172 FERC ¶ 61,030
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

North Carolina Eastern Municipal Power Agency Docket No. EL20-4-000
v.
Duke Energy Progress, LLC

ORDER ON COMPLAINT, ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES, AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued July 16, 2020)

1. On October 11, 2019, North Carolina Eastern Municipal Power Agency (NCEMPA) filed a complaint against Duke Energy Progress, LLC (Duke), under sections 206 and 306 of the Federal Power Act (FPA)[1] and Rule 206 of the Commission's Rules of Practice and Procedure,[2] alleging that the 11% return on common equity (ROE) included in the Fifth Amended and Restated Full Requirements Power Supply Agreement (Agreement) between NCEMPA and Duke is excessive and therefore unjust and unreasonable. For the reasons discussed below, we deny Duke's request to summarily dismiss the complaint, grant NCEMPA's complaint, establish hearing and settlement judge procedures, and set a refund effective date of October 11, 2019.

I. Background

2. Duke, a wholly-owned subsidiary of Duke Energy Corporation, is a regulated public utility organized in North Carolina and primarily engaged in the generation, transmission, distribution and sale of electricity in portions of North Carolina and South Carolina.[3]

[1] 16 U.S.C. §§ 824e, 825e (2018).

[2] 18 C.F.R. § 385.206 (2019).

[3] Complaint at 2.

3. NCEMPA is a joint agency and its participants include 32 cities and towns in eastern North Carolina that are municipal electric utility systems. NCEMPA states that from 1981 to 2015, NCEMPA co-owned two coal-fired generating units and three nuclear-fueled generating units with Duke. NCEMPA states that in order to reduce its costs and eliminate operational risks, it agreed to sell its ownership shares in these generating units to Duke in September 2014.[4] NCEMPA states that as part of that transaction, it also entered into the Agreement with Duke,[5] which began service on August 1, 2015. NCEMPA states that it meets the power supply needs of its participants primarily through purchases from Duke under the Agreement.

II. NCEMPA's Complaint

4. NCEMPA states that the 11% ROE is a component of the formula rate to calculate the Production Capacity Rate under the Agreement.[6] NCEMPA states that, pursuant to Article 16.1 of the Agreement, it is exercising its right to file a complaint under FPA section 206 to modify the 11% ROE component under a just and reasonable standard of review.[7]

5. NCEMPA explains that, following the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Emera Maine v. FERC*,[8] the Commission issued two orders on remand[9] that clarified its overall approach to resolving ROE complaints and proposed a methodology for addressing the issues the Court remanded for further

[4] *Id*. at 3.

[5] *Duke Energy Progress, Inc*., 149 FERC ¶ 61,220 (2014) (order accepting the Agreement); Duke Energy Progress, LLC, Rate Schedules, Schedule No. 200, Full Requirements PPA with NCEMPA, 10.0.0

[6] Complaint at 4.

[7] *Id*. at 4-5.

[8] *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017).

[9] *Martha Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (2018) (*Coakley* Briefing Order); *Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 165 FERC ¶ 61,118 (2018) (*MISO* Briefing Order), Opinion No. 569, 169 FERC ¶ 61,129 (2019) (Opinion No. 569), *order on reh'g*, Opinion No. 569-A, 171 FERC ¶ 61,154 (2019) (Opinion No. 569-A), *appeal pending sub nom. MISO Transmission Owners v. FERC*, No. 20-1182 (D.C. Cir. filed June 1, 2020).

consideration.[10] NCEMPA asserts that the application of the Commission's proposed ROE methodology, in the *Coakley* and *MISO* Briefing Orders, demonstrates that the existing 11% ROE in the Agreement is unjust and unreasonable.[11]

6. To support its claim that the 11% ROE is unjust and unreasonable, NCEMPA submitted the affidavit of Mr. Mac Mathuna,[12] a financial consultant of GDS Associates, Inc., a nationally recognized utility consulting firm. NCEMPA states that Mr. Mathuna applied the Commission's screening criteria to identify an appropriate proxy group of electric utility companies with risk characteristics similar to Duke, which has current credit ratings of A2 (Moody's) and A- (Standard and Poors). NCEMPA further states that Mr. Mathuna found it necessary to expand the lower-bound Moody's rating to include companies two notches below Duke's rating (rather than one notch below), because only two utility companies have Moody's ratings one notch below Duke's rating.[13] NCEMPA states that Mr. Mathuna explains that this is a conservative adjustment because it brings into the proxy group companies that exhibit greater risk and therefore may be expected to have higher investor return requirements. NCEMPA states that Mr. Mathuna originally identified a proxy group of 18 companies and he then removed Avangrid from the proxy group, because Avangrid has a fundamentally different corporate and ownership structure than the other companies.[14]

7. NCEMPA states that, consistent with the *Coakley* and MISO Briefing Orders, Mr. Mathuna applied three models, the Discounted Cash Flow (DCF) analysis, capital-asset pricing model analysis, and expected earnings analysis. NCEMPA states that Mr. Mathuna averaged the low and high-end results produced by the three models, with equal weighting assigned to each set of results, to produce a composite zone of

---

[10] Complaint at 5.

[11] *Id*. at 7. NCEMPA states that although the Commission's proposed ROE methodology was not adopted as a final Commission policy, the "new approach reflects the Commission's proposed policy for addressing this issue in the future, including in the proceedings currently pending before the Commission." *Id*. (citing *Coakley* Briefing Order, 165 FERC ¶ 61,030 at P 19).

[12] NCEMPA notes that Mr. Mathuna states that he has numerous objections to the Commission's proposed ROE methodology in the *Coakley* and MISO Briefing Orders, but he nonetheless applied the Commission's proposed ROE methodology to demonstrate that the existing 11% ROE in the Agreement is unjust and unreasonable. *Id*. at 8 n.14.

[13] *Id.* at 8.

[14] *Id*. at 9.

reasonableness of 7.66 to 12.02%.[15] NCEMPA explains that in the *Coakley* and MISO Briefing Orders, the Commission developed risk-differentiated quartile ranges within the composite zone of reasonableness to determine whether the existing ROE falls within or outside the quartile range found appropriate for the company based on its risk characteristics.[16] NCEMPA states that, for a utility of average risk, the Commission stated that the quartile range will be centered on the median of the composite zone of reasonableness, but, as Mr. Mathuna notes, the Commission did not provide detailed guidance as to how to calculate the quartile range centered on the median. NCEMPA states that Mr. Mathuna applied two reasonable approaches, which resulted in average risk quartiles of 8.67 to 9.76% and 8.99 to 9.46%, and he concludes that these results demonstrate that the existing 11% ROE is excessive and therefore unjust and unreasonable.[17]

8. NCEMPA also argues that the existing 11% ROE is unjust and unreasonable based on changes in financial market conditions. NCEMPA states that in the *Coakley* and MISO Briefing Orders, the Commission stated that, in addition to applying the proposed three-model framework, the Commission may consider other changes in capital market conditions since the existing ROE was established.[18] NCEMPA states that Mr. Mathuna traced the history of the existing 11% ROE in the Agreement and found that Duke's testimony in support of the filing of this Agreement refers to five earlier wholesale power purchase agreements that included an 11% ROE, and the earliest agreement was entered into in June 2009.[19] NCEMPA states that Mr. Mathuna asserts that, in considering whether there have been substantial changes in market conditions since the ROE in the Agreement was established, the Commission should not consider the Agreement's filing date in 2014, but rather, it should consider June 2009 as compared to July 2019 (the last month of Mr. Mathuna's study period).[20] NCEMPA states that Mr. Mathuna points out that June 2009 was the last month of an extended period of a severe economic disruption,

[15] *Id*. at 10-11.

[16] *Id*. at 11.

[17] *Id*. at 11-12.

[18] *Id*. at 12 (citing, e.g., *Coakley* Briefing Order, 165 FERC ¶ 61,030 at PP 29, 58).

[19] *Id*. at 12-13.

[20] *Id*. at 13.

which is now known as the "Great Recession," and capital costs have substantially declined since that time.[21]

9. NCEMPA states that, in the *Coakley* and MISO Briefing Orders, the Commission stated that "a comparison between the existing ROE and the just and reasonable ROE that the Commission would establish under current circumstances is relevant – and, in some cases, determinative – for whether the existing ROE remains just and reasonable."[22] NCEMPA states that Mr. Mathuna posits that there are two alternatives for determining the just and reasonable ROE that the Commission would establish under current circumstances: (1) the Commission's proposed methodology in the *Coakley* and MISO Briefing Orders; and (2) the two-stage constant growth DCF model, which continues to remain the Commission-approved methodology until the proposed approach in the *Coakley* and MISO Briefing Orders is adopted.[23] NCEMPA states that under the first alternative, Mr. Mathuna calculated a zone of reasonableness of 7.66 to 12.02% with a median of 9.41%.[24] NCEMPA states that under the second alternative, Mr. Mathuna calculated a zone of reasonableness of 7.26 to 10.55% with a median of 8.17%.[25] NCEMPA asserts that a comparison of these results with the existing 11% ROE in the Agreement provides additional evidence that the existing ROE is unjust and unreasonable.

10. NCEMPA requests that the Commission establish the October 11, 2019 filing date of the complaint as the refund effective date to provide it with maximum refund protection. NCEMPA also requests that the Commission establish hearing procedures to determine whether the existing 11% ROE is unjust and unreasonable and, if so, to determine the just and reasonable replacement ROE. NCEMPA states that it does not object to the Commission requiring the parties to engage in settlement discussions before a settlement judge before hearing procedures are initiated.[26]

---

[21] *Id*.

[22] *Id*. at 14-15 (citing *Coakley* Briefing Order, 165 FERC ¶ 61,030 at P 20; MISO Briefing Order, 165 FERC ¶ 61,118 at P 22).

[23] *Id*. at 15.

[24] *Id*.

[25] *Id*. at 16.

[26] *Id*. at 20.

III. Notice and Responsive Pleadings

11. Notice of NCEMPA's complaint was published in the *Federal Register*, 84 Fed. Reg. 56,447 (Oct. 22, 2019), with answers, interventions, and protests due on or before October 31, 2019. On October 21, 2019, the Commission extended the answer period and comment date until and including November 18, 2019.[27] Duke submitted a timely answer. On December 6, 2019, NCEMPA submitted an answer to Duke's answer. On January 16, 2020, Duke filed a second answer. On February 4, 2020, NCEMPA filed a second answer. On February 14, 2020, Duke filed a third answer. On March 6, 2020, NCEMPA filed a third answer.

A. Duke's Answer

12. As a threshold matter, Duke argues that the complaint should be summarily dismissed because NCEMPA has failed to meet its burden under FPA section 206 to demonstrate that the Agreement has become unjust and unreasonable. Duke asserts that NCEMPA cannot argue that a single component of the Agreement – in this case, the ROE component – at a discrete point in time is unjust and unreasonable. Duke asserts that the Commission's precedent against single-issue ratemaking is well-established and a customer seeking a rate investigation must provide some basis to question the overall rate level by taking into account changes in all cost components of the rate.[28] Duke also asserts that the Commission requires the overall rate in a long-term contract to be evaluated over the "life-of-the-contract," so that the benefits received over the term of the contract can be considered.[29] Duke argues that the Commission has applied this "life-of-the-contract" analysis to a long-term power supply contract with formula rates.[30]

13. Duke argues that NCEMPA's complaint fails to include any discussion regarding the overall rates in the Agreement, and the benefits received over the life of the Agreement. Duke asserts that the Agreement provides substantial, offsetting benefits

---

[27] *Notice of Extension of Time*, Docket No. EL20-4-000 (October 21, 2019).

[28] Duke's Answer at 16-17 (citing, e.g., *Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,081, at P 66 (2009); *Houlton Water Co. v. Maine Public Service Co.*, 55 FERC ¶ 61,037, at 61,110 (1991)).

[29] *Id*. at 18-20 (citing, e.g., *French Broad Electric Membership Corp., v. Carolina Power and Light Co.*, 92 FERC ¶ 61,283, at 61,966 (2000) (*French Broad*)).

[30] *Id*. at 19-20 (citing *Soyland Power Cooperative, Inc. v. Central Illinois Pub. Serv. Co.*, 51 FERC ¶ 61,004, at 61,014 (*Soyland*), *reh'g dismissed as moot*, 52 FERC ¶ 61,149 (1990)).

to NCEMPA. First, Duke explains that the Agreement allows NCEMPA to reduce its monthly coincident peak load for billing purposes by deploying generation owned by NCEMPA, its members and its members' customers, so that NCEMPA can pay lower fixed demand charges under the Agreement.[31] Duke states that, as a result, NCEMPA pays lower costs relative to NCEMPA's use of Duke's generation system, and Duke earns a lower effective ROE under the Agreement.[32] Second, Duke explains that the Agreement gives NCEMPA numerous early termination options, which substantially increase Duke's risks and give NCEMPA leverage in its relationship with Duke, as well as provide NCEMPA with flexibility in its future power supply arrangements.[33] Third, Duke points out that NCEMPA urged the Commission to accept this Agreement, including the 11% ROE, just five years ago. Duke argues that NCEMPA either believed that the 11% ROE was just and reasonable, or it accepted the ROE as part of an overall just and reasonable bargain embodied in the Agreement.[34]

14. Duke argues that even if the ROE is considered on a stand-alone basis, the complaint should be dismissed. Duke asserts that NCEMPA tries to reach back to capital market conditions in 2009 in the hopes of identifying a point in time when capital market conditions have changed sufficiently to warrant a change in ROE. Duke argues that it is not reasonable to look back to 2009, which is Duke's execution date of a separate power sale agreement with an 11% ROE, to evaluate the 11% ROE in the Agreement.[35] Duke asserts that 2014, the date when NCEMPA sold its ownership interests in the jointly-owned generating units to Duke and entered into the Agreement, is the relevant point in time to evaluate the ROE in the Agreement.

15. Duke argues that NCEMPA's ROE analysis is flawed and when corrected, shows that the complaint should be dismissed. Duke asserts that Mr. Mathuna's ROE analysis is flawed because the relevant proxy group should not depend on Duke's risk characteristics, but on Duke's risks under the Agreement. Duke states that its witness Mr. Robert Hevert, a consultant from ScottMadden, Inc., explains that because of NCEMPA's options to terminate or reduce its service under the Agreement, Duke's

---

[31] *Id*. at 21-26.

[32] *Id*. at 23.

[33] *Id*. at 26-27. Duke states that NCEMPA can terminate all or a portion of its supplemental load or base load purchases, or a combination thereof, as of either December 31, 2027 or December 31, 2035. *Id*. at 26.

[34] *Id*. at 28.

[35] *Id*. at 31.

risks under the Agreement are more akin to those faced by merchant generators, rather than rate-regulated utilities.[36] Duke states that Mr. Hevert explains that it would violate the financial "stand-alone" principle to assume the ROE required to attract investment in the Agreement should be the same as that required for Duke as a whole.[37]

16. Duke states that Mr. Hevert's analysis, which used his proxy group of merchant generating companies and applied Mr. Mathuna's analytical framework, produced median ROE estimates well above 11%. Duke states that Mr. Hevert calculated quartile ranges of 13.16 to 14.73% and 12.25 to 15.61%, respectively.[38] Duke states that Mr. Hevert also considered as an additional scenario the quartile range around the 25th percentile of the composite zone of reasonableness, which assumes that Duke's risks under the Agreement are associated with the lower quartile of returns for his proxy group, and this scenario produced a range of 11.01 to 12.25%.[39] Duke states that Mr. Hevert also points out that Mr. Mathuna's own analysis demonstrates that the 11% ROE falls in the 92nd percentile of the zone of reasonableness, and given that the risks under the Agreement are well beyond those associated with Duke's retail operations and are more like those of a merchant generator, the 11% ROE falling in the 92nd percentile is reasonable.[40]

17. Duke also argues that Mr. Mathuna's capital market conditions analysis is flawed. In response to Mr. Mathuna's 2009 analysis, Duke responds that the Agreement was filed with the Commission in 2014 and therefore market conditions prior to 2014 are irrelevant.[41] However, Duke states that even indulging Mr. Mathuna on his 2009 analysis, Mr. Hevert shows various reasons why changes in credit rating notches of one or even two notches do not demonstrate that the 11% ROE is unjust and unreasonable.[42] Duke states that Mr. Hevert also shows that total returns from the Dow Jones Industrial Average for the six months ended June 2009 until July 2019 demonstrates that the

---

[36] *Id*. at 34.

[37] *Id*. at 34-35.

[38] *Id*. at 36.

[39] *Id*.

[40] *Id*. at 37.

[41] *Id*. at 38.

[42] *Id*.

existing ROE is not excessive, either prospectively or retrospectively.[43] Duke also states that Mr. Hevert explains that in 2009, the reduction in the 10-year Treasury yield was the result of the Federal Reserve's unconventional monetary policies that pumped nearly $3 trillion of liquidity into the capital markets, and it is doubtful whether we can reasonably assume that the conditions created by those policies and that injected liquidity will stay in place over the long run.[44]

18. Duke asserts that in light of the unsettled nature of the Commission's ROE policy, the Commission should be cautious to upset the bilateral bargain that the Commission found just and reasonable just five years ago, and dismiss NCEMPA's attempt to extract additional concessions from Duke after a comprehensive deal was struck between Duke and NCEMPA concerning the acquisition of the jointly-owned generating units and the Agreement.[45]

B. NCEMPA's Answer to the Answer

19. NCEMPA asserts that there is no merit to Duke's threshold argument that NCEMPA has failed to meet its burden under FPA section 206. In response to Duke's contentions that NCEMPA must demonstrate that (1) the Agreement as a whole is unjust and unreasonable, and (2) the Agreement when evaluated over the "life-of-the-contract" is unjust and unreasonable, NCEMPA explains that the precedent establishing these burdens is not applicable to its complaint.[46]

20. In particular, NCEMPA explains that Duke relies on Commission precedent against single-issue ratemaking to support its assertion that NCEMPA must demonstrate that the Agreement as a whole is unjust and unreasonable, and there are at least two reasons why that precedent does not apply to its complaint.[47] First, NCEMPA explains that the parties expressly agreed, in sections 16.1 and 16.4 of the Agreement, that the parties could make single-issue filings under FPA sections 205[48] and 206 to modify

---

[43] *Id*. at 39.

[44] *Id*.

[45] *Id*. at 40.

[46] NCEMPA's Answer to the Answer at 4 (citing Duke's Answer at 15).

[47] *Id*. at 4 (citing Duke's Answer at 16).

[48] 16 U.S.C. § 824d.

the Agreement.[49] NCEMPA states that section 16.1 (titled "Unilateral Filing Rights Preserved") provides that:

> Except as otherwise provided in this Article 16, each Party expressly retains its right to make unilateral filings with FERC at any time, pursuant to Section 205 or 206 of the Federal Power Act (as applicable) for a change in the rates, terms and conditions of this Agreement (including, without limitation, a change in any formula, *or a change in the components of any formula*, used to calculate rates and charges hereunder). . . . Except as provided in Section 16.2, the standard of review for changes to any of the rates, terms and conditions of this Agreement, whether proposed by a Party, a non-Party or FERC acting *sua sponte*, shall be the "just and reasonable" standard of review.

NCEMPA states that section 16.4 (titled "Modification Process") memorializes the agreement to permit single-issue filings and provides that:

> A Party which seeks a modification under this Agreement in accordance with the provisions of this Article 16 will first provide the other Party with a written proposal that sets forth the proposed modification and the bases therefor. Thereafter, the Parties shall negotiate in an attempt to agree upon an amendment to the Agreement to implement such proposed modification. . . . Except as provided in Section 16.2, in the event the Parties are unable to reach agreement pursuant to Section 17.1, then either Party may proceed to file an application with FERC under Section 205 or 206 of the Federal Power Act, as applicable, *for the limited purpose of obtaining FERC acceptance or approval of the amendment proposed by such Party.* In the event a Party files an application under Section 205 or 206, the other Party shall have all rights afforded by the Federal Power Act to intervene, comment, protest and oppose such filing.[50]

21. NCEMPA therefore states that the express language of sections 16.1 and 16.4 reflects the parties' agreement that a discrete, single-component filing could be made under FPA sections 205 or 206 to change a component of the formula rate, such as the

[49] NCEMPA's Answer to the Answer at 5.

[50] *Id*. (emphasis added); *see* Complaint, Attach. 1, Agreement, §§ 16.1, 16.4.

ROE, in the Agreement.[51] NCEMPA states that this contract language is the crucial fact that sets this case apart from Duke's cited cases against single-issue ratemaking.[52] NCEMPA states that requiring a party to conduct an analysis of the whole Agreement in order to change a component of the formula rate would contravene these express filing rights under the Agreement.[53]

22. Second, NCEMPA explains that another factor that distinguishes this case from the cases that Duke cited regarding single-issue ratemaking arises from the fundamental difference in regulatory treatment between stated or "fixed" rates as compared to formula rates. NCEMPA states that in the cited cases that Duke principally relies on, the question was whether a fixed rate was rendered unjust and unreasonable because of a change in a single cost component that was among many costs to be recovered by the fixed rate.[54] NCEMPA explains that in situations involving fixed rates, the Commission considers the change in the single cost component as well as other possible offsetting costs to determine whether the fixed rate will under- or over-recover the utility's total revenue requirement. NCEMPA explains the same question does not arise in annually-updating cost-of-service formula rates, like those in the Agreement, because these formula rates are designed to precisely recover the exact amount of other costs and therefore there is no possibility that an excessive ROE could be offset by an under-recovery of other costs.[55] NCEMPA states that for this reason, the cases requiring an analysis of overall rate level have no application in the context of comprehensive cost-of-service formula rates.

---

[51] *Id*.

[52] *Id*. (*citing E.ON Climate & Renewables North America LLC v. North. Ind. Pub. Serv. Co.,* 149 FERC ¶ 61,217, at P 51 (2014) (*E.ON Climate*) (footnotes omitted) ("[T]he inclusion of language in a contract that allows either party to ask the Commission to change the rate pursuant to sections 205 and 206 of the FPA presumes that the parties agreed that the provisions of the contract, even though executed, are subject to change. … A reservation of rights to file under sections 205 and 206 to change the terms of an executed contract is as much a provision agreed to by the parties as other terms of the contract.").

[53] *Id*. at 6.

[54] *Id*. at 7.

[55] *Id*. at 7-8. NCEMPA states that under its formula rate, Duke provides NCEMPA, by December 1 of each year, the estimated capacity and energy charges that are billed during the following calendar year, and those charges are later trued-up to actual costs when actual costs become known. *Id*. at 8.

23. NCEMPA also explains that the cases, which require the Commission to review the justness and reasonableness of the rates in a long-term contract by evaluating the benefits received over the "life-of-the-contract," are not applicable to its complaint. NCEMPA explains that section 16.1 of the Agreement gave Duke and NCEMPA the unilateral and unconditional right to change the rates in the agreement, including a change in the components of any formula used to calculate the rates.[56] NCEMPA points out that there is no suggestion in section 16.1 or elsewhere in the Agreement that a filing party must demonstrate the burdens of the contract outweigh the benefits of the contract over any particular timeframe.[57]

24. NCEMPA asserts that the *French Broad* case, on which Duke relies for its "life of the contract" analysis, is inapposite because the Commission considered a long-term fixed rate power sales agreement.[58] NCEMPA states that in the *French Broad* case, the Commission also summarized its precedent on its "life-of-the-contract" analysis, which it has applied to long-term fixed-rate contracts.[59] NCEMPA contends that the "life-of-the-contract" analysis makes sense in the context of a long-term, fixed-rate agreement because where the benefits to the customer are front-loaded in the contract, it would be inequitable to allow the customer to modify the rate downward as soon as the customer has received the front-loaded benefits.[60] NCEMPA asserts that, in contrast, a cost-based formula has neither front-loaded nor backloaded benefits to either party, but recovers the supplier's actual costs each year. NCEMPA therefore asserts that there is no logical or valid purpose to require a complainant to submit a "life-of-the-contract" analysis for a formula rate that has annually-updated cost-based charges.[61] NCEMPA notes, however, that even if the "life-of-the-contract" analysis were applied to this Agreement, the Agreement's recovery of actual costs under the formula rate with an excessive ROE would simply show that the Agreement is burdensome to the customer and beneficial to the supplier in each and every year of the Agreement's term.

25. NCEMPA notes that Duke relies on the *Soyland* case, in which the Commission applied a "life-of-the-contract" analysis to a long-term power supply arrangement with

---

[56] *Id*. at 10.

[57] *Id*.

[58] *Id*. at 11 (citing Duke's Answer at 18 (citing *French Broad*, 92 FERC ¶ 61,283)).

[59] *Id*. at 11-12.

[60] *Id*. at 12.

[61] *Id*. at 12-13.

formula rates.[62] NCEMPA asserts that for the reasons that it has explained that it makes no sense to apply the "life-of-the-contract" analysis to a formula rate that has annually-updated cost-based charges, it would be easy to dismiss *Soyland* as wrongly decided.[63] NCEMPA asserts that even if *Soyland* was correctly decided, there are crucial distinctions between *Soyland* and this case that make *Soyland* inapposite to its complaint.

26. NCEMPA states that the first important distinction between this case and *Soyland* is that Commission's order in *Soyland* states that "Soyland agreed to abide by the terms of the Agreements for their duration and Soyland waived any right to unilaterally seek a modification of those terms."[64] In comparison, NCEMPA states that, under its Agreement, it reserved its unilateral right to file a change to the formula rate or a change to any individual component of the formula rate.

27. NCEMPA states that a second important distinction is that the Commission's order in *Soyland* characterized the rate as "consist[ing] primarily of formulas,"[65] and was not a conventional cost-of-service formula rate.[66] NCEMPA explains that Commission's order in *Soyland* indicates that: (i) the *Soyland* formulas contained specific provisions that deviated from Commission ratemaking policies and practices; (ii) those deviations had the effect of front-loading the benefits of the contract into the early years of its term; (iii) Soyland filed its complaint to modify the agreement once the benefits had been exhausted; and (iv) Soyland's complaint attacked, in addition to the ROE, the very same deviations from Commission ratemaking policies and practices that produced benefits for

[62] *Id*. at 13 (citing Duke's Answer at 19-20 (citing *Soyland*, 51 FERC ¶ 61,004).

[63] *Id*. at 13.

[64] *Id*. at 13-14 (citing *Soyland*, 51 FERC ¶ 61,004 at 61,012)

[65] *Id*. at 14 (citing *Soyland*, 51 FERC ¶ 61,004 at 61,013 (referencing the statement in Soyland's concurrence letter that "the Agreements included certain provisions that differed from existing Commission evaluation formulas or policies applying to typical wholesale rates" and quoting Soyland's statement in its February 25, 1986 concurrence letter that "some of the provisions and conditions may not fit into existing Commission evaluation formulas or policies applying to typical wholesale rate cases").

[66] *Id*. at 14 (citing *Soyland*, 51 FERC ¶ 61,004 at 61,014 (referencing Soyland's statement that "the benefits and burdens of these Agreements would not be spread evenly over the life of the Agreements" and describing Soyland's estimate that "the agreements will save [the customers] approximately $5,000,000 in the early years of the agreements" as compared to their prior service arrangement)).

Soyland between the contract's effective date and the filing of Soyland's complaint.[67] NCEMPA argues that, given these facts, it is not surprising that the Commission insisted on a "life-of-the-contract" analysis that reviewed the years that Soyland received benefits from the challenged provisions and the years after those benefits were exhausted.[68] NCEMPA asserts that the factors that the Commission cited in *Soyland* as necessitating a "life-of-the-contract" analysis are simply not present in its complaint.

28. NCEMPA states that a third important difference between *Soyland* and its case is that Soyland urged the Commission to accept provisions that deviate from Commission ratemaking policies and practices and then three years later, it attacked the same provisions in its complaint before the Commission.[69] NCEMPA states that while it generally supported Duke's filing of the Agreement, it did not single out support for the stated ROE in the Agreement, and it retained its filing rights to challenge individual components of the formula rate.

29. Finally, NCEMPA notes that in *Soyland*, the Commission took pains to confine the *Soyland* ruling to the facts of that case.[70] NCEMPA therefore asserts that the Commission should not deem itself bound by *Soyland* in determining whether NCEMPA's complaint satisfies the requirements for making a *prima facie* showing under FPA section 206.

30. NCEMPA asserts that Duke's other arguments for dismissing the complaint are also without merit. First, NCEMPA asserts that Duke's argument that the Commission's ROE policy is unsettled is now moot, because the Commission just issued Opinion No. 569.[71] NCEMPA explains that Opinion No. 569 provides important new guidance about the methodology that the Commission considers appropriate to establish a just and reasonable ROE. NCEMPA states that it submits a second affidavit from Mr. Mathuna, which: (1) applies Opinion No. 569, develops a composite zone of reasonableness of 7.06% – 10.57%, and supports that the existing 11% ROE is unjust and unreasonable;

---

[67] *Id*. at 14-15.

[68] *Id*. at 15.

[69] *Id*. at 15-16.

[70] *Id*. at 16 (citing *Soyland*, 51 FERC ¶ 61,004 at 61,013 (observing that the Commission's decision to not send the case to hearing under a just and reasonable or public interest standard of review was "based on the nature of the contracts between Central Illinois and Soyland and the facts surrounding their negotiation and filing with the Commission").

[71] *Id*. at 1, 17-18 (citing Opinion No. 569, 169 FERC ¶ 61,129).

and (2) demonstrates that Duke's affidavit from Mr. Hevert does not support the ROE included in the Agreement.[72] For example, Mr. Mathuna objects to Mr. Hevert's use of a proxy group composed of companies whose operations principally involve merchant generation, because, he explains, the higher risk profile of this proxy group is not representative of the risks that Duke faces under the Agreement.[73]

31. Second, NCEMPA argues that the numerous issues raised by Duke concerning the history of the Agreement and the acquisition of the generating units are irrelevant to the issue raised by its complaint. In particular, NCEMPA explains that Duke accuses it of selectively attacking the ROE term just five years after the Agreement became effective, while ignoring the substantial benefits of the Agreement, such as NCEMPA's right to use its behind-the-meter generation and receive Duke's real-time load signal.[74] NCEMPA states that these various arguments are irrelevant as to whether the ROE in the Agreement is just and reasonable under current market conditions. NCEMPA explains that under Duke's reasoning, neither party would be permitted to make a unilateral filing to change an individual component of the formula rate in the Agreement, which is directly contrary to the unilateral filing rights of both parties in sections 16.1 and 16.4 of the Agreement.[75]

32. NCEMPA also explains that the parties expressly agreed that there are a handful of provisions that the parties cannot unilaterally modify in the Agreement, which are defined as the "Excepted Provisions" in section 16.2 of the Agreement, and the ROE is not one of the "Excepted Provisions."[76] NCEMPA therefore asserts that the express language of the Agreement confirms that a unilateral filing by either party to modify the stated ROE was contemplated and provided for by the contracting parties.

C. Duke's Second Answer

33. Duke argues that the reservation of unilateral filing rights in sections 16.1 and 16.4 of the Agreement does not mean that the parties can submit single-issue rate filings under sections 205 and 206 of the FPA. Duke reiterates that a complainant under section 206 of the FPA that challenges one component of a long-term contract must demonstrate that its long-term contract is unjust and unreasonable when the overall benefits and burdens of

[72] *Id*. at 20-22.

[73] *Id*., Attach. 1, NCEMPA's Second Aff. at PP 34, 38-42.

[74] NCEMPA's Answer the Answer at 23-24 (citing Duke's Answer at 26-27).

[75] *Id*. at 23.

[76] *Id*. at 25.

the contracts are viewed over the "life-of-the-contract."[77] Duke asserts that sections 16.1 and 16.4 apply the just and reasonable standard of review to a party's unilateral filing rights, and the just and reasonable standard of review requires a balanced assessment of the contract over its life.[78] Duke further asserts that the Commission's rationale to review a contract over the "life-of-the-contract" – to avoid the inequities of one party seeking to change a single element of the contract as the benefits and burdens of the contract change over time – should apply regardless of whether the rate in the contract is a stated rate, a formula rate, or some combination of the both.[79] In response to NCEMPA, Duke points out that, similar to the Agreement, *Soyland* involved a long-term contract containing a formula rate with a stated ROE component.[80] Duke asserts that *Pontook*[81] is an example in which the Commission applied its "life-of-the-contract" analysis to a long-term contract containing a formula rate and where the parties reserved their section 205 and 206 filing rights. Duke therefore asserts that NCEMPA's arguments that the "life-of-the-contract" analysis do not apply to the Agreement have no merit.

34. Duke also asserts that another part of the Agreement, which carves out an issue for single-issue ratemaking, demonstrates that the parties know how to reserve issues for single-issue ratemaking and that the parties did not intend to apply single-issue ratemaking to other aspects of the Agreement.[82] Duke points out that Note M of the Production Capacity Rate Formula in the Agreement specifies that Duke may make a single-issue rate filing to address the narrow issue of early retirements of generation assets, and no other aspects of the Agreement's rate would be allowed to be examined.[83]

---

[77] Duke's Second Answer at 5-6 (citing *Soyland*, 51 FERC ¶ 61,004 at 61,015).

[78] *Id*. at 6-7.

[79] *Id*. at 8-9.

[80] *Id*. at 9.

[81] *Id*. at 10 (citing *Pontook Operating Ltd. P'ship v. Pub. Serv. Co. of New Hampshire*, 94 FERC ¶ 61,144 (2001) (*Pontook*)).

[82] *Id*. at 11.

[83] *Id*. at 11-12 (citing Complaint, Attachment 1, Agreement, Exhibit 1 Production Capacity Formula Rate, page 5 of 16, Note M). Duke notes that Note M was subsequently added to the Agreement as the result of a settlement agreement between the parties. *Id*. at 12 (citing *Carolina Pwr. & Light Co*., 149 FERC ¶ 61,266 (2014) (approving the settlement)).

35. Duke asserts that even if the Commission does not apply a "life-of-the-contract" analysis to the complaint, the complaint should be dismissed because the 11% ROE in the Agreement remains just and reasonable. Duke states that it submits a second affidavit from Mr. Hevert, which: (1) applies the Opinion No. 569 methodology to a proxy group of merchant generating companies, as discussed in his initial affidavit, and finds that the 11% ROE falls at the very low end of the composite zone of reasonableness of 10.49% – 19.59%; and (2) reiterates his concerns with Mr. Mathuna's analysis, such as his use of a proxy group of principally state-regulated electric utilities.[84]

D. NCEMPA's Second Answer

36. NCEMPA asserts that Duke's reliance on *Pontook* – for Duke's assertion that "the Commission has applied the life-of-the-contract analysis to other long-term contracts containing a formula-based rate and a provision preserving parties' rights to seek to change all or one component of the rate in a section 206 filing" – is unavailing.[85] NCEMPA explains that in *Pontook*, the Commission dismissed a complaint seeking to modify a grandfathered transmission contract, stating that a complainant must provide evidence that tends to show that, over the life of the contract, the rate is unjust and unreasonable.[86] NCEMPA explains that in *Pontook*, the Commission pointed out that the complainant's evidence was limited to its claim that it should be paying the current OATT rate.[87] NCEMPA states that, in contrast, it has submitted expert testimony and detailed analysis to support its claim that the existing ROE is unjust and unreasonable, based on the Commission's currently approved ROE methodology. NCEMPA also states that it has demonstrated that its annually updated cost-based formula rate, which incorporates an excessive ROE, will produce an unjust and unreasonable rate as a whole, because in such a formula rate, there is no under-recovery of costs that might offset the excessive ROE.[88] NCEMPA therefore asserts that it has laid the predicate for a Commission investigation that the complainant in *Pontook* did not.

37. NCEMPA also points out that in the years since it ruled on *Soyland* and *Pontook*, the Commission has, in two cases, set for hearing a section 206 complaint seeking to reduce the ROE in a bilateral, long-term power purchase agreement (PPA) without requiring proof that the PPA, as a whole, considered over the "life-of-the-contract," has

---

[84] *Id*. at 15-16*;* Attach. A, Duke's Second Aff. at 5-18.

[85] NCEMPA's Second Answer at 5 (citing Duke's Second Answer at 10).

[86] NCEMPA's Second Answer at 5.

[87] *Id*. (citing *Pontook*, 94 FERC at ¶ 61,144 at 61,552).

[88] *Id*. at 5 (citing NCEMPA's Answer to the Answer at 6-9).

become unjust and unreasonable.[89] NCEMPA explains that in these two separate complaints, the Commission set for hearing the 11.1% ROE included in the utility's PPAs.[90] NCEMPA therefore states that, contrary to Duke's assertion, the Commission does not consider a holistic "life-of-the-contract" analysis to be an essential ingredient of any section 206 complaint that seeks to reduce, to a just and reasonable level, the ROE in a long-term PPA.

38. NCEMPA argues that Note M in the formula rate does not support Duke's position that Note M is a carve-out for single-issue ratemaking and therefore sections 16.1 and 16.4 of the Agreement do not permit single-issue rate filings. NCEMPA explains that Note M does not concern requests to modify the formula rate; rather, it governs any section 205 filings that Duke may make to recover additional early-retired generating plant (in addition to the retired generating plant listed in Note N) through the existing formula rate.[91] NCEMPA explains that when Duke makes a section 205 filing to recover additional retired plant under the existing formula rate, Note M simply prevents the customers from opening up the entire formula rate to unrelated changes that customers might like to make.[92] NCEMPA therefore explains that Note M has nothing to do with section 16.1 of the Agreement, which allows requests to modify a discrete component of the formula rate. NCEMPA also explains that the sequence of historical events does not support Duke's argument that Note M is evidence that the parties knew how to reserve single-issue ratemaking in the Agreement and did not do so for the ROE. NCEMPA points out that Note M was the product of a settlement that applied to NCEMPA's prior PPA with Duke and that settlement was executed five weeks after the Agreement was signed. NCEMPA states that eight months later, Note M was added to the Agreement. NCEMPA therefore asserts that Note M proves nothing regarding the parties' intent for the reservation of filing rights in section 16.1 of the Agreement.[93]

39. NCEMPA asserts that the lynchpin of Duke's ROE analysis is that Duke argues that it bears risks in providing service under the Agreement that are more comparable to the risks faced by merchant generators, rather than the risks of regulated electric utility

---

[89] *Id*. at 6 (citing *East Texas Elec. Coop. v. Southwestern Elec. Pwr. Co.,* 161 FERC ¶ 61,222 (2017) (*East Texas)*; *Minden v. Southwestern. Elec. Pwr. Co.*, 163 FERC ¶ 61,194 (2018) (*Minden*).

[90] *Id*. at 6.

[91] *Id*. at 8.

[92] *Id*. at 9.

[93] *Id*. at 10.

companies.[94] NCEMPA submits a third affidavit by Mr. Mathuna, which explains why the risks of service under the Agreement are in no way more comparable to the risks faced by merchant generators than to the risks of regulated electric utility companies.[95] NCEMPA asserts that, even setting aside the risk differences discussed by Mr. Mathuna, the Commission has never adopted or endorsed Duke's approach. NCEMPA also states that the Commission has rebuffed attempts to distinguish between specific utility functions or narrow company attributes in the evaluation of a fair ROE.[96] NCEMPA asserts that there is no reason in this case to diverge from the Commission's long-standing, judicially-endorsed approach of evaluating a company's ROE based on a proxy group of companies with comparable credit ratings.[97]

40. With respect to Duke's argument that the 11% ROE in the Agreement cannot be considered unjust and unreasonable because it falls within the composite zone of reasonableness in NCEMPA's first affidavit, NCEMPA asserts that the Commission has long held the view that an ROE within a calculated zone of reasonableness may be found unjust and unreasonable under FPA section 206. NCEMPA states that the Commission also recently said that the "FPA section 206 does not require the Commission to find that an existing rate is 'entirely outside the zone of reasonableness' before it can exercise its authority under FPA section 206 to change that rate."[98] NCEMPA also points out that, under the *Coakley* and MISO Briefing Orders, the composite zone of reasonableness is not the final step of the Commission's ROE analysis and when Mr. Mathuna applied the Commission's risk-based quartile to the values in the composite zone of reasonableness, the resulting range of reasonableness had a top end that was below 11%.[99]

41. NCEMPA also states that Mr. Mathuna's third affidavit responds to other arguments in Mr. Hevert's second affidavit concerning Mr. Mathuna's application of the

---

[94] *Id*. at 11 (citing Duke's Second Answer at 16).

[95] *Id*. at 12; Att. A, NCEMPA's Third Aff. at 3-4).

[96] NCEMPA's Second Answer at 12 (citing, e.g., *Midwest Indep. Sys. Operator, Inc*., 100 FERC ¶ 61,292, at P 12 (2002) (rejecting the proposal to restrict the proxy group for transmission owners to generation-divested utilities)).

[97] *Id*. at 12-13.

[98] *Id*. at 17 (citing Opinion No. 554-A, *Potomac-Appalachian Transmission Highline, LLC,* 170 FERC ¶ 61,050, at P 24 (2020) (footnote omitted) (*citing Emera Maine v. FERC*, 854 F.3d 9 at 22-23)).

[99] *Id*. at 17-18.

Commission's ROE methodology in the *Coakley* and MISO Briefing Orders, and in Opinion No. 569.[100]

E. Duke's Third Answer

42. Duke argues that *East Texas* and *Minden* do not stand for the proposition asserted by NCEMPA that the Commission does not consider a holistic "life-of-the-contract" analysis to be an essential ingredient of any section 206 complaint that seeks to reduce, to a just and reasonable level, the ROE in a long-term PPA.[101] Duke states that those cases did not present the kind of single-issue complaint, like NCEMPA's complaint, that would warrant the Commission's application of the "life-of-the-contract" analysis. Duke asserts that *Minden* was not a single-issue complaint; rather, the complaint challenged the ROE component of the PPA, and sought to change other components of the formula rate and other provisions of the contract.[102] Duke explains that in *Minden*, the Commission did not differentiate between the various components of the PPA that were challenged, and it set the entire complaint for hearing.[103] Duke states that in *East Texas*, the parties had expressly reserved the right in the PPA to make a unilateral filing to revise the ROE in the PPA, and therefore the parties permitted single-issue rate filings regarding the ROE.[104] Duke asserts that the Agreement contains no such analogous or specific provision permitting NCEMPA to file a single-issue ROE complaint.

43. Duke also argues that the PPAs in *East Texas* and *Minden* contained basic terms and conditions for power supply, and did not contain specific and customized provisions that were intended to provide benefits to one of both parties and were expressly agreed to as part of a larger integrated bargain, as is the case with the Agreement.[105] Duke therefore asserts that, regardless of whether the Commission applied or did not apply a "life-of-the-contract" analysis in *East Texas* and *Minden*, those cases are factually distinct from this complaint and therefore inapposite to this complaint.[106]

---

[100] *Id*. at 18-20.

[101] Duke's Third Answer at 2-5 (citing NCEMPA's Second Answer at 6).

[102] *Id*. at 3.

[103] *Id*. (citing *Minden*, 163 FERC ¶ 61,194 at P 33).

[104] *Id*. at 3-4.

[105] *Id*. at 4.

[106] *Id*. at 5.

44. Duke also asserts that Opinion No. 554-A, issued January 24, 2020, raises continued uncertainty regarding the Commission's preferred ROE methodology going forward.[107] Duke therefore states that it continues to believe that it would not be easy to resolve the limited issue of the ROE raised in the complaint through settlement or hearing procedures.[108]

F. NCEMPA's Third Answer

45. NCEMPA asserts that the arguments in Duke's third answer cannot be reconciled with Duke's previous arguments. In particular, NCEMPA argues that Duke cannot, on the one hand, distinguish *Minden* as inapposite to its complaint because the case involved multiple formula rate issues and the Commission did not apply a "life-of-the-contract" analysis, and, on the other hand, rely on *Soyland* because the case involved multiple formula rate issues and the Commission did apply a "life-of-the-contract" analysis.[109] NCEMPA argues that if Duke believes that *Minden* is inapposite because it concerned multiple formula rate issues, then *Soyland* should be inapposite because it concerned multiple formula rate issues.[110]

46. With respect to Duke's reliance on *East Texas*, NCEMPA asserts that there is no analytically meaningful difference in the customer's preservation of filing rights to change the ROE in the PPA in *East Texas*, and NCEMPA's preservation of filings rights to seek "a change in any formula, or change in *the components of any formula*" in the Agreement.[111] Given that the Commission did not apply a "life-of-the-contract" analysis where the *East Texas* customer only had filing rights to change the ROE in a formula rate, it would make no sense to apply the tougher "life-of-the-contract" analysis here where NCEMPA has broader filing rights to change the formula rate or the components of the formula rate.[112]

47. NCEMPA states that Duke's comparison and characterization of the PPAs in *East Texas* and *Minden* as containing basic terms and conditions for power supply and of the Agreement as containing specific and customized provisions is subjective, and Duke's

---

[107] *Id*. at 6 (citing Opinion No. 554-A, 170 FERC ¶ 61,050).

[108] *Id*. at 6.

[109] NCEMPA's Third Answer at 4.

[110] *Id*.

[111] *Id*. at 5 (citing Complaint, Attach. 1, Agreement, § 16.1 (emphasis added)).

[112] *Id*. at 5

resulting conclusions are untenable. NCEMPA states that, in essence, Duke contends that, due to the customized and unique nature of the Agreement, a change in a single component of the Agreement would upset the balance of benefits between the parties.[113] NCEMPA asserts that if a change in the Agreement's customized and unique provisions is inherently unjust and unreasonable due to its effect on the balance of benefits, the reservation of unilateral filing rights in section 16.1 of the Agreement would serve no purpose.[114] NCEMPA states that the Commission recognizes that it must interpret each agreement in a manner that gives effect to its express provisions,[115] and a reading of the Agreement that moots section 16.1 is not permissible.

48. In response to Duke's assertion that Opinion No. 554-A raises continued uncertainty regarding the Commission's preferred ROE methodology going forward and it would not be easy to resolve the ROE issue through settlement or hearing procedures, NCEMPA maintains that settlement and hearing procedures would be productive. NCEMPA states that the goal of settlement procedures would be to find a compromise ROE that both parties find acceptable from a business perspective. NCEMPA states that if the parties find that the persistent ROE uncertainty prevents settlement, they can simply ask the settlement judge to declare an impasse and proceed to hearing, where the uncertainty will eventually be removed.[116]

IV. Discussion

A. Procedural Matters

49. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits answers to an answer unless otherwise ordered by the decisional authority. We accept NCEMPA's and Duke's answers because they provided information that assisted us in our decision-making process.

---

[113] *Id*. at 6.

[114] *Id*.

[115] *Id*. (citing, e.g., *NextEra Desert Center Blythe, LLC v. Cal. Indep. Sys. Op. Corp.*, 153 FERC ¶ 61,208, at n.19 (2015) (citing *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 547 (D.C. Cir. 2010))).

[116] *Id*. at 7.

B. Substantive Matters

50. For the reasons discussed below, we deny the request to summarily dismiss the complaint, grant the complaint, establish hearing and settlement judge procedures, and set a refund effective date of October 11, 2019.

1. Unilateral Filing Rights

51. As a threshold matter, Duke requests that the complaint be summarily dismissed because, it asserts, NCEMPA has failed to meet its burden under FPA section 206 to demonstrate that the overall rate level in the Agreement evaluated over the "life-of-the-contract" has become unjust and unreasonable. We deny Duke's request for the following reasons.

52. We find that the parties expressly and specifically agreed, in sections 16.1 and 16.4 of the Agreement, that the parties could make single-issue rate filings under FPA sections 205 and 206 to change any formula or component of any formula used to calculate the rates in the Agreement.[117] Section 16.1 of the Agreement provides, in relevant part:

> [E]ach Party expressly retains its right to make unilateral filings with FERC at any time, pursuant to Section 205 or 206 of the Federal Power Act (as applicable) for a change in the rates, terms and conditions of this Agreement (including, without limitation, a change in any formula, *or a change in the components of any formula*, used to calculate rates and charges hereunder). . . . Except as provided in Section 16.2, the standard of review for changes to any of the rates, terms and conditions of this Agreement, whether proposed by a Party, a non-Party or FERC acting *sua sponte*, shall be the "just and reasonable" standard of review.[118]

Section 16.4 of the Agreement further provides, in relevant part:

> A Party which seeks a modification under this Agreement in accordance with the provisions of this Article 16 will first provide the other Party with a written proposal that sets forth

[117] *E.ON Climate,* 149 FERC ¶ 61,217 at P 51 ("A reservation of rights to file under sections 205 and 206 to change the terms of an executed contract is as much a provision agreed to by the parties as other terms of the contract.").

[118] Complaint, Attach. 1, Agreement, § 16.1 (emphasis added).

> the proposed modification and the bases therefor….in the event the Parties are unable to reach agreement pursuant to Section 17.1, then either Party may proceed to file an application with FERC under Section 205 or 206 of the Federal Power Act, as applicable, *for the limited purpose of obtaining FERC acceptance or approval of the amendment proposed by such Party*.[119]

The 11% ROE in the Agreement is a component of the formula rate, used to calculate the Production Capacity Rate under the Agreement.[120] We find that, in accordance with sections 16.1 and 16.4, NCEMPA exercised its filing rights under FPA section 206 to propose a change to the ROE, through its filing of a single-issue complaint under FPA section 206 to change a component of the formula, here the stated ROE, used to calculate the rates and charges under the Agreement.[121]

53. Given the parties' single-issue filing rights in sections 16.1 and 16.4 of the Agreement, the Commission's cases that Duke cites – which typically would require a customer to demonstrate that the overall rate level in the contract[122] evaluated over the "life-of-the-contract" [123] has become unjust and unreasonable – are inapposite, because

---

[119] *Id*., § 16.4 (emphasis added).

[120] Complaint at 4.

[121] *See, e.g*., *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 547 (when a contract is unambiguous, that language controls and the court "must give effect to the unambiguously expressed intent of the parties"); *Pac. Gas and Elec. Co*., 107 FERC ¶ 61,154, at P 19 (2004) (stating "when the language of a contract is explicit and clear ... then the court may ascertain the intent from its written terms and not go further"); *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229, at 61,755 (2000) (stating when a contract's terms are clear, it is to be construed according to its literal terms and extrinsic evidence cannot be used to alter or contradict the contract's express terms); *accord Pellaton v. The Bank of N.Y*., 592 A.2d 473, 478 (Del. 1991) (stating when an instrument is clear on its face, the court is not to consider parol evidence to interpret its intentions).

[122] Duke's Answer at 16-17 (citing, e.g., *Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,081 at P 66; *Houlton Water Co. v. Maine Public Service Co.*, 55 FERC ¶ 61,037 at 61,110).

[123] *Id*. at 18-20 (citing, e.g., *Soyland*, 51 FERC ¶ 61,004 at 61,014); Duke's Second Answer at 10 (citing *Pontook*, 94 FERC ¶ 61,144).

the agreements at issue in those cases did not include contracts that provided the parties with single-issue filing rights.

54. We also agree with NCEMPA that section 16.2 of the Agreement is supportive of the interpretation that sections 16.1 and 16.4 of the Agreement permitted unilateral single-issue filings to change the ROE component in the formula rate. In section 16.2 of the Agreement, the parties expressly agreed that there are a handful of provisions that the parties cannot seek to unilaterally modify in the Agreement, which are defined as the "Excepted Provisions," and the ROE is not one of the "Excepted Provisions" of the Production Capacity Rate Formula.[124] Therefore, we find that sections 16.1, 16.2 and 16.4 of the Agreement allow a unilateral single-issue rate filing to change the ROE component in the formula rate.

55. We disagree with Duke that Note M is evidence that the Agreement did not provide for single-issue filings. Note M governs any section 205 filings that Duke may make to recover additional early-retired generating plant-related costs (in addition to the retired generating plant listed in Note N) through the existing formula rate.[125] When Duke makes a section 205 filing to recover the additional early-retired generating plant-related costs, Note M prevents the customers from opening up the formula rate to make unrelated changes.[126] That is not the circumstance present here. We further note that NCEMPA also explains that Note M was the product of a settlement that applied to NCEMPA's prior PPA with Duke, and that settlement was executed five weeks after the Agreement was signed.[127] NCEMPA states that, eight months later, Note M was added to the Agreement.[128] For these reasons, we find that Note M is not probative as to the

[124] In section 16.2.1.2 of the Agreement, the "Excepted Provisions" of the Production Capacity Rate Formula, which the parties cannot unilaterally modify in the Agreement, relate to: (1) the acquisition adjustment that Duke paid to NCEMPA for NCEMPA's ownership interests in the jointly-owned generating assets; and (2) environmental costs. Complaint, Attach. 1, Agreement, § 16.2.1.2.

[125] NCEMPA's Second Answer at 8.

[126] *Id*. at 9. Note M states, in relevant part, that "[t]he proceeding commenced in response to such a single issue Section 205 filing shall not include or allow for consideration or examination of any other aspects of the Formula Rate or other issues associated with the Formula Rate." Complaint, Attachment 1, Agreement, Exhibit 1 Production Capacity Formula Rate, page 5 of 16, Note M.

[127] NCEMPA's Second Answer at 10.

[128] *Id*.

parties' intent as to their reservation of unilateral filing rights in sections 16.1 and 16.4 of the Agreement at the time the Agreement was executed.

56. Next, we address the parties' dueling interpretations of the Commission's cases. As set forth in the cases discussed below, the Commission has applied, or not applied, a "life-of-the-contract" analysis, in response to a section 206 complaint concerning a power sales agreement, based on two considerations: (1) the scope of the unilateral FPA section 205 or 206 filings rights that the parties reserved to themselves to make mid-stream changes in the contract rates; and (2) whether the rates, terms and conditions in the particular contract are such that the benefits and burdens to each party occur in different time periods over the "life-of-the-contract."

57. With respect to the first of these two considerations, Duke points out that, in *East Texas*,[129] the contracts at issue contained unilateral FPA section 205 or 206 filings rights that provided that "[t]he Parties expressly agree that either Party shall have the right unilaterally to submit to FERC a rate filing that proposes that the 11.1% ROE be revised . . ."[130] Duke argues that, in *East Texas*, the parties had expressly reserved the right in the contract to make a unilateral filing to revise the ROE in the contract, and therefore the parties permitted single-issue rate filings regarding the ROE. Duke asserts that the Agreement contains no such analogous or specific provision permitting NCEMPA to file a single-issue ROE complaint.[131] We disagree. As set forth above, we find that the Agreement provides the parties here with broader single-issue filings rights than *East Texas*, because the Agreement allows each party to make a unilateral filing under FPA section 205 or 206 to change any formula or a component of any formula.[132]

---

[129] *East Texas*, 161 FERC ¶ 61,222.

[130] Duke's Third Answer at 3-4 & n.13 (citing Complaint of East Texas Electric Cooperative, Inc. and Northeast Texas Electric Cooperative, Inc. at 4, Docket No. EL17-85-000 (filed Aug. 31, 2017) (quoting ETEC-NTEC PSA § 5.05 and NTEC PSA § 4.03); Respondent's Answer to Complaint at 2-3, Docket No. EL17-85-000 (filed Oct. 6, 2017) (quoting same)).

[131] *Id*. at 3-4.

[132] Given the complainant's single-issue filing rights to change the ROE, which the respondent recognized, the Commission did not need to consider, in *East Texas*, whether to apply the Commission's "life-of-the-contract" analysis. Because the parties had these single-issue filings rights, NCEMPA is incorrect that *East Texas* is an example of a formula rate contract in which the Commission did not employ a "life-of-the contract" analysis. NCEMPA's Second Answer at 6.

58. With respect to the second of these two considerations, the Commission described its policy of applying a "life-of-the-contract" analysis for long-term, fixed rate contracts in *French Broad*. The Commission stated that the proper timeframe in determining the justness and reasonableness of long-term, fixed-rate contracts is over the "life-of-the-contract," rather than on a "snapshot" in time basis, because the Commission recognized that the benefits and the burdens of a long-term, fixed rate contract must be viewed over the full term of the contract.[133] For example, a long-term, fixed rate contract may be designed to front-load benefits to the customer and burdens to the supplier in the earlier years of the contract, while the supplier receives benefits and the customer has burdens in the later years of the contract. In such case, it would not be just and reasonable for the Commission to allow the customer to receive the benefits in the earlier years of the contract and then make a filing, pursuant to section 206, to reduce the rate in the contract and thus reduce the benefits that the supplier receives in the later years of the contract. Therefore, the Commission has stated that the complainant must provide evidence which tends to show that, over the "life-of-the-contract," the fixed rate is unjust and unreasonable.[134]

59. While the Commission has employed a general rule of applying a "life-of-the-contract" analysis for long-term, fixed rate contracts, the Commission has not adopted a general rule of applying a "life-of-the-contract" analysis for long-term contracts with formula rates or long-term contracts with a mixture of fixed and formula rates. Instead, the Commission has analyzed the rates, terms, and conditions of the particular long-term contract in question to determine whether a "life-of-the-contract" analysis is appropriate in each instance.[135] The Commission also has rejected factual comparisons and distinctions between the case at issue and the cases in which the Commission has

---

[133] *French Broad*, 92 FERC ¶ 61,283 at 61,967; *San Diego Gas & Elec. Co. v. Pub. Serv. Co. of N.M.*, 95 FERC ¶ 61,073, at 61,202 (2001) (*San Diego*) (For a long-term, fixed rate contract, "it is appropriate to look at the revenue streams and various overall benefits and burdens over the life of the contract.").

[134] *French Broad*, 92 FERC ¶ 61,283 at 61,967.

[135] *Soyland*, 51 FERC ¶ 61,004 at 61,013-14 ("[B]ased on the nature of the contracts between Central Illinois and Soyland and the facts surrounding their negotiation and filing with the Commission," and where the customer recognized that the benefits and burdens of these contracts would not be spread evenly over the life of the agreements, the Commission found a "life-of-the-contract" analysis applicable to these contracts with formula and fixed rates, and it dismissed the complaint based on the customer's failure to make that showing). In *Pontook*, the Commission dismissed a complaint seeking to modify a grandfathered transmission contract with formula and fixed rates because the complainant's evidence was limited to its claim that

decided that it was appropriate to employ a "life-of-the-contract" analysis.[136] Therefore, NCEMPA's and Duke's arguments based on comparing and contrasting the rates, terms and conditions of the Agreement with the rates, terms, and conditions of the agreements in *Soyland*, *Pontook*, *East Texas* and *Minden* are misplaced.[137]

60. In the instant case, NCEMPA's single-issue filings rights in sections 16.1 and 16.4 of the Agreement are determinative of Duke's request to summarily dismiss the complaint. Given these single-issue filings rights, we do not need to reach the question of whether the complainant needs to conduct a "life-of-the-contract" analysis with evidence that tends to show that, over the "life-of-the-contract," the formula rate is unjust and unreasonable in order to obtain a hearing to change the stated ROE. Accordingly, we deny Duke's request to summarily dismiss the complaint.

---

it should be paying the current OATT rate and mere economic hardship or unforeseen changed circumstances of the type alleged are not appropriate considerations for contract modifications. *Pontook*, 94 FERC ¶ 61,144 at 61,551-52. In *Pontook*, the fixed rate concerned a $100,000 fixed payment toward the rebuilding of a specific segment of transmission line, which significantly reduced electrical losses on the transmission system, and the express terms of the contract showed that the customer agreed to make the one-time, fixed payment in order to reduce its annual formula transmission rate throughout the term of the contract. *Id*. at 61,550. Given the relationship between the fixed and formula rates throughout the term of the contract, the Commission also stated that the Commission applies a "life-of-the-contract" analysis to fixed rates and the evidence that was limited to arguing that it should be paying the current OATT rate does not meet that standard. *Id*. at 61,552. The Commission does not state in *Soyland* or *Pontook* that it will apply a "life-of-the-contract" analysis to all contracts with formula and fixed rates, or all contracts with formula rates.

[136] *San Diego*, 95 FERC ¶ 61,073 at 61,204 (footnotes omitted) ("The fact that the [*Soyland*] analysis included factors unique to that case and not present here is not relevant. Indeed, long-term, fixed-rate contracts like that in *Soyland* and like the [System Power Agreement] at issue here will always be unique because they reflect the particular compromises that the parties found mutually beneficial to their own circumstances.")

[137] In addition, we disagree with NCEMPA's assertion that *Minden* can be read as an example of a formula rate contract in which the Commission did not apply a "life-of-the-contract" analysis. NCEMPA's Second Answer at 6. In *Minden*, the contract at issue provided the parties with unilateral FPA section 205 or 206 filings rights, and the respondent did not object to the complainant's exercise of its unilateral filing rights to change certain components of the formula rate in the contract or raise the issue of a "life-of-the-contract" analysis. Therefore, the Commission did not reach the question of whether to apply the Commission's "life-of-the-contract" analysis to this contract.

2. ROE

61. As a preliminary matter, Duke raises concerns that the Commission's preferred ROE methodology going forward is uncertain, and, for this reason, it asserts that it would not be easy to resolve the limited issue of the ROE raised in the complaint through hearing or settlement judge procedures.[138] However, after the filing of all of the answers in this proceeding, the Commission issued an order on rehearing, in Opinion No. 569-A, which established the Commission's new base ROE methodology, which included modifications to the ROE methodology in Opinion No. 569.[139] In Opinion No. 569-A, the Commission also stated that any party in other proceedings will be free to argue that the base ROE methodology applied in Opinion No. 569-A should be modified or applied differently because of the specific facts and circumstances of the proceeding involving that party.[140] Therefore, particularly given this recent development in the Commission's ROE policy, we find that hearing and settlement judge procedures are appropriate in resolving the instant dispute concerning the justness and reasonableness of the Agreement's ROE, and, as set forth below, we order hearing and settlement judge procedures concerning the Agreement's ROE.

62. We find that the complaint raises issues of material fact concerning the Agreement's ROE that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly, we set the complaint for trial-type evidentiary hearing and settlement judge procedures under section 206 of the FPA.

63. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[141] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge

[138] Duke's Third Answer at 6.

[139] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 205.

[140] *Id*.

[141] 18 C.F.R. § 385.603 (2019).

based on workload requirements which determine judges' availability.[142] The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

64. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Section 206(b) permits the Commission to order refunds for a 15-month refund period following the refund effective date. Consistent with our general policy of providing maximum protection to customers,[143] we will establish the refund effective at the earliest date possible, i.e., October 11, 2019, as requested.

65. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within 12 months of the commencement of hearing procedures, or, if the case were to go to hearing immediately, by July 31, 2021. Thus, we estimate that, if the case were to go to hearing immediately and the Presiding Judge issued an initial decision within 12 months, we would be able to issue our decision within approximately 10 months of the filing of briefs on and opposing exceptions, or by July 31, 2022.

---

[142] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (http://www.ferc.gov/legal/adr/avail-judge.asp).

[143] *See, e.g., Seminole Elec. Coop., Inc. v. Fla. Pwr. & Light Co*., 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153 (1989), *reh'g denied*, 47 FERC ¶ 61, 275 (1989).

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the ROE in the Agreement, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.60, the Chief Judge is hereby directed to appoint a settlement judge in this proceeding within 45 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five days of the date of this order.

(C) Within 60 days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within 45 days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426, or remotely (by telephone or electronically), as appropriate. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(E) Given that the circumstances caused by the COVID-19 pandemic may disrupt, complicate, or otherwise change the ability of participants to engage in normal hearing procedures, the Chief Judge is hereby authorized to set or change the dates for the commencement of the hearing and the issuance of the initial decision as may be appropriate.

(F) The refund effective date established in Docket No. EL20-4-000 pursuant to section 206(b) of the FPA is October 11, 2019, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.