

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

Duke Energy Carolinas, LLC)	Docket No.	ER13-83-001
Carolina Power and Light Company)		
)		
Alcoa Power Generating, Inc.)		ER13-88-001

**REQUEST FOR REHEARING OR, IN THE
ALTERNATIVE, CLARIFICATION**

Pursuant to Rules 207, 212, and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 C.F.R. §§ 385.207, .212, and .713 (2012), and Section 313 of the Federal Power Act (“FPA”), 16 U.S.C. § 825*l* (2006), Duke Energy Carolinas, LLC (“Duke”) and Carolina Power and Light Company, d/b/a Progress Energy Carolinas, Inc. (“Progress”) hereby submit this request for rehearing or, in the alternative, clarification of the February 21, 2013 order¹ issued in the above-referenced proceeding.

I. STATEMENT OF ISSUES AND SPECIFICATIONS OF ERROR²

1. The Commission erred in finding that Duke and Progress are a single public utility transmission provider.³ Such finding does not

¹ *Duke Energy Carolinas, LLC*, 142 FERC ¶ 61,130 (2013) (“*Order*”).

² The list below is intended to satisfy both the requirement that errors be specified and a statement of issues be provided as to all issues on which rehearing is sought. 18 C.F.R. § 385.713 (2012).

³ *See* 18 C.F.R. §§ 35.28 & 37.3.

constitute reasoned decision-making in light of the applicable regulatory text.⁴

2. The Commission lacks support for its theory that non-incumbents would perceive the North Carolina Transmission Planning Collaborative (“NCTPC”) as a region in which non-incumbents would not want to invest resources on the grounds that Duke’s and Progress’s parent companies have merged. Such theory is mere speculation and not well-founded.⁵

In addition, Duke and Progress are seeking clarification that if they are a single transmission provider for purposes of Order No. 1000,⁶ that such Duke-Progress transmission provider has no retail distribution service area, but rather has a single footprint for purposes of Order No. 1000.

II. REQUEST FOR REHEARING

A. **The Order Provides No Reasoned Response to the Fact that Duke and Progress are Separate Transmission Providers as that Term Has Been Defined by the Commission**

The primary thrust of the *Order* is that, post-merger, Duke and Progress so closely coordinate transmission and certain other activities that they are incapable of identifying more efficient and cost effective regional projects. That is, Order No. 1000 is based on the principle that two (or more) heads are better than one, and an entity with a single head will not ensure that better projects are found.

⁴ *E.g., Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (a court must ensure that FERC has articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made).

⁵ *E.g., Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1517 (D.C. Cir. 1984).

⁶ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh’g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012), *order on reh’g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

Although Duke and Progress do not accept the fundamental premise -- that among Duke, Progress, *and their stakeholders* (including non-incumbents), the region cannot identify more efficient and cost effective regional projects, the legal grounds for this rehearing request is the simple fact that *legally* Duke and Progress are separate “public utility transmission providers” and thus meet the legal requirement for a planning region.⁷

The Commission’s first basis for claiming that Duke and Progress are a single transmission provider is that “they still report to the same senior management, board of directors, and shareholders.” *Order* at P 28. Actually, six separate Duke Energy Corporation transmission providers report to the same senior management, board of directors, and shareholders. Yet, only two of the six have been found to comprise a single transmission provider. Plainly, common senior management is not the standard for whether two Duke operating companies comprise a single public utility transmission provider.

Next, the Commission recites a litany of statements that Duke and Progress will closely coordinate post-merger. *Order* at PP 29-33. Although the two will closely coordinate, close coordination on transmission planning is the very aim of Order No. 1000. The planned coordination of the activities of the two companies is not a rational basis for rejecting the region.

⁷ Order No. 1000, at P 160, holds that that “an individual public utility transmission provider cannot, by itself, satisfy the regional transmission planning requirements of either Order No. 890 or this Final Rule.”

The Commission dismisses the primary legal argument -- that the two entities each separately meet the legal definition of transmission provider. The basis for its dismissal was that the Commission did not make any finding in the merger orders “that the Joint OATT’s definition of ‘Transmission Provider’ was consistent with the definition of ‘transmission provider’ in Part 37 of the C.F.R., or that the proposed change to the *pro forma* definition of transmission provider would satisfy the C.F.R. definition.” *Order* at P 34. The Commission misstates the argument. Duke and Progress did *not* argue that the definition of Transmission Provider in their Joint OATT matches the definition of transmission provider in the Code of Federal Regulations (“C.F.R.”) or that the *pro forma* definition was the same as the C.F.R. definition. What Duke and Progress argued was quite simple – that, legally, they both meet the definition of transmission provider in the C.F.R.,⁸ which is a “public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce.” 18 C.F.R. § 37.3(a). Order No. 1000 is codified in 18 C.F.R. § 35.28, which provides in Subsection (a) that “[t]his section applies to any public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce.” That is, the definition of transmission provider for Order No. 1000 purposes is the very same definition as in 18 C.F.R. § 37.3(a).

⁸ They also argued that they both meet the definition in the Joint OATT, which is nearly identical to that in the C.F.R.

The Commission does assert that any claims that the two companies meet definitions used by FERC of the term transmission provider “undermine[s] the reasons why the Commission issued Order No. 1000, namely, to require public utility transmission providers to engage in regional transmission planning.” *Order* at 34. This somewhat obtuse response merely reiterates the notion that the Commission desired more than one transmission provider to be engaged in regional planning activities. It does not counter the legal fact that Duke and Progress each meet the definition of transmission provider.

In sum, the Commission has not responded in an adequate fashion to the fact that Duke and Progress are two transmission providers, as FERC uses that term in both Sections 35.28 and 37.3 of the C.F.R.

B. The *Order* Rejects the NCTPC Based on an Unsupported Theory as to How Non-Incumbents Might Perceive the NCTPC

In the *Order*, the Commission finds that a region dominated by a single transmission provider creates the perception “that only the views of that single transmission provider will be further considered in the regional transmission planning process” and that a non-incumbent transmission developer “will not be encouraged to invest its resources without believing that it has a fair opportunity for success.” *Order* at P 41. Rather obviously, the Commission cannot produce any actual evidence as to whether non-incumbents are hesitating to expend resources in the NCTPC in light of the merger, as the NCTPC Order No. 1000

planning process never took effect. Rather, the Commission can only rely on a theory.

Where an agency relies solely on theoretical evidence for the basis for an action,⁹ the theory itself must be a well supported and highly developed prediction of what will actually happen in the real world, not mere speculation on the part of the agency.¹⁰ The Commission's theory here is that, as a result of the merger of the Duke and Progress parent companies, non-incumbents will have a certain perception of the NCTPC that will make them unwilling to participate in the NCTPC planning process.

The Commission's theory is pure speculation and has no real world basis. There is simply no logic behind the theory that a non-incumbent would have the perception that a region with two transmission providers that are commonly owned would be any more or less welcoming to non-incumbents than a region with two (or more) unaffiliated transmission providers. The theory both ignores the NCTPC structure and the myriad factors that would be considered by a non-incumbent with regard to whether a region is sufficiently welcoming to non-incumbents to spend the time and resources to propose a regional project. Numerous factors would and could affect the perception of non-incumbents about a region, including: whether the region was permitted to retain a right of first

⁹ *Cf. Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006) (calling into question, but leaving open, the issue of whether a theoretical threat is a sufficient basis to impose a rulemaking).

¹⁰ *E.g., Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1517 (D.C. Cir. 1984).

refusal (“ROFR”) as to certain types of projects; whether any states within a region have enacted a ROFR or prohibit non-incumbent development; whether there is a voting structure as to the inclusion of regional projects for cost allocation; the complexity of the application process for developers; the support or lack of support of the relevant state commissions for Order No. 1000; the number of entities that typically propose or bid on projects. Singling out one single factor, rather than examining all the factors, in determining whether to propose a project or participate in a region, would be a facially irrational approach for a non-incumbent to take. For example, the Commission does not consider the obvious possibility that a non-incumbent may perceive it easier to deal with two entities under common ownership than multiple, wholly separate utilities, *each* of which must be satisfied before a project can be included in a regional transmission plan.

The only attempt by the Commission to justify its theory about the perception is a statement by LSP Power Transmission, LLC and LSP Transmission Holdings, LLC (“LSP”) that “a nonincumbent transmission developer will not be encouraged to invest its resources without believing that it has a fair opportunity for success.” *Order* at P 41 (citing LSP Protest at 5).¹¹ The actual quote from LSP is as follows:

[I]n the business world a company risking its resources is only encouraged to invest those resources, whether people or money, if it believes that it has a fair

¹¹ In contrast, the Commission ignores the support for the NCTPC as a region, as reflected in the comments of North Carolina Electric Membership Corporation (“NCEMC”) and the North Carolina Utilities Commission (“NCUC”).

opportunity at success and the deck is not stacked against it from the start.¹²

This statement does not support the Commission's flawed theory that the NCTPC will be perceived to be less welcoming than other regions. The nearly identical quote appears in LSP's Protest of the ISO-New England regional planning process:

In the business world, a company risking its resources is only encouraged to invest those resources, whether people or money, if it believes that it has a fair opportunity at success and the deck is not stacked against it from the start.¹³

Additionally, the statement appears in modified form in other LSP protests, such as the protest against the NYISO region:

Without a level playing field, a company will not risk its resources, whether those resources are people or money.¹⁴

LSP has "perceived" the potential for discrimination by incumbents and even by ISOs to be a national problem, not one specific to the NCTPC or the Duke-Progress merger.

¹² Motion to Intervene, Protest and Comments of LS Power Transmission, LLC and LSP Transmission Holdings, LLC at 5, Docket No. ER13-83-000 (Nov. 26, 2012) ("LSP Protest").

¹³ Motion to Intervene and Protest of LS Power Transmission, LLC and LSP Transmission Holdings, LLC at 7, Docket No. ER13-193-000 (Dec. 10, 2012).

¹⁴ Motion to Intervene and Protest [of] LS Power Transmission, LLC, LSP Transmission Holdings, LLC and Pattern Transmission LP at 6, Docket No. ER13-102-000 (Nov. 26, 2012).

III. IN THE ALTERNATIVE, REQUEST FOR CLARIFICATION

In the event the Commission does not grant rehearing, Duke and Progress seek the following clarification.

The concepts of “regional projects” and “local projects” were developed in Order No. 1000.¹⁵ One primary purpose of the local project concept was to identify which projects could be subject to a ROFR¹⁶ and were *not* subject to regional cost allocation. A local project is defined as “a transmission facility located solely within a public utility transmission provider’s retail distribution service territory or footprint that is not selected in the regional transmission plan for purposes of cost allocation.” Order No. 1000 at P 63. The Commission acknowledged that Duke and Progress each have their own retail distribution service area. *Order* at P 27 (explaining that although they “may have distinct retail distribution territories,” this fact “does not control whether Duke and Progress are separate transmission providers for purposes of Order No. 1000 compliance”). Indeed, the Commission has no jurisdiction to determine the scope of retail service territories, as service territory determinations are within the exclusive purview of the states.¹⁷ The Duke-Progress transmission provider found

¹⁵ Order No. 1000 at P 63.

¹⁶ Non-RTO regions do not include ROFRs in their tariffs; they had to create an opportunity for non-incumbents to have the costs of their selected regional projects allocated to beneficiaries.

¹⁷ *Gainesville Utils. Dep’t v. Fla. Power Corp.*, 79 P.U.R.3d 269 (FPC Nov. 5, 1968).

to exist by this Commission has no retail distribution service territory, as only a state has legal authority to define such a territory.

Therefore, the only way to interpret the term local project in the context of a single Duke-Progress transmission provider is that a local project is a transmission facility located solely within the Duke-Progress footprint. If Duke-Progress is one transmission provider, as the Commission posits, it can only have one “footprint.” Indeed, the very concept of footprint was coined for entities that lacked a retail distribution service territory, such as Duke-Progress.¹⁸ It would be utterly illogical to claim a single entity has two footprints.

LSP’s clarification request actually confirms the conclusion above.¹⁹ LSP first makes the point that “[t]here is no dispute that Duke and Progress maintain distinct retail distribution service territories.” LSP Request at 2. That is absolutely true. The impact of that truism, however, is that Duke-Progress have no such retail territory at all because retail territories were assigned by the state commissions to Duke and Progress *separately*, not as a combined, single entity. LSP next claims that the “Commission’s suggestion that two distinct retail distribution service providers can plan ‘local’ projects in a joint manner with other

¹⁸ Order No. 1000-A explains, at P 420, that footprint “was intended to include, but not be limited to, the location of the transmission facilities of a transmission-only company that owns and/or controls the transmission facilities of formerly vertically-integrated utilities, as well as the location of the transmission facilities of any other transmission-only company.”

¹⁹ Request for Clarification of LSP Transmission Holdings, LLC, Docket No. ER13-83-000 (Mar. 15, 2013) (“LSP Request”). This request for clarification thus also constitutes a response to that pleading.

unaffiliated load-serving entities has the potential to turn Order No. 1000 on its head.” *Id.* at 3. Under Order No. 890,²⁰ a transmission provider is not permitted to engage in *local* planning *without* engaging all interested stakeholders, including unaffiliated load-serving entities, rendering this claim nonsensical. The combined Duke-Progress entity must plan for its footprint because it lacks a service territory and it must engage load-serving entities in its footprint. LSP concludes that “it would be inappropriate for Duke and Progress to jointly plan transmission addressing the needs of unaffiliated load-serving entities” outside the regional planning process. LSP Request at 3. This statement flies in the face of the Commission’s decision permitting the NCTPC to be a vehicle for local transmission planning. *See Order* at P 39.

If the Commission denies rehearing and affirms Duke-Progress is a single transmission provider for Order No. 1000 purposes, it thus should confirm that Duke-Progress has no retail distribution service area, but rather has a single footprint for Order No. 1000 purposes.

²⁰ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007) (subsequent history omitted).

IV. CONCLUSION

For the foregoing reasons, Duke and Progress respectfully request that the Commission grant rehearing, or in the alternative, grant clarification for the reasons specified above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, D.C., this 25th day of March, 2013.

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