangeburg have conceded as much. To the extent Duke seeks to alleviate uncertainty, the present order gives as much certainty as the Commission can provide in the present circumstances.

The order, by its clear terms, establishes no broad policy directly affecting the rights of any entities other than Duke and Orangeburg. Even with respect to Duke and Orangeburg, the order by its terms is limited to the facts before the Commission at the time the Commission made its decision. The Commission stated that any future orders of the Commission concerning the agreement or the order, involving Duke and Orangeburg, must be considered based upon the facts before the Commission at that time. By its express terms the order was never binding on any future ratemaking decisions of the Commission. Therefore, once the agreement was terminated by Orangeburg, the basis for this appeal dissolved. Contrary to Appellants' arguments, this case is now moot.

III.

Our determination that the issues brought forth in this appeal are moot does not end our inquiry. "Even if moot ... this Court may, if it chooses, consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph,* 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (citations omitted); *see also* *Granville Co.,* 329 N.C. at 623, 407 S.E.2d at 789-90.

We may also consider a moot issue on appeal pursuant to other established exceptions to the mootness doctrine. Relevant to the present appeal, cases which are " ' "capable of repetition, yet evading review" may present an exception to the mootness doctrine.' " *Boney Publishers, Inc. v. Burlington City Council,* 151 N.C.App. 651, 654, 566 S.E.2d 701, 703 (2002) (citations omitted). " 'There are two elements required for the exception to apply: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.' " *Id.* at 654, 566 S.E.2d at 703-04 (citation omitted).

IV.

Duke Energy, quoting *In re Investigation into Injury of Brooks,* 143 N.C.App. 601, 605, 548 S.E.2d 748, 751 (2001) (citations omitted), argues that our Court has a " 'duty to "consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution." ' " *Brooks* in turn cites *Randolph,* 325 N.C. at 701, 386 S.E.2d at 186. Our Supreme Court clearly stated in *Randolph* that North Carolina appellate courts *may* consider moot issues that involve matters of public interest in certain circumstances *if they so choose. Id.; see also* *Calabria,* ---N.C.App. at ----, 680 S.E.2d at 746 (citation omitted). In the present case, we do not believe the moot issues are appropriate for consideration pursuant to the public interest exception, especially in light of the fact that deciding the issues in this case would involve "the premature litigation of constitutional issues." *Granville Co.,* 329 N.C. at 625, 407 S.E.2d at 791 (citation omitted). We do not believe the order in this case, which the Commission expressly limited to the parties and the facts before it, and which is not binding on future ratemaking decisions by the Commission[1], implicates the public interest to such a degree that we should invoke this exception to the mootness doctrine. We also note that this matter became moot because Orangeburg decided to withdraw from the agreement-pursuant to terms of the agreement which permitted it to do so. The agreement included provisions protecting both Duke and Orangeburg should certain eventualities occur, and Orangeburg decided to exercise its right to withdraw from the agreement pursuant to the terms of the agreement. Finally, as discussed in detail below, Duke and Orangeburg have failed to demonstrate that they have no alternative forum available within which to litigate these issues. We do not believe public policy favors that we decide issues in a moot case if the issues may be properly decided while ripe in an alternative forum.

V.

***5** Both Duke and Orangeburg contend that the "capable of repetition, yet evading review" exception should apply in this case, however, we are unconvinced. First, as with the public interest exception to the mootness doctrine, our decision to consider or not consider any issue pursuant to the "capable of repetition, yet evading review" exception to the mootness doctrine is discretionary. *Crumpler v. Thornburg,* 92 N.C.App. 719, 724, 375 S.E.2d 708, 711 (1989), citing *In re Jackson,* 84 N.C.App. 167, 171, 352 S.E.2d 449, 452 (1987).

Second, as stated above, this case would not be moot had Orangeburg not withdrawn from the agreement. This is unlike the election cases cited by Duke where the endpoint of a controversy, the election itself, is firmly set and beyond the control of litigants. *See* e.g. *Merle v. United States,* 351 F.3d 92, 95 (3d Cir.N.J.2003). Further, Orangeburg acknowledges that if it were to negotiate a new agreement with Duke that provided Orangeburg with the more favorable system average cost rates, and submited the new agreement to the Commission for approval, the Commission would not necessarily reach the same result. Both Duke and Orangeburg conceded before the Commission that the order would not be binding on future Commissions. *See also* N.C.G.S. § 62-80; *State ex rel. Utilities Comm'n v. MCI,* 132 N.C.App. 625, 630, 514 S.E.2d 276, 280 (1999). Had Orangeburg not withdrawn from the agreement, the terms of the agreement would have remained in effect until at least 31 December 2018-absent early termination by either Duke or Orangeburg-and this matter would still be ripe for appellate review.

Third, neither Duke nor Orangeburg argue that there is no other forum within which they could resolve the disputed issues while they are ripe for review. As Duke and Orangeburg conceded in the petition: "Orangeburg is under no constraints as to the arguments it may advance in any forum." Orangeburg makes no argument that any condition prevented it from seeking a declaratory order or judgment in any other forum concerning the authority of the Commission to interfere with the rates it and Duke had agreed upon. Orangeburg has apparently not attempted to obtain any ruling-other than the one it appeals in this case-concerning the relative authorities of the Commission and FERC in deciding ratemaking issues such as those at issue in the agreement. *See Utah v. Federal Energy Regulatory Com. .,* 691 F.2d 444, 446 (10th Cir.1982). There is no evidence that Orangeburg unsuccessfully attempted to bring an action to settle these issues in any other forum.

Duke, pursuant to an earlier agreement with the Commission purported to contract away certain of its legal rights. Specifically, Duke agreed to the following restrictions, contained in Docket No. E-7, Sub. 795(7)(d), on its rights to challenge the ratemaking authority of the Commission:

> (iii) Duke Power shall not assert before the FERC or any federal or state court that (1) transactions entered into pursuant to Duke Power's cost- or market-based rate authority or (2) the filing with, or acceptance for filing by, the FERC of any wholesale power contract imply a cost allocation methodology that is binding on the Commission, require the pass-through of any costs or revenues under the filed rate doctrine, or preempt the Commission's authority to assign, allocate, make pro-forma adjustments to, or disallow the revenues and costs associated with, Duke Power's wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes.
>
> ***6** (iv) Duke Power shall not assert before any federal or state court that the exercise of authority by the Commission to assign, allocate, make pro [-]forma adjustments to, or disallow the costs and revenues associated with Duke Power's wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes in itself constitutes an undue burden on interstate commerce or otherwise violates the Commerce Clause of the United States Constitution. However, Duke Power retains the right to argue that a specific exercise of authority by the Commission violates the Commerce Clause based upon specific evidence of undue interference with interstate commerce.
>
> (v) Except as provided in the foregoing conditions, Duke Power retains the right to challenge the lawfulness of any Commission order issued in connection with the assignment, allocation, pro-forma adjustments to, or disallowances of the revenues and costs associated with Duke Power's wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes on any other grounds, including but not limited to the right outlined in G.S. [§ ] 62-94(b).

However, Duke does not argue that no other forum was available to it to decide the issues in the appeal before us. By its terms[2], Regulatory Condition 7(d)(iii) precludes Duke from arguing before FERC, or any federal or state court, that any agreement it entered into pursuant to its "cost- or market-based rate authority" should constitute binding authority on the Commission, or "preempt" the Commission's "authority to assign, allocate, make pro-forma adjustments to, or disallow the revenues and costs associated with, Duke Power's wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes." Our reading of Regulatory Condition 7(d)(iii) suggests that it only applies to *transactions* and *contracts, entered into* by Duke. We find nothing in Regulatory Condition 7(d)(iii) that would preclude Duke from attempting to obtain a declaratory order from FERC, or a declaratory judgment from a federal or state court, concerning the relative authorities of FERC and the Commission with respect to the broader issues in this appeal, including the preemption doctrine.

Regulatory Condition 7(d)(iv), on the other hand, purports to prevent Duke from bringing any action asserting that the Commission's exercise of authority over wholesale interstate ratemaking, such as was involved in this case, violates the Commerce Clause of the United States Constitution. However, Regulatory Condition 7(d)(iv) is limited by its terms to *federal and state courts.* Nothing in Regulatory Condition 7(d)(iv) would prevent Duke from pursuing a declaratory order, or any other appropriate remedy, from FERC. Furthermore, Regulatory Condition 7(d)(iv) states: "Duke Power retains the right to argue that a *specific exercise* of authority by the Commission violates the Commerce Clause based upon specific evidence of undue interference with interstate commerce." (Emphasis added).

***7** Based upon the foregoing, we do not believe a showing has been made that "the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration[.]" *Boney,* 151 N.C.App. at 654, 566 S.E.2d at 703 (citation omitted). Because one of the prongs required to give us the discretion to apply the "capable of repetition, yet evading review" exception to the mootness doctrine has not been met, we hold that this is not an appropriate case in which to apply that exception. The case on appeal is moot, and we will not consider it. We therefore dismiss this action. *Roberts,* 344 N.C. at 398-99, 474 S.E.2d at 787.

Dismissed.

Judges STROUD and HUNTER, JR. concur.

Report per Rule 30(e).

**All Citations**

208 N.C.App. 278, 702 S.E.2d 240 (Table), 2010 WL 4609092

Footnotes

1 *See* N.C. Gen.Stat. § 62-80 (2009).

2 We note that Duke does not argue that it has challenged in any forum the provisions of Regulatory Conditions 7(d)(iii) and (iv) which, if effective, constitute a waiver of Duke's rights to bring certain actions in certain forums. *See Newton v. Rumery,* 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987); *United States v. Purdue Pharma L.P.,* 600 F.3d 319, 329-30 (4th Cir.Va.2010); *Davies v. Grossmont Union High School Dist.,* 930 F.2d 1390, 1397-1400 (9th Cir.Cal.1991).

**End of Document**

*Orangeburg, South Carolina v. FERC* **Docket Nos. ER12-1338 and**
**D.C. Cir. No. 15-1274** **ER12-1347**

## CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 21st day of June 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system as indicated below:

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