

168 FERC ¶ 61,023
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, and Duke Energy Florida, LLC Docket No. ER19-1876-000

ORDER GRANTING REQUESTS FOR WAIVERS

(Issued July 18, 2019)

1. On May 15, 2019, pursuant to Rule 207(a)(5) of the Commission's Rules of Practice and Procedure,¹ Duke Energy Carolinas, LLC (DEC), Duke Energy Progress, LLC (DEP), and Duke Energy Florida, LLC (DEF) (collectively, Duke Southeast Companies) submitted requests for waivers of the applicable provisions of their Joint Open Access Transmission Tariff (Joint OATT)² to address certain discrete effects of the Tax Cuts and Jobs Act³ in their 2019 Annual Updates of their formula transmission rates (Formula Rates). Specifically, the Duke Southeast Companies seek waivers to allow them to make adjustments to their Formula Rates to eliminate the impact of excess accumulated deferred income taxes (ADIT) resulting from the Tax Cuts and Jobs Act and hold customers harmless from a potential rate base increase. They assert that this request for waivers is similar to the request for waivers that the Commission approved in June

¹ 18 C.F.R. § 385.207(a)(5) (2018).

² The Joint OATT is located within the DEC eTariff database, and DEP and DEF have filed concurrences in their respective eTariff databases. *See* Duke Energy Carolinas, LLC, Tariffs, Rate Schedules and Service Agreements, Tariff Volume No. 4, Open Access Transmission Tariff (9.0.0).

³ Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (Tax Cuts and Jobs Act). Section 13001 of the Tax Cuts and Jobs Act reduces the federal corporate income tax rate from a maximum of 35 percent to a flat 21 percent. *See also Public Utility Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, 165 FERC ¶ 61,117 (2018) (ADIT NOPR).

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2018.⁴ For the reasons and to the extent discussed below, we grant the Duke Southeast Companies' waiver requests.

I. Background

2. The Duke Southeast Companies explain that DEC, DEP and DEF are each wholly-owned subsidiaries of Duke Energy Corporation. They state that DEC, DEP and DEF are public utilities that own generation and transmission facilities, with DEC and DEP serving wholesale and retail customers in North Carolina and South Carolina, and DEF serving wholesale and retail customers in Florida. Each company offers open-access transmission service under the Joint OATT, which contains individual Formula Rates and Formula Rates Implementation Protocols, as described below.⁵

3. DEC's estimated charges for 2019 are based on actual 2018 costs, as reported in FERC Form No. 1 for 2018, plus estimated 2019 capital additions. DEC uses these estimated charges starting on June 1, 2019, and the 2020 Annual Update will include a true-up adjustment based on 2019 actual costs.⁶

4. Similar to DEC, DEF's charges in 2019 will be based on actual 2018 costs and these amounts will be billed to customers beginning on June 1, 2019. The 2020 Annual Update will include a true-up adjustment based on actual costs for 2019.⁷

5. DEP's Formula Rate uses a historical test year methodology whereby DEP's rates change each year on June 1st based on the immediate preceding year's costs, calculated using end-of-year balances from FERC Form No. 1. Unlike DEC and DEF, DEP's Formula Rate does not include a true-up adjustment.⁸

⁴ *Duke Energy Carolinas, LLC, et al.*, 163 FERC ¶ 61,240 (2018).

⁵ DEC's Formula Rate is in Exhibit B of Schedule 10-B and its Formula Rate Implementation Protocols are in Exhibit A of Schedule 10-B. DEF's Formula Rate is in Schedule 10.A-2, its Formula Rate Implementation Protocols are in Schedule 10.A-1, and additional notes regarding its Formula Rate are in Schedule 10.A-3. DEP's Formula Rate is in Attachment H-1, its Formula Rate Implementation Protocols are in Attachment H-2, and additional notes regarding its Formula Rate are in Attachment H-3.

⁶ Request for Waiver at 3-4.

⁷ *Id.* at 4-5.

⁸ *Id.* at 5.

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II. Waiver Requests

6. The Duke Southeast Companies explain that, in order to comply with the Financial Accounting Standard No. 109 (FAS 109), they are required to adjust ADIT liabilities and assets to account for the effect of changes in tax laws or rates. The Duke Southeast Companies thus re-measured their ADIT balances based on the 21 percent federal income tax rate established by the Tax Cuts and Jobs Act⁹, resulting in each of the Duke Southeast Companies having excess ADIT. In their 2017 FERC Form No. 1 filings, the Duke Southeast Companies adjusted their ADIT assets and liabilities to reflect the excess ADIT.¹⁰ Specifically, the Duke Southeast Companies transferred the excess ADIT from an ADIT asset or liability (i.e., FERC Accounts 190, 281, 282, and 283) into a regulatory asset or liability (i.e., FERC Accounts 182.3 or 254).

7. The Duke Southeast Companies further explain that their Formula Rates provide that ADIT amounts in FERC Accounts 190, 282, and 283 will be an adjustment to rate base. They state that DEC's and DEF's Formula Rates also provide that FERC Account 281 will adjust rate base. The Duke Southeast Companies further explain that there are no provisions in their Formula Rates to adjust rate base to reflect the corresponding excess ADIT recorded as regulatory assets or liabilities in FERC Accounts 182.3 or 254 or for adjustments made in accordance with FAS 109. Accordingly, the Duke Southeast Companies assert that strict adherence to their Formula Rates would create unintended, significant increases in rate base, and increase their Joint OATT rates.¹¹

⁹ The Tax Cuts and Jobs Act provided for a number of changes to the federal tax system, including the reduction of the federal corporate income tax rate from a maximum of 35 percent to a flat 21 percent rate as of January 1, 2018.

¹⁰ *Id.* at 6 & n.13 (citing 18 C.F.R. §§ 35.24 and 154.305; *Tax Normalization for Certain Items Reflecting Timing Differences in the Recognition of Expenses or Revenues for Ratemaking and Income Tax Purposes*, 144 FERC ¶ 30,254 (1981), *order on reh'g*, 144-A FERC ¶ 30,340 (1982); and ADIT NOPR, 165 FERC ¶ 61,117 (2018)).

¹¹ *Id.* at 7. The Duke Southeast Companies state that for DEC, ADIT liabilities in FERC Account 282 associated with transmission plant were reduced by approximately \$220 million; for DEF, ADIT liabilities in FERC Account 282 associated with transmission plant were reduced by approximately \$160 million; and for DEP, ADIT liabilities in FERC Account 282 associated with transmission plant were reduced by \$140 million. In addition, Duke Southeast Companies advise that FAS 109 requires that Account 254 liabilities be “grossed-up” for the rate changes needed to ratably flow back the net amounts in future rates, and the offset to the gross-up are new ADIT assets in Account 190, reflecting an additional increase to rate base.

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8. The Duke Southeast Companies assert that, in order to hold customers harmless from a rate base increase, they seek waivers to make an adjustment in their 2019 Annual Updates to eliminate the impact of reclassifications of excess ADIT. Specifically, they plan to unwind the changes made to Accounts 190, 281, 282, and 283 stemming from the Tax Cuts and Jobs Act, and to restate the balances in those ADIT accounts to reflect the 2017 and 2018 year-end balances that would have existed without the re-measurement and transfer that occurred to comply with FAS 109.¹² They state that, by unwinding the changes, the restated amounts will neutralize rate base increases that would occur without the waivers. The Duke Southeast Companies note that their requests address an issue identified in the Tax Cuts and Jobs Act Notice of Inquiry¹³ and ADIT Notice of Proposed Rulemaking (NOPR),¹⁴ which is ongoing. They state that the adjustment they seek is intended to hold customers harmless while the Commission works to finalize a long-term solution.¹⁵

9. The Duke Southeast Companies state that good cause exists to grant their waiver requests. They state that the Commission generally requires that a requested waiver: (1) be in good faith; (2) be of limited scope; (3) address a concrete problem that needs to be remedied; and (4) not have undesirable consequences, such as harming third parties.¹⁶ They also assert that the Commission has granted similar waiver requests in recent orders to ensure that customers receive the benefits of the Tax Cuts and Jobs Act.¹⁷

10. First, the Duke Southeast Companies contend that their waiver requests are in good faith. They state that, after the Tax Cuts and Jobs Act was issued, they undertook an evaluation of how the federal corporate income tax changes would impact their

¹² *Id.* at 7-8.

¹³ *Inquiry Regarding the Effect of the Tax Cuts and Jobs Act on Commission-Jurisdictional Rates*, 162 FERC ¶ 61,223 (2018).

¹⁴ *See supra* note 3.

¹⁵ The Duke Southeast Companies anticipate that the rate base neutrality issue, as well as tariff provisions, will be resolved in the future by compliance filings required after the Commission's issuance of a final rule in the ADIT NOPR proceeding. Requests for Waivers at 8 n.19.

¹⁶ *Id.* at 8 & n.20 (citing, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059 (2016)).

¹⁷ *Id.* at 9 (citing *Pub. Serv. Co. of Colo.*, 162 FERC ¶ 61,216 (2018); *MISO Transmission Owners*, 162 FERC ¶ 61,217 (2018)).

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Commission-jurisdictional rates. The Duke Southeast Companies assert that their waiver requests are consistent with their good faith efforts to ensure that the economic benefits of the reduction in the federal corporate income tax rate established by the Tax Cuts and Jobs Act are passed on to customers, while awaiting final Commission action in the ADIT NOPR proceeding.¹⁸

11. Second, the Duke Southeast Companies contend that their waiver requests are limited in scope because they: (1) solely address the federal income tax rate reduction established by the Tax Cuts and Jobs Act; (2) are tailored to address specific issues with their compliance with financial and Commission accounting standards in response to the federal corporate income tax rate reduction; and (3) are limited to adjustments to their 2019 Annual Updates. The Duke Southeast Companies also state that no other Joint OATT provisions are implicated, and that the waiver requests will not impact the transmission rates they charge.¹⁹

12. Third, the Duke Southeast Companies assert that granting the requested waivers addresses and remedies a concrete problem. Specifically, while they wait for Commission direction in the ADIT NOPR proceeding, the requested waivers will ensure transmission customers are held harmless from rate base increases that would otherwise occur.²⁰

13. Finally, the Duke Southeast Companies maintain that the requested waivers will not have undesirable consequences, such as harming third parties. Rather, the Duke Southeast Companies state that the requested waivers will hold customers harmless from potential rate base increases as a result of their compliance with financial and Commission accounting standards and the filed rate. They note that the Commission has previously granted waiver requests to protect the customers of the Duke Southeast Companies in similar circumstances.²¹

III. Notice and Responsive Pleadings

14. Notice of the Duke Southeast Companies' filing was published in the *Federal Register*, 84 Fed. Reg. 24,129 (2019), with interventions and protests due on or before

¹⁸ *Id.* at 9.

¹⁹ *Id.*

²⁰ *Id.* at 10.

²¹ *Id.* at 11 & n.24 (citing *Duke Energy Carolinas, LLC*, et al., 163 FERC ¶ 61,240 (2018)).

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June 5, 2019. Seminole Electric Cooperative, Inc. (Seminole) filed a timely motion to intervene and comments. North Carolina Electric Membership Corporation filed a timely motion to intervene.

15. Seminole supports the Duke Southeast Companies' request for waivers. Seminole notes that, as the Duke Southeast Companies make clear, the waivers are necessary to avoid rate base increases. Seminole notes that the same factors that moved the Commission to grant the Duke Southeast Companies similar waivers in 2018 continue to exist at present and justify the granting of this request for waivers.²²

IV. Discussion

a. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

b. Substantive Matters

17. We grant the Duke Southeast Companies' request for waivers of the applicable provisions of their Joint OATT to allow the Duke Southeast Companies to make adjustments in their 2019 Annual Updates to eliminate the impact of excess ADIT as a result of the Tax Cuts and Jobs Act, and to hold customers harmless from a potential rate base increase and preserve rate base neutrality.

18. The Commission has granted waiver of tariff provisions where: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.²³ We find that the Duke Southeast Companies' waiver requests satisfy these waiver criteria.

19. First, we find that the Duke Southeast Companies acted in good faith because their waiver requests are consistent with good faith efforts to ensure that the economic benefits of the reduction in the federal corporate income tax rate established by the Tax Cuts and Jobs Act are passed on to customers, while awaiting final Commission action in the ADIT NOPR proceeding.

20. Second, we find that the waivers are limited in scope because they solely address the federal corporate income tax rate reduction established by the Tax Cuts and Jobs Act,

²² Seminole Comments at 4-5.

²³ See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059 at P 13.

are tailored to address specific issues with the Duke Southeast Companies' compliance with financial and Commission accounting standards in response to the federal corporate income tax rate reduction, and are limited to adjustments to their 2019 Annual Updates. We note that the Duke Southeast Companies assert that no other Joint OATT provisions will be implicated, and that the waiver requests will not impact the transmission rates they charge.

21. Third, we find that the waivers address and remedy a concrete problem. Specifically, while the Duke Southeast Companies wait for Commission direction in the ADIT NOPR proceeding, the requested waivers will ensure transmission customers are held harmless from rate base increases that would otherwise occur.

22. Finally, we find that the waivers will not have undesirable consequences, such as harming third parties. Instead, they will protect the Duke Southeast Companies' customers from potential rate base increases in their 2019 Annual Updates.

The Commission orders:

The Duke Southeast Companies' requested waivers are hereby granted, as discussed in the body of this order.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.