

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Duke Energy Carolinas, LLC	)	Docket Nos. OA08-50-004
Progress Energy Carolinas, Inc.	)	OA08-51-003

**REQUEST FOR CLARIFICATION OR, IN THE  
ALTERNATIVE, REHEARING OF  
DUKE ENERGY CAROLINAS, LLC AND  
PROGRESS ENERGY CAROLINAS, INC.**

Pursuant to Section 313 of the Federal Power Act, 16 U.S.C. § 825/  
(2006), and Rules 212 and 713 of the Rules and Regulations of the Federal Energy  
Regulatory Commission (“Commission” or “FERC”), 18 C.F.R. §§ 385.212, .713  
(2009), Duke Energy Carolinas, LLC and Progress Energy Carolinas, Inc. (the  
“Filing Parties”) request clarification or, in the alternative, rehearing of an issue  
addressed in the Commission’s June 18, 2009 order in the above-referenced  
dockets involving their transmission planning processes.<sup>1</sup>

**I. STATEMENT OF ISSUE AND SPECIFICATION OF ERROR**

The following is a statement of the rehearing issue and specifications  
of error:

1. If the Commission has reversed the finding in Order No. 890 that confidentiality agreements may restrict the availability of competitive confidential information, such that it is only available to non-merchant function personnel, it has erred. If the Commission has reversed the finding in Order No. 890, it has failed to provide a

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<sup>1</sup> *Duke Energy Carolinas, LLC*, 127 FERC ¶ 61,281 (2009) (*June 18 Order*).

reasoned basis for a significant change in policy<sup>2</sup> and has acted arbitrarily.<sup>3</sup>

## **II. REQUEST FOR CLARIFICATION, OR IN THE ALTERNATIVE, REHEARING**

The *June 18 Order*, when read in light of the *SPP Order*,<sup>4</sup> raises the concern that wholesale markets will be compromised by a possible requirement to disclose competitive confidential information to merchant function personnel. The Filing Parties' concern is limited to a subset of confidential information, such as resource-specific data concerning individual resources (e.g., heat rates, fuel cost data) or data that is particularly commercially sensitive (e.g., the order of a load serving entity's economic generation dispatch stack), referred to as "competitive confidential information" herein. Specifically, they are concerned that the release of competitive confidential information to personnel engaged in competitive activities in the wholesale power markets could harm such markets and be used for anticompetitive purposes.

In the *June 18 Order*, FERC:

direct[ed] Duke and Progress . . . to require that resource-specific data in the planning process be disclosed by Participating Transmission Owners, under applicable confidentiality provisions, if the information is needed to participate in the transmission

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<sup>2</sup> E.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

<sup>3</sup> E.g., *Colo. Interstate Gas Co. v. FERC*, 850 F.2d 769 (D.C. Cir. 1988).

<sup>4</sup> *Southwest Power Pool, Inc.*, 127 FERC ¶ 61,271 (2009) (*SPP Order*).

planning process and/or to replicate transmission planning studies.<sup>5</sup>

In the *SPP Order*, the Commission similarly ruled “that restricting access to resource specific data denies access to data that market participants need to replicate the results of transmission planning studies in general, . . . and, therefore, is inconsistent with the transparency requirement that stakeholders have sufficient information to replicate all transmission planning studies.”<sup>6</sup> Given that the Filing Parties do not need to perform the same types of economic analyses in their transmission planning processes as do ISOs such as SPP,<sup>7</sup> they fully expect that stakeholders in their planning process will be able to replicate studies and otherwise participate in the planning process without the use of competitive confidential information. Nonetheless, if a situation arises where it is necessary to release competitive confidential information, the Filing Parties seek assurance that such information need not be disclosed to merchant function personnel.

**A. The Commission Should Clarify that It Has Not Overturned Order No. 890’s Limits on Access to Competitive Confidential Information by Personnel Engaged in Wholesale Merchant (Buying and Selling) Function Activities**

Throughout the entire Order No. 890 debate over access to confidential information, and competitive confidential information in particular,

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<sup>5</sup> *June 18 Order* at P 30 (emphasis added).

<sup>6</sup> *SPP Order* at P 15 (citation omitted).

<sup>7</sup> For an example, an ISO may need to perform customer-specific cost-benefit analysis in order to identify beneficiaries of a project under a beneficiary-pays approach to cost allocation.

the Filing Parties understood that competitive confidential information would *not* have to be released to those personnel engaged in wholesale merchant functions. Such understanding was based on the plain language of Order No. 890. Although the Filing Parties realized that competitive confidential information might have to be released to consultants, transmission function employees, and others, the Commission repeatedly made clear that some confidential information would not have to be disclosed, even under a confidentiality agreement, to “customer personnel that are involved” in “merchant functions.”<sup>8</sup> At the time the Commission made such commitment, Order No. 2004<sup>9</sup> was in effect, such that the term “merchant function” was understood to be quite broad, including personnel involved in wholesale purchasing.<sup>10</sup>

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<sup>8</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 276 n.177 (2007) (“The [confidentiality] agreement may appropriately restrict the sharing of sensitive information with customer personnel that are involved only in transmission functions, as opposed to merchant functions.”), *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 92 n.48 (“The confidentiality agreement may appropriately restrict the sharing of sensitive information with customer personnel that are involved only in transmission functions, as opposed to merchant functions.”), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

<sup>9</sup> *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003), *subsequent history omitted*.

<sup>10</sup> Also, the Standards of Conduct NOPR pending when Order No. 890 was issued continued to include a broad definition of Energy Affiliate. *See Standards of Conduct for Transmission Providers*, FERC Stats. & Regs. ¶ 32,611 (Jan. 18, 2007). The NOPR eliminating the Energy Affiliate concept and narrowing the concept of Marketing Function was issued March 21, 2008, several months after Order No. 890-A was issued. *Standards of Conduct for Transmission Providers*, FERC Stats. & Regs. ¶ 32,630 (2008).

The very first time the words “confidentiality agreement” are mentioned in Order No. 890 (at P 276), FERC included a footnote indicating that any confidentiality agreement may restrict the sharing of commercially sensitive information. In discussing the openness principle, FERC noted that “TAPS suggests that access to data be limited to transmission dependent utility employees not involved in marketing or to an outside consultant.”<sup>11</sup> The Commission indicated that:

We agree with the concerns of some commenters that safeguards must be put in place to ensure that confidentiality and CEII concerns are adequately addressed in transmission planning activities. Accordingly, we will require that transmission providers, in consultation with affected parties, develop mechanisms, such as confidentiality agreements and password-protected access to information, in order to manage confidentiality and CEII concerns.<sup>12</sup>

Given that the Commission already had made clear that confidentiality agreements could contain limits on disclosure to merchant personnel, this solution was adequate.

In discussing the transparency principle, the Commission similarly approved the concept of differing treatment of merchant and non-merchant personnel with regard to access to competitive confidential information. For example, FERC noted that as to non-jurisdictional transmission providers

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<sup>11</sup> Order No. 890 at P 459.

<sup>12</sup> *Id.* at P 460.

“existing reciprocity requirements ensure that information is not inappropriately shared with the non-public utility transmission provider’s marketing affiliate.”<sup>13</sup>

The Commission also noted that non-public utility transmission providers should abide by the Standards of Conduct with regard to managing non-public transmission planning information obtained through the planning process.<sup>14</sup> FERC continued:

In order for the Final Rule’s transmission planning process to be as effective as possible, we emphasize that all transmission providers, both jurisdictional and nonjurisdictional, must be assured that the information they provide in that process will not be used inappropriately in the wholesale power market.<sup>15</sup>

Moreover, in discussing economic planning studies, the Commission made clear that confidential information supplied to perform congestion studies could *not* be provided to merchant personnel of the Transmission Provider due to the Standards of Conduct:

Providing for confidential treatment and application of the Standards of Conduct, as discussed above, will give assurance to customers that their cost and other information will not be used improperly.<sup>16</sup>

Obviously, if the Transmission Provider’s merchant function was not entitled to the information, no *other* entity’s merchant personnel should receive it either, as

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<sup>13</sup> *Id.* at P 473.

<sup>14</sup> *Id.* at P 474.

<sup>15</sup> *Id.* at P 475.

<sup>16</sup> *Id.* at P 550.

the stated purpose of not allowing access by merchant personnel was not to prevent discriminatory access, but to prevent the harm to the market that would result from “improper use.”

In Order No. 890-A, again, the very first time a mention is made of a confidentiality agreement, there is a footnote indicating that such agreements may include restrictions on disclosure to merchant personnel.<sup>17</sup> Also in Order No. 890-A, FERC reiterated that Transmission Providers performing congestion studies could not disclose customer confidential information to their own merchant personnel, confirming an E.ON U.S. statement that, if transmission providers are provided cost information, they “must maintain the confidentiality of this information, protecting it from distribution to employees of the merchant function and its affiliates.”<sup>18</sup> If the Commission had intended all stakeholders, including all merchant function personnel, to receive the information, it would not have included such a limitation.

In sum, the Filing Parties always understood that the obligation to disclose confidential information to a stakeholder in order to allow such entity to verify transmission study results, replicate studies, or craft new studies did not mean that *every* employee of such stakeholder was permitted to review such information. And, in the highly unusual circumstance that all employees of a

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<sup>17</sup> Order No. 890-A at P 92 n.48.

<sup>18</sup> *Id.* at P 206.

stakeholder were “Merchant Function”<sup>19</sup> personnel, such entity could hire a consultant to support the replication of transmission studies. Indeed, given that the primary concern of the Commission is the ability of stakeholders to be able to replicate studies, it would be reasonable to limit disclosures of the most sensitive information to persons who have the requisite electrical engineering, power flow modeling, and transmission planning skills to perform studies.

The Commission routinely denies access to competitive confidential information in its litigated proceedings, restricting access to price and cost data to “non-Competitive Duty Personnel.”<sup>20</sup> Thus, the Filing Parties’ disclosure concerns could be mitigated by the Commission confirming that they are permitted to require parties receiving confidential information to sign a confidentiality agreement containing language similar to FERC protective orders that restrict access to non-Merchant Function, i.e., non-Competitive Duty, Personnel.

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<sup>19</sup> A Merchant Function Person, more typically called a “Competitive Duty Person” in FERC protective orders, is commonly defined as one whose duties include (i) the marketing or sale of electric power at wholesale, (ii) the purchase or sale of electric power at wholesale, (iii) the direct supervision of any employee with such responsibilities, or (iv) the provision of electricity marketing consulting services to entities engaged in the sale or purchase of electric power at wholesale. *E.g.*, *Connecticut Municipal Electric Energy Cooperative v. Milford Power Company, LLC*, Order of Chief Judge Adopting Protective Order, Dkt. No. EL08-17 (Apr. 2, 2008); *Mirant Americas Energy Marketing, L.P. v. ISO New England, Inc.*, Order of Chief Judge Adopting Protective Order, Dkt. No. EL01-93 (Dec. 3, 2007).

<sup>20</sup> *E.g.*, *Southwest Power Pool, Inc.*, Order of Chief Judge Adopting Protective Order, Dkt. No. ER09-342, et al. (June 15, 2009); *Key-Span Ravenswood, LLC v. New York Independent System Operator, Inc.*, Order Granting Motion to Replace Protective Order, Dkt. No. EL05-17 (Aug. 22, 2008).



**B. If the Commission Does Not Grant the Clarification as to Confidentiality Agreement, Rehearing Should Be Granted**

Given that the Commission ruled in Order No. 890 that competitive confidential information need not be disclosed to merchant function personnel, it would be legally and procedurally inappropriate to reverse that finding through individual compliance filing orders. If the Commission intends to prohibit Transmission Providers from adopting confidentiality agreements that restrict access, an approach approved in Order No. 890, it should do so through a notice and comment rulemaking process.<sup>21</sup> As discussed above, if the Commission denies the clarification, it will be making a significant change in a policy established in a rulemaking through company-specific adjudicated proceedings.

“‘[A]n agency changing its course must supply a reasoned analysis.’”<sup>22</sup> In Order No. 890, the Commission reflected its understanding that cost information is highly sensitive and should not be disclosed to merchant personnel. The only basis it has provided for reversing such finding is that stakeholders need information to replicate studies. As already discussed, however, non-merchant personnel or consultants can perform such studies rather than merchant personnel. The limitation on dissemination of confidential information should not prove to be a hardship, as the stakeholders that intend to replicate

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<sup>21</sup> *E.g., Appalachian Power Company v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *Alaska Professional Hunters Association, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999).

<sup>22</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

studies likely are those with significant resources, as they also need software and in-house or outside personnel with technical skills.

Finally, the Commission has permitted other Transmission Providers to restrict access to competitive confidential information and thus would be acting arbitrarily if it applied a different policy to the Filing Parties.<sup>23</sup> In the California ISO's ("CAISO") Transmission Planning Business Practice Manual, at Section 9.2,<sup>24</sup> the CAISO states:

Information that is confidential under Section 20.2(h)(1) or 20.2(h)(2) may be disclosed to any individual designated by a Market Participant, electric utility regulatory agency within California, or other TPP Participant that signs and returns to the ISO the form of the non-disclosure agreement, nondisclosure statement *and certification that the individual is or represents a non-Market Participant, which is any person or entity not involved in a marketing, sales, or brokering function as market, sales, or brokering are defined in FERC's Standards of Conduct for Transmission Providers* (18 C.F.R. § 358 et seq.) . . . .

Emphasis added. The fact that the CAISO was limiting information to individuals that were not acting in a "Market Participant" role was fully disclosed to FERC in the CAISO's December 21, 2007 Transmittal Letter (Docket No. OA08-62 at 8), which stated:

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<sup>23</sup> *Colo. Interstate Gas Co. v. FERC*, 850 F.2d 769, 774 (D.C. Cir. 1988) ("[T]he Commission's dissimilar treatment of evidently identical cases . . . seems the quintessence of arbitrariness and caprice"). See also *Westar Energy, Inc., et al. v. FERC* 473 F.3d 1239 (D.C. Cir. 2007).

<sup>24</sup> This BPM is available at: <https://bpm.caiso.com/bpm/bpm/version/0000000000000013> (at 69).

*Market Participants that are not involved in market, sales, or brokering functions, as defined under Commission regulations (18 C.F.R. § 385.3), may obtain information that the CAISO has solicited or the release of which could harm competitive markets if they sign the non-disclosure agreement. The restriction on access is intended to encompass both a Marketing Affiliate and Energy Affiliate of a Transmission Provider.*

Emphasis added. And, the restriction was mentioned in the order conditionally approving the CAISO filing.<sup>25</sup> A denial of the Filing Parties' request for rehearing would be arbitrary and capricious given that the CAISO has been permitted to restrict the dissemination of competitive confidential information in its transmission planning process.

### **III. CONCLUSION**

Wherefore, the Commission should grant the Filing Parties' clarification and/or rehearing request for the reasons set forth above.

Respectfully submitted,

/s/

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<sup>25</sup> *Cal. Indep. System Operator Corp.*, 123 FERC ¶ 61,283 at PP 30, 38 (2009).

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document on those parties on the official Service List compiled by the Secretary in these proceedings.

Dated at Washington, D.C., this 20th day of July, 2009.

/Jennifer L. Key/

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