

136 FERC ¶ 61,237
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Carolinas, LLC

Docket No. IN11-9-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued September 30, 2011)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and Duke Energy Carolinas, LLC (DEC). This order is in the public interest because it resolves the investigation of DEC regarding its compliance with a Commission order, its Commission-approved tariffs, and Commission regulations related to its market-based rate (MBR) authority and the Commission's Electric Quarterly Reports (EQR) filing requirements. DEC has agreed to pay a civil penalty of \$425,000.

Background

2. DEC is a subsidiary of Duke Energy Corporation (Duke Energy), which is one of the largest electric power holding companies in the United States with approximately four million customers, approximately 35,000 megawatts of electric generating capacity in the Midwest and the Carolinas, and natural gas distribution services in Ohio and Kentucky. DEC serves approximately 2.4 million residential, commercial, and industrial customers across 24,000 square miles in North Carolina and South Carolina.

3. Enforcement's investigation arose after an audit of DEC by the Commission's Division of Audits (DA).¹ Enforcement obtained further information from DEC and received the full cooperation of the company.

¹ See Docket No. FA09-8-000. DA initiated the audit of DEC to evaluate the company's compliance with: (1) cross-subsidization restrictions on affiliate transactions; (2) regulations under the Public Utility Holding Company Act of 2005; (3) Uniform System of Accounts for Public Utilities' Accounting for Service Company Billings; (4) MBR requirements; and (5) EQR filing requirements. The audit covered the period from January 1, 2006, through December 31, 2008.

Violations

A. DEC Charged Counterparties Prices Exceeding the Maximum Allowed Rate Under Its Cost-Based Rate Tariff in Violation of a Commission Order, DEC's Commission-Approved Tariffs, and Commission Regulations.

4. Between December 2006 and September 2008, DEC made forty-two power sales in its control area to eight counterparties at prices exceeding the maximum allowed rate established in DEC's cost-based rate (CBR) tariff. The amount billed in excess of the CBR tariff's maximum allowed rate totaled \$97,591.² In making these forty-two transactions, DEC violated several Commission requirements.

5. First, these forty-two transactions violated the Commission's June 30, 2005 order revoking DEC's MBR authority in DEC's control area and requiring DEC to provide CBR sales in its control area.³ Because these sales occurred in DEC's control area, DEC was required by the Revocation Order to make them under its CBR tariff and abide by that tariff's maximum allowed rate. Instead, it sold the power at market rates provided for in its MBR tariff.

6. Second, DEC's forty-two transactions violated DEC's Commission-approved MBR tariff and CBR tariff. Like the Commission's directive in the Revocation Order, DEC's Commission-approved MBR and CBR tariffs prohibit DEC from making MBR sales in DEC's control area. DEC's MBR tariff explicitly prohibits MBR sales in the DEC control area.⁴ Also, DEC's CBR tariff requires prices based on cost-of-service and prohibits DEC from selling power at prices exceeding a specified maximum price, which is equal to the sum of a demand charge, the System Incremental Cost plus ten percent, and the cost of transmission service and any ancillary services purchased by DEC and resold to the buyer.⁵

7. Third, the forty-two transactions violated Commission regulations, which require DEC to abide by the rates provided for in DEC's tariffs. Specifically, section 35.1(e) of

² DEC has issued refunds totaling \$97,591, plus interest, to these counterparties. Therefore, disgorgement is not necessary.

³ *Duke Power*, 111 FERC ¶ 61,506, at P 1 (2005) (Revocation Order).

⁴ *Duke Power, A Division of Duke Energy Corporation, FERC Electric Tariff, Second Revised Volume No. 3, at Section X ("Prohibition on Sales in Duke Control Area")*.

⁵ *DEC Wholesale Cost-Based Rate Tariff Providing for Sales of Capacity and Energy, Tariff Volume No. 6, at Section IV*.

the Commission's regulations, 18 C.F.R. § 35.1(e) (2011), states: "No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge or compensation for or in connection with electric service subject to the jurisdiction of the Commission, or impose any classification, practice, rule, regulation or contract with respect thereto, which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown."

B. DEC Misreported 134 Transactions Occurring in Its Control Area as MBR Sales in Violation of Commission Regulations.

8. In addition to the forty-two transactions described above, DEC incorrectly reported 134 transactions occurring in its control area as MBR sales. In contrast to the forty-two transactions, these 134 sales did not exceed DEC's maximum allowed rate under its CBR tariff. Nonetheless, because they involved power sold in DEC's control area, they should have been reported under the CBR tariff. The 134 sales occurred between May 2006 and December 2008.

9. DEC's 134 transactions that were misreported as MBR sales violated the Commission's EQR filing requirements, which require public utilities to file detailed transaction information covering all services it provides for each of the four calendar quarters of each year. Specifically, section 35.10b of the Commission's regulations, 18 C.F.R. § 35.10b (2011), directs each public utility to file an updated EQR covering all services it provides for each of the four calendar quarters of each year, prepared in conformance with the software and guidance posted on the Commission's website. Similarly, the Commission's Order No. 2001 requires all public utilities to file an EQR, in which they must summarize the contractual terms and conditions in all their jurisdictional service agreements (including MBR and CBR sales) and provide detailed transaction information for power sales during the most recent calendar quarter.⁶

Stipulation and Consent Agreement

10. Enforcement and DEC resolved the Enforcement investigation by means of the attached agreement. DEC admits that it committed the violations referenced above.

11. DEC agrees to pay a civil penalty in the amount of \$425,000 to the United States Treasury. The payment is due within ten days of the effective date of the Agreement.

12. DEC also agrees to make two semi-annual compliance monitoring reports to Enforcement for one year following the effective date of the Agreement. After the receipt of the second semi-annual report, Enforcement may, at its sole discretion, require

⁶ See *Revised Public Utility Filing Requirements*, Order No. 2001, 99 FERC ¶ 61,107 (2002).

DEC to submit semi-annual reports for one additional year. Each compliance report will: (a) advise Enforcement whether violations by DEC have occurred related to DEC's MBR authority and the Commission's EQR filing requirements; (b) provide a detailed update of all compliance training administered and compliance measures instituted in the applicable period (excluding reliability matters), including a description of the training provided to all relevant personnel concerning DEC's MBR authority and the Commission's EQR filing requirements, and a list of the personnel that have received such training and when the training took place; and (c) include an affidavit executed by an officer of DEC that the compliance reports are true and accurate.

Determination of the Appropriate Civil Penalty

13. Pursuant to section 316A(b) of the Federal Power Act (FPA), the Commission may assess a civil penalty up to \$1,000,000 for each day that the violation continues.⁷ In approving the Agreement and the \$425,000 civil penalty, Enforcement considered the factors set forth in section 316A(b) of the FPA and the Penalty Guidelines.⁸ DEC entered into the relevant transactions in violation of the Revocation Order, which the Commission specifically directed at DEC. DEC charged eight counterparties prices exceeding the maximum allowed rate established in DEC's CBR tariff. Moreover, these transactions occurred for close to two years, between December 2006 and September 2008. At the time of its violations, DEC had a FERC Compliance Program, which included an annual budget, a Chief Ethics and Compliance Officer, a Chief FERC Compliance Officer, training programs, and a compliance hotline, but the program lacked written controls and training on DEC's CBR tariff. DEC promptly refunded overcharges that occurred as a consequence of its violations and has taken other measures to prevent their recurrence. Lastly, the civil penalty reflects DEC's full cooperation during the course of the investigation.

14. We conclude that the civil penalty and the semi-annual compliance monitoring reports specified in the Agreement are fair and equitable, and in the public interest.⁹

⁷ 16 U.S.C. § 825o-1(b) (2006).

⁸ *Enforcement of Statutes, Orders, Rules and Regulations*, 132 FERC ¶ 61,216 (2010). The Penalty Guidelines applied to the instant matter because settlement negotiations commenced after issuance of the Guidelines. *See id.* at n.2.

⁹ The civil penalty falls within a range consistent with the Penalty Guidelines. Application of the Penalty Guidelines in this case furthers the goal of "add[ing] greater fairness, consistency, and transparency to our enforcement program." *Id.* at P 2. We have considered the factors set forth in the Revised Policy Statement on Penalty Guidelines and have concluded that the penalty in this case is appropriate.

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The Commission orders:

The attached Stipulation and Consent Agreement is hereby approved without modification.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Duke Energy Carolinas, LLC

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Docket No. IN11-9-000

STIPULATION AND CONSENT AGREEMENT

I. INTRODUCTION

1. The staff of the Office of Enforcement (Enforcement) of the Federal Energy Regulatory Commission (Commission) and Duke Energy Carolinas, LLC (DEC) enter into this Stipulation and Consent Agreement (Agreement) to resolve an investigation under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2011), into whether DEC violated a Commission order, DEC's Commission-approved tariffs, and the Commission's regulations.

II. STIPULATED FACTS

Enforcement and DEC hereby stipulate and agree to the following:

A. Background

2. DEC is a subsidiary of Duke Energy Corporation (Duke Energy), which is one of the largest electric power holding companies in the United States with approximately four million customers, approximately 35,000 megawatts of electric generating capacity in the Midwest and the Carolinas, and natural gas distribution services in Ohio and Kentucky. DEC serves approximately 2.4 million residential, commercial, and industrial customers across 24,000 square miles in North Carolina and South Carolina.

3. Enforcement's investigation of DEC commenced following the identification of certain issues by the Division of Audits (DA) during an audit in Docket No. FA09-8-000. DA initiated the audit of DEC to evaluate the company's compliance with: (a) cross-subsidization restrictions on affiliate transactions; (b) regulations under the Public Utility Holding Company Act of 2005; (c) Uniform System of Accounts for Public Utilities' Accounting for Service Company Billings; (d) market-based rate (MBR) requirements; and (e) Electric Quarterly Reports (EQR) filing requirements. On January 27, 2010, DA referred certain of its findings to Enforcement regarding DEC's compliance with its MBR authority and the Commission's EQR filing requirements related to 176 transactions occurring from May 2006 through December 2008, in which DEC sold power in its control area to twelve counterparties.

B. Summary of Violations

1. DEC Charged Counterparties Prices Exceeding the Maximum Allowed Rate Under Its Cost-Based Rate Tariff in Violation of a Commission Order, DEC's Commission-Approved Tariffs, and Commission Regulations.

4. Between December 2006 and September 2008, DEC made forty-two power sales in its control area to eight counterparties at prices exceeding the maximum allowed rate established in DEC's cost-based rate (CBR) tariff. The amount billed in excess of the CBR tariff's maximum allowed rate totaled \$97,591.¹⁰ In making these forty-two transactions, DEC violated several Commission requirements.

5. First, these forty-two transactions violated the Commission's June 30, 2005, order revoking DEC's MBR authority in DEC's control area and requiring DEC to provide CBR sales in its control area (Revocation Order).¹¹ Because these sales occurred in DEC's control area, DEC was required by the Revocation Order to make them under its CBR tariff and abide by that tariff's maximum allowed rate. Instead, it sold the power at market rates provided for in its MBR tariff.

6. Second, DEC's forty-two transactions violated DEC's Commission-approved MBR tariff and CBR tariff. Like the Commission's directive in the Revocation Order, DEC's Commission-approved MBR and CBR tariffs prohibit DEC from making MBR sales in DEC's control area. DEC's MBR tariff explicitly prohibits MBR sales in the DEC control area.¹² Also, DEC's CBR tariff requires prices based on cost-of-service and prohibits DEC from selling power at prices exceeding a specified maximum price, which is equal to the sum of a demand charge, the System Incremental Cost plus ten percent, and the cost of transmission service and any ancillary services purchased by DEC and resold to the buyer.¹³

7. Third, the forty-two transactions violated Commission regulations, which require DEC to abide by the rates provided for in DEC's tariffs. Specifically, section 35.1(e) of the Commission's regulations, 18 C.F.R. § 35.1(e) (2011), states: "No public

¹⁰ DEC has issued refunds totaling \$97,591, plus interest, to these counterparties. Therefore, disgorgement is not necessary.

¹¹ *Duke Power*, 111 FERC ¶ 61,506, at P 1 (2005) (Revocation Order).

¹² *Duke Power, A Division of Duke Energy Corporation, FERC Electric Tariff, Second Revised Volume No. 3, at Section X ("Prohibition on Sales in Duke Control Area")*.

¹³ *DEC Wholesale Cost-Based Rate Tariff Providing for Sales of Capacity and Energy, Tariff Volume No. 6, at Section IV*.

utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge or compensation for or in connection with electric service subject to the jurisdiction of the Commission, or impose any classification, practice, rule, regulation or contract with respect thereto, which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown.”

2. DEC Misreported 134 Transactions Occurring in Its Control Area as MBR Sales in Violation of Commission Regulations.

8. In addition to the forty-two transactions described above, DEC incorrectly reported 134 transactions occurring in its control area as MBR sales. In contrast to the forty-two transactions, these 134 sales did not exceed DEC’s maximum allowed rate under its CBR tariff. Nonetheless, because they involved power sold in DEC’s control area, they should have been reported under the CBR tariff. The 134 sales occurred between May 2006 and December 2008.

9. DEC’s 134 transactions that were misreported as MBR sales violated the Commission’s EQR filing requirements, which require public utilities to file detailed transaction information covering all services it provides for each of the four calendar quarters of each year. Specifically, section 35.10b of the Commission’s regulations, 18 C.F.R. § 35.10b (2011), directs each public utility to file an updated EQR covering all services it provides for each of the four calendar quarters of each year, prepared in conformance with the software and guidance posted on the Commission’s website. Similarly, the Commission’s Order No. 2001 requires all public utilities to file an EQR, in which they must summarize the contractual terms and conditions in all their jurisdictional service agreements (including MBR and CBR sales) and provide detailed transaction information for power sales during the most recent calendar quarter.¹⁴

C. Additional Factors Regarding DEC’s Violations and Subsequent Corrective Actions

10. Enforcement found no evidence that DEC willfully refused to comply with the Revocation Order or intended to unjustly profit from making prohibited MBR sales in its control area. In fact, for the first nine months after the Commission issued the Revocation Order, DEC took appropriate steps and implemented controls to comply with the order and properly sold power in its control area under its CBR tariff and reported these sales as CBR sales. These efforts, however, did not continue after DEC’s April 2006 merger with Cinergy Corporation. In the post-merger environment, DEC did not ensure that effective pre-merger processes and training related to DEC’s CBR and MBR tariffs stayed in place.

¹⁴ See *Revised Public Utility Filing Requirements*, Order No. 2001, 99 FERC ¶ 61,107 (2002).

11. At the time of its violations, Duke Energy had a FERC Compliance Program, which included an annual budget, a Chief Ethics and Compliance Officer, a Chief FERC Compliance Officer, training programs, and a compliance hotline, but the program lacked written controls and training on DEC's CBR tariff. As a result, DEC's relevant personnel lacked sufficient familiarity with the Commission's requirements regarding DEC's MBR authority.

12. After learning of DA's findings and conducting its own internal review, DEC has taken substantial efforts to remedy its violations and prevent their recurrence, including:

- DEC immediately stopped making sales under its MBR tariff to customers who bought power with a delivery point in DEC's control area.
- DEC issued refunds totaling \$97,591, plus interest, for the forty-two transactions that contained a price exceeding the maximum rate under the CBR tariff.
- DEC documented the specific responsibilities for each office to ensure that sales under its CBR tariff will be priced and reported properly.
- DEC made appropriate modifications to its trade capture system to restore a distinct designation for sales under its CBR tariff, to ensure that such sales are priced and reported properly.
- DEC has implemented formal training for all relevant personnel regarding the rules and restrictions related to DEC's CBR and MBR tariffs.

III. REMEDIES AND SANCTIONS

13. For purposes of settling any and all civil and administrative disputes arising from Enforcement's investigation, DEC agrees with the facts as stipulated in Section II of this Agreement and admits to the violations described therein. DEC further agrees to take the following actions.

A. Civil Penalty

14. DEC shall pay a civil penalty of \$425,000 to the United States Treasury, by wire transfer, within ten days after the Effective Date of this Agreement, as defined below. DEC shall not pass through the civil penalty, directly or indirectly, to any present or future DEC customers or ratepayers or any customers or ratepayers of its affiliates.

B. Compliance Monitoring

15. DEC shall make two semi-annual compliance monitoring reports to Enforcement for one year following the Effective Date of this Agreement. The first semi-annual report shall be submitted no later than six months after the Effective Date of this Agreement and the second report shall be submitted no later than one year after the Effective Date of this Agreement. Each compliance report shall: (a) advise Enforcement whether violations by DEC have occurred related to DEC's MBR authority and the Commission's EQR filing requirements; (b) provide a detailed update of all compliance training administered and compliance measures instituted in the applicable period, including a description of the training provided to all relevant personnel concerning DEC's MBR authority and the Commission's EQR filing requirements, and a list of the personnel that have received such training and when the training took place; and (c) include an affidavit executed by an officer of DEC that the compliance reports are true and accurate. Upon request by Enforcement, DEC shall provide to Enforcement documentation to support its reports. After the receipt of the second semi-annual report, Enforcement may, at its sole discretion, require DEC to submit semi-annual reports for one additional year.

IV. TERMS

16. The Effective Date of this Agreement shall be the date on which the Commission issues an order approving this Agreement without material modification and that order becomes no longer subject to appeal. When effective, this Agreement shall resolve the matters specifically addressed herein as to DEC and any affiliated entity, and their agents, officers, directors and employees, both past and present.

17. Commission approval of this Agreement in its entirety and without material modification shall release DEC and forever bar the Commission from holding DEC, its affiliates, agents, officers, directors and employees, both past and present, liable for any and all administrative or civil claims arising out of, related to, or connected with the investigation addressed in this Agreement.

18. DEC's failure to: (a) make a timely civil penalty payment; (b) comply with the compliance monitoring requirements specified herein; or (c) comply with any other provision of this Agreement, shall be deemed a violation of a final order of the Commission issued pursuant to the Federal Power Act (FPA), and may subject DEC to additional action under the enforcement and penalty provisions of the FPA.

19. If DEC does not timely make the civil penalty payment, interest payable to the United States Treasury will begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19a(a)(2)(iii)(A) (2011) from the date those payments are due, in addition to any other enforcement action and penalty that the Commission may take or impose.

20. The Agreement binds DEC and its agents, successors, and assigns. The Agreement does not create any additional or independent obligations on DEC, or any affiliated entity, its agents, officers, directors, or employees, other than the obligations identified in this Agreement.

21. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer, or promise of any kind by any member, employee, officer, director, agent, or representative of Enforcement or DEC has been made to induce the signatories or any other party to enter into the Agreement.

22. Unless the Commission issues an order approving the Agreement in its entirety and without material modification, the Agreement shall be null and void and of no effect whatsoever, and neither Enforcement nor DEC shall be bound by any provision or term of the Agreement, unless otherwise agreed to in writing by Enforcement and DEC.

23. In connection with the payment of the civil penalty provided for herein, DEC agrees that the Commission's order approving the Agreement without material modification shall be a final and unappealable order assessing a civil penalty under section 316(a) of the FPA, 16 U.S.C. § 825o(a). DEC waives findings of fact and conclusions of law, rehearing of any Commission order approving the Agreement without material modification, and judicial review by any court of any Commission order approving the Agreement without material modification.

24. Each of the undersigned warrants that he or she is an authorized representative of the entity designated, is authorized to bind such entity, and accepts the Agreement on the entity's behalf.

25. The undersigned representative of DEC affirms that he has read the Agreement, that all of the matters set forth in the Agreement are true and correct to the best of his knowledge, information and belief, and that he understands that the Agreement is entered into by Enforcement in express reliance on those representations.

26. This Agreement is executed in duplicate, each of which so executed shall be deemed to be an original.

Agreed to and accepted:



Norman C. Bay, Director
Office of Enforcement
Federal Energy Regulatory Commission

9/19/11

Date



Catherine S. Stempier
Senior Vice President
Chief FERC Compliance Officer
Duke Energy Corporation

9/8/11

Date

Document Content(s)

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