

139 FERC ¶ 61,193
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Corporation	Docket Nos.	ER12-1338-000
Progress Energy, Inc.		ER12-1343-000
Florida Power Corporation		ER12-1345-000
Carolina Power & Light Company		ER12-1346-000
		ER12-1347-001

ORDER ON JOINT DISPATCH AGREEMENT AND JOINT OPEN ACCESS
TRANSMISSION TARIFF

(Issued June 8, 2012)

1. On March 26, 2012, Duke Energy Corporation (Duke Energy) and Progress Energy, Inc. (Progress Energy) (collectively, Applicants) filed a Joint Dispatch Agreement (JDA), on behalf of Duke Energy Carolinas, LLC (Duke Energy Carolinas) and Carolina Power & Light Company (CP&L), and a joint open access transmission tariff (Joint OATT), on behalf of Duke Energy Carolinas, CP&L, and Florida Power Corporation (Florida Power), pursuant to section 205 of the Federal Power Act (FPA) and Part 35 of the Commission's regulations.¹ In addition, on March 26, 2012, Florida Power filed a concurrence to the Joint OATT, and CP&L filed concurrences to the Joint OATT and to the JDA.² Applicants state that the JDA, the Joint OATT and the concurrence

¹ 16 U.S.C. § 824d (2006); 18 C.F.R. Part 35 (2011). The JDA was filed by Applicants in Docket No. ER12-1338-000, and the Joint OATT was filed in Docket No. ER12-1343-000.

² Progress Energy, on its own behalf and on behalf of Florida Power, filed a concurrence to the Joint OATT in Docket No. ER12-1345-000. It also filed, on its own behalf and on behalf of CP&L, a concurrence to the Joint OATT in Docket No. ER12-

(continued...)

filings were made in connection with the proposed merger of Duke Energy and Progress Energy. In this order the Commission conditionally accepts the JDA, the Joint OATT, and the concurrence filings, to be effective upon consummation of the proposed merger in Docket No. EC11-60-004.

I. Background

2. On April 4, 2011, in Docket No. EC11-60-000, pursuant to section 203 of the FPA,³ Applicants filed a merger application under which Progress Energy would become a wholly-owned subsidiary of Duke Energy and the former shareholders of Progress Energy would become shareholders of Duke Energy. On April 4, 2011, Applicants also filed a *pro forma* JDA and a *pro forma* Joint OATT in Docket Nos. ER11-3306-000 and ER11-3307-000, respectively. On October 19, 2011, Applicants filed the JDA and the Joint OATT pursuant to section 205 of the FPA in Docket Nos. ER12-115-000 and ER12-116-000, respectively. In addition, on October 19, 2011, CP&L and Florida Power filed concurrences to the Joint OATT and the JDA in Docket Nos. ER12-118-000, ER12-119-000, and ER12-120-000. The *pro forma* filings and the section 205 filings were made in connection with the proposed merger of Duke Energy and Progress Energy.

3. On September 30, 2011, the Commission issued an order finding that in the absence of appropriate mitigation, the proposed merger could be expected to result in adverse effects on competition and therefore conditionally authorized the merger, subject to Commission approval of market power mitigation measures.⁴

4. On October 17, 2011, in Docket No. EC11-60-001, Applicants filed a compliance filing addressing the conditions in the Merger Order. On December 14, 2011, the Commission issued an order rejecting this compliance filing.⁵ In a companion order, the Commission: (1) rejected the *pro forma* Joint OATT and *pro forma* JDA as moot

1346-000. Finally, Progress Energy, on its own behalf and on behalf of CP&L, filed a concurrence to the JDA in Docket No. ER12-1347-000. The March 26, 2012 filing made in Docket No. ER12-1347-000 was terminated when Progress Energy, on its own behalf and on behalf of CP&L, made a filing on April 12, 2012 in Docket No. ER12-1347-001.

³ 16 U.S.C. § 824a (2006).

⁴ *Duke Energy Corp., and Progress Energy, Inc.*, 136 FERC ¶ 61,245 (2011) (Merger Order).

⁵ *Duke Energy Corp., and Progress Energy, Inc.*, 137 FERC ¶ 61,210 (2011) (Merger Compliance Order).

because they had been superseded by the October 19, 2011 Joint OATT and JDA filings; and (2) rejected the October 19, 2011 Joint OATT, JDA, and concurrence filings because of its ruling in the Merger Compliance Order.⁶ The Commission stated, however, that its December 14, 2011 order on the Joint OATT and JDA was without prejudice to Applicants re-filing the Joint OATT and JDA.⁷

II. Applicants' Filings

5. Duke Energy Carolinas is a wholly-owned subsidiary of Duke Energy. CP&L and Florida Power are subsidiaries of Progress Energy. Applicants state that the proposed JDA provides for the joint merit dispatch of Duke Energy Carolinas' and CP&L's generation resources in order to permit the more efficient operation of their combined resources.⁸ Applicants state that the Joint OATT combines the current versions of the Duke Energy Carolinas, CP&L, and Florida Power OATTs into a single OATT.⁹

A. The JDA

6. Applicants state that the purpose of the JDA is to allow Duke Energy Carolinas and CP&L to achieve efficiencies by jointly dispatching their generation facilities to serve their loads. Applicants further state that the savings from joint dispatch – in fuel, purchased power, and related savings – will go directly to retail and wholesale customers in North Carolina and South Carolina.¹⁰ They state that Duke Energy Carolinas will act as “Joint Dispatcher” and will conduct merit dispatch of the companies' generation resources to meet load requirements and contractual commitments, subject to reliability and contractual requirements.

7. Applicants state that the joint dispatch costs will be allocated hourly on an after-the-fact basis. They explain that Duke Energy Carolinas' and CP&L's native load customers will be deemed to have received service from the lowest cost resources, while the remaining cost resources will be deemed to have served off-system sales. Applicants

⁶ *Duke Energy Corp., and Progress Energy, Inc.*, 137 FERC ¶ 61,209 (2011).

⁷ *Id.* P 22.

⁸ Applicants' March 26, 2012 JDA Transmittal Letter at 3-4 (JDA Transmittal).

⁹ Applicants' March 26, 2012 Joint OATT Transmittal Letter at 1 (Joint OATT Transmittal).

¹⁰ JDA Transmittal at 3-4.

state that the JDA also provides for payments between the two companies to compensate them for the energy purchased and sold between them in accordance with joint dispatch. To fulfill this requirement, the Joint Dispatcher will calculate the payments for each hour on an after-the-fact basis and determine the cost each company would have incurred if it had operated on a stand-alone basis.

8. Applicants explain that the JDA is limited to joint dispatch and is not intended to provide for system integration or combination of any other utility operations. They also note that the JDA does not provide for joint operation of Duke Energy Carolinas' and CP&L's transmission systems or balancing authority areas, or provide for joint resource planning.¹¹

B. The Joint OATT

9. Applicants state that the Joint OATT makes use of provisions from the CP&L, Florida Power and Duke Energy Carolinas Commission-approved OATTs. To resolve any conflicts among the OATTs, Applicants state that they either selected the provision from one of the approved OATTs (thus making it applicable to all of the zones) or made the provision applicable for transmission service only in one zone. All other changes are, according to Applicants, non-substantive "clean-up" modifications. Therefore, Applicants state that the Joint OATT consists of provisions that have been approved on prior occasions.¹²

10. Applicants state that the primary differences in the Joint OATT, when compared to the currently-effective OATTs, are: (1) a zonal rate structure that would prevent rate pancaking for transactions involving more than one of the Duke Energy Carolinas, CP&L, or Florida Power systems by only charging transmission customers the zonal rate for the zone where the transaction sinks (i.e., a license plate rate structure); (2) elimination of Recallable Long-Term Firm Point-to-Point Transmission Service from Duke Energy Carolinas' OATT; (3) updating the form of Duke Energy Carolinas' Network Integration Transmission Service Agreement to conform with the form that Duke Energy Carolinas filed in Docket No. ER10-1926-000; and (4) removal of references to the CP&L zone in provisions in the CP&L/Florida Power OATT governing Network Contract Demand transmission service.¹³

¹¹ *Id.* at 4.

¹² Joint OATT Transmittal at 4, 7-8.

¹³ *Id.* at 5-8.

11. Notwithstanding the submission of the Joint OATT, Applicants state that, following the proposed merger, Duke Energy Carolinas, CP&L, and Florida Power will each continue to operate their own control areas and will continue to use their own OASIS sites. Applicants explain that transmission customers will use the OASIS site for the corresponding zone for their transmission service. If transmission service involves the use of multiple zones, the transmission customer will use the OASIS sites of the applicable zones and comply with the zonal OATT provisions of those zones.¹⁴

C. Concurrence Filings

12. In these proceedings, Duke Energy is the “designated” filer, and CP&L and Florida Power are the “non-designated joint filers.” To comply with Order No. 714,¹⁵ in Docket Nos. ER12-1346-000 and ER12-1347-001, CP&L filed concurrences for the Joint OATT and the JDA, respectively. In Docket No. ER12-1345-000, Florida Power filed a concurrence to the Joint OATT.

D. Effective Date

13. Applicants propose that the JDA and Joint OATT go into effect on the date the merger is consummated. Applicants request that the Commission issue an order accepting the JDA, the Joint OATT, and the concurrence filings within 60 days after their filings, but in no event later than June 8, 2012, so that Applicants can close their merger prior to the July 8, 2012 termination date of the merger agreement.

E. Motion to Consolidate

14. On March 26, 2012, Applicants filed a motion to consolidate the instant filings involving the proposed JDA in Docket No. ER12-1338-000 and the related concurrence filing in Docket No. ER12-1347-000 with the *pro forma* JDA filing made on April 4, 2011 in Docket No. ER11-3306-000. They also filed a motion to consolidate the Joint OATT filings in Docket Nos. ER12-1343-000, ER12-1345-000, and ER12-1346-000 with the *pro forma* Joint OATT filing made in Docket No. ER11-3307-000. Applicants state that these requests involve aligned dockets in which the *pro forma* filings and the section 205 issues are virtually identical. They assert that consolidation of the dockets will result in greater administrative efficiency.

¹⁴ *Id.* at 10.

¹⁵ *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 63 (2008).

III. Notice of Filing and Responsive Pleadings

15. Notice of Applicants' filings in Docket Nos. ER12-1338-000, ER11-1343-000, ER12-1345-000, ER12-1346-000, and ER12-1347-000 was published in the *Federal Register*, 77 Fed. Reg. 20,016-17 (2012), with interventions and protests due on or before April 16, 2012. Notice of Progress Energy's filing in Docket No. ER12-1347-001 was published in the *Federal Register*, 77 Fed Reg. 23,709 (2012), with interventions and protests due on or before April 19, 2012. Notices of intervention and motions to intervene were filed by the entities listed in the appendix to this order.

16. City of Orangeburg filed a motion to intervene and protest of the JDA and related concurrence filing. In its protest City of Orangeburg supports the Applicants' proposal to consolidate Docket Nos. ER12-1338-000, ER12-1347-000, and ER11-3306-000.¹⁶

17. On May 1, 2012, Applicants and North Carolina Commission Staff filed answers to the protests. On May 10, 2012, City of Orangeburg filed an answer to the answers.

IV. Discussion

A. Procedural Matters

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

19. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers submitted in these proceedings because they have provided information that has assisted us in our decisionmaking process.

20. The Commission denies the requests to consolidate the JDA-related proceedings in Docket Nos. ER12-1338-000, ER12-1347-000, and ER11-3306-000. We also deny the requests to consolidate the Joint OATT proceedings in Docket Nos. ER12-1343-000, ER12-1345-000, ER12-1346-000, and ER11-3307-000. In general, the Commission formally consolidates matters only if a trial-type evidentiary hearing is required to resolve

¹⁶ City of Orangeburg April 16, 2012 Protest at 5-6 (City of Orangeburg Protest).

common issues of law and fact and consolidation will ultimately result in greater administrative efficiency.¹⁷ We see no need to formally consolidate these proceedings since Docket Nos. ER11-3306-000 and ER11-3307-000 are closed and because we are addressing all the March 26, 2012 filings in this order and not ordering a hearing.

B. Substantive Matters

21. As discussed below, we conditionally accept the JDA, the Joint OATT, and the concurrence filings, subject to compliance filings, to be effective upon consummation of the proposed merger.¹⁸ As discussed below, we decline City of Orangeburg's request that we modify the JDA pursuant to section 205(a) of the Public Utility Regulatory Policies Act (PURPA).¹⁹ In addition, we find that section 3.2(c) of the JDA contains provisions pertaining to retail ratemaking that are not appropriately included in a wholesale agreement before this Commission. Further, although we do not object to the JDA's allocation of the lowest cost power to native load customers, we find the JDA's allocation of different cost levels for new and existing non-native load customers to be unjust, unreasonable, and unduly discriminatory or preferential. Finally, we also find that the Joint OATT appears to be just and reasonable and has not been shown to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful.

1. Limitation of the Applicability of the JDA

a. Proposal

22. The JDA includes provisions that prohibit it from being construed as requiring a single integrated transmission system. Specifically, section 3.2(a) of the JDA provides that nothing in the JDA "is intended to or shall be construed" as:

- (i) Providing for or requiring a single integrated electric system;

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

¹⁸ Because transactions under the JDA and Joint OATT will not begin until the proposed merger is consummated, the Commission will conditionally accept the JDA, Joint OATT and related concurrences to be effective upon consummation of the proposed merger. Applicants must submit a compliance filing, within ten days of the consummation of the proposed merger, revising each of the FERC rate schedule tariff sheets to reflect the revised effective date. Applicants would also need to file to cancel any superseded tariff provisions at that time.

¹⁹ 16 U.S.C. § 824a-1 (2006).

- (ii) Providing for or requiring a single BAA, control area or transmission system;
- (iii) Providing for or requiring joint planning or joint development of generation or transmission;
- (iv) Providing for or requiring a Party to construct generation or transmission facilities for the benefit of the other Party;
- (v) Transferring any rights to generation or transmission facilities from one Party to the other; or
- (vi) Providing for or requiring any equalization of the Parties' production costs or rates.

23. Section 3.2(c) of the JDA states that Duke Energy Carolinas and CP&L have agreed, in proceedings before the North Carolina Utilities Commission (North Carolina Commission), "to insert into any affiliate agreements such as [the JDA] the following" provisions:

- (i) The participation by both [Duke Energy Carolinas] and [CP&L] in this Agreement is voluntary, neither [Duke Energy Carolinas] nor [CP&L] is obligated to participate in this Agreement or to make any purchases or sales pursuant thereto and the participation of both [Duke Energy Carolinas] and [CP&L] in this Agreement is subject to termination, after notice is provided pursuant to Section 2.1 of this Agreement;
- (ii) Neither [Duke Energy Carolinas] nor [CP&L] may make or incur a charge under this Agreement except in accordance with North Carolina law and the rules, regulations and orders of the [North Carolina Commission] promulgated thereunder;
- (iii) Neither [Duke Energy Carolinas] nor [CP&L] may seek to reflect in its North Carolina retail rates (i) any costs incurred under this Agreement exceeding the amount allowed by the [North Carolina Commission] or (ii) any revenue level earned under the Agreement other than the amount imputed by the [North Carolina Commission]; and
- (iv) Neither [Duke Energy Carolinas] nor [CP&L] will assert in any forum that the [North Carolina Commission's] authority to assign, allocate, make pro forma adjustments to or disallow revenues or costs for retail ratemaking and regulatory accounting and reporting purposes is preempted and [Duke

Energy Carolinas] and [CP&L] will bear the full risk of any preemptive effects of federal law with respect to this Agreement.

b. Protests

24. City of Orangeburg asks the Commission to reject the executed JDA, approve the JDA subject to the City of Orangeburg's proposed changes, or set the issues raised by the JDA for hearing. City of Orangeburg argues that the executed JDA, in conjunction with new state regulatory conditions filed at the North Carolina Commission, will allow the North Carolina Commission to use its retail ratemaking authority to "effect a multistate geographic market allocation of Duke's and Progress' average system cost power."²⁰ More specifically, City of Orangeburg argues that Duke Energy Carolinas and CP&L have agreed to new state regulatory conditions that purport to grant the North Carolina Commission the authority to disregard the terms of Commission-jurisdictional sales when the North Carolina Commission reviews Duke Energy Carolinas' and CP&L's retail rates.

25. As background, City of Orangeburg states that, on March 30, 2009, pursuant to existing state regulatory conditions, the North Carolina Commission issued an order on a power purchase agreement between Duke Energy Carolinas and City of Orangeburg. The North Carolina Commission found that if Duke Energy Carolinas were to sell power to City of Orangeburg at average system cost-based prices, the North Carolina Commission would treat the sale as having been made from Duke's higher cost incremental resources for retail ratemaking purposes.²¹ The parties terminated this power purchase agreement as a result of the North Carolina Commission order.²² City of Orangeburg claims that this policy produced similar results with regard to a proposed wholesale sale from Duke Energy Carolinas to Fayetteville, North Carolina and a competitive offer to the North Carolina Eastern Municipal Power Agency.

26. City of Orangeburg asserts that the JDA is "expressly made subject to the same [North Carolina Commission] wholesale rate review authority" in section 3.2(c)(ii)-(iv).²³

²⁰ City of Orangeburg Protest at 6.

²¹ *Id.* at 5. In response to the North Carolina Commission order, City of Orangeburg filed a petition for declaratory relief with the Commission in Docket No. EL09-63-000.

²² *Id.* at 12.

²³ *Id.* at 12.

Consequently, City of Orangeburg argues that the JDA will result in the North Carolina Commission's usurpation of the Commission's exclusive jurisdiction over wholesale sales.

27. City of Orangeburg asks the Commission to declare the North Carolina Commission's "control" of Duke Energy Carolinas' and CP&L's wholesale sales illegal, including the existing and proposed state regulatory conditions that "purport to provide that authority."²⁴

28. City of Orangeburg also asks the Commission to exempt Duke Energy Carolinas and CP&L from the North Carolina Commission's efforts to impede the voluntary coordination of their facilities under section 205(a) of PURPA. It contends that the JDA is an "agreement for central dispatch" providing for "coordination" in accordance with this section and that the Commission should exempt Duke Energy Carolinas and CP&L from the state regulatory conditions to permit "lawful and voluntary" coordination under the JDA.²⁵

c. Answers

29. Applicants argue that City of Orangeburg's arguments have nothing to do with the proposed JDA but are related to City of Orangeburg's past efforts to obtain requirements service from Duke Energy Carolinas. Instead, they contend that City of Orangeburg is seeking another forum, in addition to its petition in Docket No. EL09-63-000, in which to attack the North Carolina Commission's decision regarding City of Orangeburg's prior agreement with Duke Energy Carolinas. Applicants argue that Docket No. EL09-63-000 is the more appropriate setting to address City of Orangeburg's allegations.²⁶

30. North Carolina Commission Staff asks the Commission to reject City of Orangeburg's arguments because the harms alleged by City of Orangeburg stem from existing state regulatory policies that will "continue in effect" regardless of whether or not Applicants consummate the merger and obtain approval of the JDA.²⁷ North Carolina Commission Staff states that, prior to Applicants' proposal to merge, both Duke Energy/Duke Energy Carolinas and Progress Energy/CP&L had agreed to the regulatory conditions at issue. Hence, it asserts that "there is . . . nothing substantively new" about

²⁴ *Id.* at 15.

²⁵ *Id.* at 16-17.

²⁶ Applicants Answer at 3-5.

²⁷ North Carolina Commission Staff Answer at 5.

the regulatory conditions in question; rather, they reflect the pre-existing North Carolina Commission policies that City of Orangeburg has taken issue with in Docket No. EL09-63-000.²⁸

31. In addition, North Carolina Commission Staff states that Applicants voluntarily entered into the merger and the JDA and that the North Carolina Commission has not yet issued a final order with regard to either filing. It also states that Applicants voluntarily agreed to comply with the regulatory conditions at issue pursuant to a settlement agreement in the North Carolina Commission merger proceeding. North Carolina Commission Staff reasons that Applicants did so based upon their conclusion that such an agreement would increase the likelihood of the North Carolina Commission approving the merger.²⁹ According to North Carolina Commission Staff, under the settlement agreement, Applicants have:

agreed to protect against adverse impacts on retail ratepayers as a result of the merger by preserving the [North Carolina Commission's] authority to enforce [Duke Energy Carolinas'] and [CP&L's] obligations to plan and dispatch generation to reliably serve their native load customers on a least cost basis and to determine the treatment of voluntary post-merger wholesale sales contracts for retail ratemaking and accounting purposes.³⁰

North Carolina Commission Staff maintains that Applicants voluntarily expressed their willingness to waive or limit their rights to seek full cost recovery in a retail ratemaking proceeding in return for securing North Carolina Commission approval of the proposed merger.³¹

32. Responding to City of Orangeburg's arguments about PURPA section 205(a), North Carolina Commission Staff states that the retail ratemaking treatment by the North Carolina Commission provided for in the JDA does not and will not prohibit or prevent Applicants' "voluntary coordination" under PURPA. Instead, it argues that the North Carolina Commission would "merely be evaluating the Applicants' voluntarily agreed-

²⁸ *Id.* at 6.

²⁹ *Id.* at 10-11.

³⁰ *Id.*

³¹ *Id.* at 14.

upon conditions for purposes of the treatment of the costs of post-merger contracts in a future retail ratemaking proceeding.”³²

33. North Carolina Commission Staff also disputes City of Orangeburg’s allegation that the North Carolina Commission is usurping the Commission’s exclusive jurisdiction through the JDA. It states that any North Carolina Commission action pursuant to the regulatory conditions “would merely apply a retail ratemaking standard to which the Applicants had agreed” and “would not establish or change any rate, term or condition of any wholesale sales contract itself.”³³

34. In its answer, City of Orangeburg argues that the fact “[t]hat . . . an anticompetitive market structure exists today” does not permit the Commission to ignore the continued operation of this market structure “in conjunction with and pursuant to” the JDA.³⁴ On this point, it reiterates its contention that the JDA is “expressly” made subject to the North Carolina Commission’s wholesale rate authority.³⁵ In support of this claim, City of Orangeburg cites testimony from Duke Energy’s chairman, president, and chief executive officer, James Rogers, stating that Applicants included such authority in the JDA at the behest of the North Carolina Commission.

d. Commission Determination

35. With respect to the concerns that City of Orangeburg raises regarding the JDA and PURPA section 205(a), we find that no modification to the JDA is warranted. PURPA section 205(a) states that the Commission may:

exempt electric utilities . . . from any provision of State law, or from any State rule or regulation, which prohibits or prevents the voluntary coordination of electric utilities, including any agreement for central dispatch, if the Commission determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area.³⁶

³² *Id.* at 32.

³³ *Id.* at 24-25.

³⁴ City of Orangeburg May 10, 2012 Answer at 6-7 (City of Orangeburg Answer).

³⁵ *Id.* at 8.

³⁶ 16 U.S.C. § 824a-1 (2006).

36. PURPA section 205(a) does not apply to the circumstances at issue here. We find that none of the provisions of the JDA, including section 3.2(a) “prohibit[s] or prevent[s]” Duke Energy Carolinas and CP&L from elsewhere agreeing to engage in “voluntary coordination” or amending the JDA to provide for such coordination.³⁷ Section 3.2(a) provides only how to interpret the terms of the JDA.

37. With respect to City of Orangeburg’s objections to specific provisions of section 3.2(c) of the JDA, we find that section 3.2(c)(ii)-(iv) pertains fundamentally to retail ratemaking. For this reason, the inclusion of such provisions is not appropriate in a Commission-jurisdictional wholesale agreement. Accordingly, Applicants are directed to omit the provisions in section 3.2(c)(ii)-(iv) from the JDA.³⁸ We direct Applicants to make this revision in a compliance filing within 60 days of the issuance of this order. Beyond requiring removal of these provisions from the JDA, we offer no view on the North Carolina Commission’s authority to impose or apply such requirements in its proceedings.

2. Treatment of Non-Native Load Customers

a. Proposal

38. Article I of the JDA defines several categories of customers. Article VII of the JDA allocates energy costs based upon the category under which a customer falls. The two general categories of customers are “Native Load” and “Non-Native Load,” with the latter then sub-divided further into “New Non-Native Load Sales” and “Existing Non-Native Load Sales.” More specifically, the JDA defines “Native Load” as “the load of a Party’s Retail Native Load Customers and the retail load of its wholesale customers or its wholesale customers’ members served by the Party, directly or indirectly, at Native Load Priority.”³⁹ “Native Load Customers” refers to:

[A] Party’s Retail Native Load Customers plus its wholesale customers that have Native Load served by the Party, for which the Party has an obligation pursuant to current or future wholesale contracts, for the length of such contracts, to engage in planning and to sell and deliver electric capacity and

³⁷ See *New PJM Companies*, 107 FERC ¶ 61,271, at PP 12, 69-76 (2004) (finding that a state law requiring state commission approval prior to joining an RTO effectively prevented utilities from participating in “voluntary coordination”).

³⁸ See *Progress Energy, Inc.*, 97 FERC ¶ 61,141 (2001).

³⁹ JDA Article I.

energy in a manner comparable to the Party's service to its Retail Native Load Customers.⁴⁰

"New Non-Native Load Sales" are defined as "Non-Native Load Sales entered into after the effective date" of the JDA, and "Existing Non-Native Load Sales" are defined as non-native load sales "made pursuant to obligations entered into prior to the effective date of" the JDA.⁴¹

39. Article VII of the JDA is entitled "Calculation of Joint Dispatch Savings." Section 7.1(b) of Article VII provides that the "least cost energy" from the companies' power resources shall be applied first to serve the companies' native load obligations. Section 7.2 states that "New Non-Native Load Sales shall be deemed to have been satisfied by the highest cost energy from [Duke Energy Carolinas' and CP&L's] Power Supply Resources produced in that hour (other than Must Run Resources)." Under section 7.3, "Existing Non-Native Load Sales shall be deemed to have been satisfied by the next highest cost energy (other than from Must Run Resources) available after the allocation of energy to New Non-Native Load Sales." Section 7.4 provides that after the allocation of energy costs to non-native load, "the remaining least cost energy" produced in an hour shall be deemed to have served the parties' native loads. In addition, under section 7.4, each company's native load is allocated the costs of energy produced from its own must run resources.

b. Protests

40. City of Orangeburg argues that the JDA will result in undue rate discrimination based upon the arbitrary categorization of Duke's and CP&L's existing and potential new customers as native or non-native load customers. It argues that the new state regulatory conditions filed at the North Carolina Commission give the North Carolina Commission the ability to grant or disallow the granting of native load priority to Duke's and CP&L's customers. In addition to this North Carolina Commission authority, the City of Orangeburg asserts that the JDA will arbitrarily divide Duke's and CP&L's wholesale sales into native load and non-native load categories and permit the North Carolina Commission to decide which wholesale customers fall into each category. City of Orangeburg argues that the JDA will afford Duke Energy Carolinas, CP&L, and the

⁴⁰ *Id.*

⁴¹ *Id.*

North Carolina Commission the ability to unduly discriminate against wholesale customers in violation of the FPA requirement that rates be not unduly discriminatory.⁴²

41. City of Orangeburg states that it is a non-native load wholesale customer and, therefore, ineligible to purchase lower cost power from Duke Energy Carolinas or CP&L. It argues, however, that refusal by either Duke Energy Carolinas or CP&L to sell City of Orangeburg lower cost power on the basis of this categorization is “patent rate discrimination” and prohibited pursuant to Duke Energy Carolinas’ and CP&L’s Commission-approved market-based rate tariffs.⁴³

c. Answers

42. Applicants contend that the JDA does not provide for allocation of power among wholesale customers and, therefore, it does not discriminate against non-native load wholesale customers. Instead, they assert that the JDA’s “Calculation of Joint Dispatch Savings” provision “represent[s] nothing more than an after-the-fact accounting used for no purpose other than to allocate between [Duke Energy Carolinas’] and [CP&L’s] payment obligations to each other under the JDA.”⁴⁴ For this reason, Applicants argue that City of Orangeburg is wrong when it argues that, “under the JDA, native load wholesale customers are eligible for lower cost power and non-native load customers are not.”⁴⁵

43. North Carolina Commission Staff states that nothing in the JDA establishes or modifies any rate in any existing or post-merger wholesale contract. Additionally, it argues that the JDA will not cause or result in undue rate discrimination because the JDA’s distinction between wholesale native load and non-native load customers distinguishes between customers that are not similarly situated.⁴⁶ It also cites *Golden Spread Electric Cooperative, Inc. v. Southwestern Public Service Company* in support of its argument that the JDA may distinguish between these two customer classes for the purposes of the “retail ratemaking treatment to be accorded to the generation costs associated with [Duke Energy Carolinas’] and [CP&L’s] wholesale sales contracts with

⁴² City of Orangeburg Protest at 7-9.

⁴³ *Id.* at 10.

⁴⁴ Applicants Answer at 6.

⁴⁵ *Id.* at 7.

⁴⁶ North Carolina Commission Staff Answer at 16-18.

such customers.”⁴⁷ North Carolina Commission Staff also states that the JDA and the regulatory conditions are appropriate “to protect native load customers against being forced to subsidize system average pricing in wholesale contracts with non-native load customers.”⁴⁸

44. In reply to Applicants, City of Orangeburg argues that the JDA provides for wholesales sales subject to the Commission’s jurisdiction. In this regard, it states that the JDA’s after-the-fact billing methodology is plainly a Commission-jurisdictional rate.⁴⁹ City of Orangeburg also states that the JDA will “enshrine entitlements to cheap power from a wholly new resource, i.e., the post-merger combined joint dispatch of . . . system resources to [Duke Energy Carolinas’] and [CP&L’s] respective retail and wholesale ‘Native Load’ customers.”⁵⁰ City of Orangeburg again asserts that this allocation is unduly discriminatory and not just and reasonable. Also, in disagreement with North Carolina Commission Staff, City of Orangeburg asserts that the fact that Applicants voluntarily agreed to the new state regulatory conditions is immaterial. City of Orangeburg states that the Commission cannot accept the JDA because the North Carolina Commission cannot, pursuant to its determination of wholesale native load status, decide upon wholesale service rights.⁵¹

d. Commission Determination

45. We find that the allocation of the lowest cost energy under the JDA to the native load customers of Duke Energy Carolinas and CP&L is not unduly discriminatory. In Order No. 2000, the Commission acknowledged that in areas without retail choice, state commissions have the authority to “require a utility to sell its lowest cost power to native

⁴⁷ *Id.* at 19 (citing *Golden Spread Elec. Coop, Inc., et al. v. Southwestern Pub. Serv. Co., et al.*, 123 FERC ¶ 61,047 (2008)).

⁴⁸ *Id.* at 30.

⁴⁹ City of Orangeburg Answer at 5.

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at 14.

load, as [they] always [have].”⁵² The JDA’s allocation of lowest cost power to the native load customers of Duke Energy Carolinas and CP&L is consistent with this finding.

46. However, we find that Applicants have not justified allocating lower cost energy to *existing* non-native load customers over *new* non-native load customers. The only difference between these two classes of non-native load customers is whether the customer entered into the sale before or after the effective date of the JDA. Applicants have not provided a justification for why disparate treatment of these two customer classes is just, reasonable, and not unduly discriminatory or preferential. Therefore, we conditionally accept the JDA subject to Applicants removing the distinction between the existing non-native load customers and new non-native load customers. We direct Applicants to submit a revised JDA in a compliance filing within 60 days of the issuance of this order.

3. Other Concerns

47. Applicants have not shown whether their existing joint ownership agreements establish whether, and if so, how, co-owners of jointly-owned facilities will share in cost savings resulting from economic dispatch as contemplated under the JDA. Accordingly, we direct Applicants to submit, in a compliance filing within 60 days of the issuance of this order, an explanation of whether, and if so, how, co-owners of jointly-owned facilities will share in cost savings resulting from economic dispatch as contemplated under the JDA for each of their existing joint ownership agreements.

The Commission orders:

(A) Applicants’ JDA and Joint OATT filed in Docket Nos. ER12-1338-000 and ER12-1343-000 are hereby conditionally accepted, to be effective upon consummation of the proposed merger, as discussed in the body of this order.

(B) Applicants are hereby directed to make a compliance filing within 60 days of the date of this order, as discussed in the body of this order.

(C) CP&L’s and Florida Power’s concurrence tariff records filed in Dockets Nos. ER12-1345-000, ER12-1346-000, and ER12-1347-001 are hereby conditionally

⁵² *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff’d sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

accepted, to become effective upon consummation of the proposed merger, as discussed in the body of this order.

(D) Applicants shall notify the Commission within ten days of the date on which the proposed merger is consummated.

(E) Applicants must submit a compliance filing, within ten days of the consummation of the proposed merger, revising the effective date of the JDA, Joint OATT and concurrence tariff records.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

APPENDIX

Joint Dispatch Agreement and Related Concurrence Filing

Docket No. ER12-1338-000 and ER 12-1347-001

Motions to Intervene

Blue Ridge Electric Membership Corporation, Rutherford Electric Membership Corporation, Piedmont Electric Membership Corporation, and Haywood Electric Membership Corporation (Docket No. ER12-1338-000 only)
North Carolina Attorney General and North Carolina Utilities Commission Public Staff
North Carolina Electric Membership Corporation
South Carolina Office of Regulatory Staff (Out-of-time)

Intervention and Protest

City of Orangeburg, South Carolina (City of Orangeburg)

Answers

Applicants
City of Orangeburg
North Carolina Utilities Commission Public Staff (North Carolina Commission Staff)

Joint OATT and Related Concurrence Filings

Docket Nos. ER12-1343-000, ER12-1345-000, and ER12-1346-000

Motions to Intervene

Blue Ridge Electric Membership Corporation, Rutherford Electric Membership Corporation, Piedmont Electric Membership Corporation, and Haywood Electric Membership Corporation (Docket Nos. ER12-1343-000 and ER12-1345-000 only)
City of Orangeburg, South Carolina (City of Orangeburg)
North Carolina Attorney General and North Carolina Utilities Commission Public Staff
North Carolina Electric Membership Corporation
Reedy Creek Improvement District (Docket Nos. ER12-1343-000 and ER12-1345-000 only)
South Carolina Office of Regulatory Staff (Out-of-time)