

153 FERC ¶ 61,189  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

North Carolina Waste Awareness  
and Reduction Network, Inc.

v.

Docket No. EL15-32-001

Duke Energy Carolinas, LLC  
and Duke Energy Progress, Inc.

ORDER DENYING REHEARING

(Issued November 19, 2015)

1. On May 14, 2015, the North Carolina Waste Awareness and Reduction Network, Inc. (NC WARN) filed a request for rehearing<sup>1</sup> of the Commission's order issued on April 20, 2015<sup>2</sup> in the above-captioned proceeding. The Commission denies NC WARN's request for rehearing, as explained below.

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<sup>1</sup> While NC WARN titled its pleading "Motion for Reconsideration and Renewal of Petition for Investigation," because it seeks to reverse the Commission's decision in the original order, it is essentially a request for rehearing and we will exercise our discretion to treat it as such. *E.g., Seminole Elec. Coop., Inc. v. Florida Power & Light Co.*, 153 FERC ¶ 61,037, at P 11 & n.16 (2015) ("creative nomenclature does not make [public comments] anything other than a request for rehearing"); *Stowers Gas & Oil Co.*, 27 FERC ¶ 61,001, at n.3 (1984) ("Nor does the style in which a petitioner frames a document necessarily dictate how the Commission must treat it.").

<sup>2</sup> *North Carolina Waste Awareness and Reduction Network, Inc. v. Duke Energy Carolinas, LLC and Duke Energy Progress, Inc.*, 151 FERC ¶ 61,079 (2015) (Order on Complaint).

## **I. Background and Procedural History**

2. On December 16, 2014, pursuant to Rule 206 of the Commission's Rules of Practice and Procedure,<sup>3</sup> NC WARN filed a complaint and petition for investigation of the practices of Duke Energy Carolinas, LLC (Duke Energy Carolinas) and Duke Energy Progress, Inc. (Duke Energy Progress) (together, Duke Energy) that NC WARN alleged lead to "excess capacity and waste."<sup>4</sup> Specifically, NC WARN asked the Commission to hold an investigative hearing in Raleigh, North Carolina concerning the three issues raised in the complaint. First, whether Duke Energy manipulated the electricity market through its generation construction and other resource procurement practices, leading to unjust and unreasonable rates. Second, whether Duke Energy failed to comply adequately with Order No. 1000<sup>5</sup> and related orders and policies.<sup>6</sup> Third, whether Duke Energy built and continues to build unnecessary generation resources instead of purchasing from neighboring utilities in the Southeast. NC WARN also asked the Commission to fund an independent study to evaluate the potential benefits of Duke Energy entering into a regional transmission organization (RTO) and requiring Duke Energy to purchase power from other utilities in lieu of constructing its own power plants.<sup>7</sup>

3. On April 30, 2015, the Commission denied the complaint, finding that NC WARN had not demonstrated that Duke Energy's capacity construction and procurement-related activities resulted in unjust and unreasonable wholesale energy or transmission rates.<sup>8</sup> The Commission also found that NC WARN had not made a viable claim of market manipulation; nor had NC

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<sup>3</sup> 18 C.F.R. § 385.206 (2015). Complaints typically are filed under section 206 of the Federal Power Act (FPA). 16 U.S.C. § 824e (2012).

<sup>4</sup> Complaint at 1.

<sup>5</sup> *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*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

<sup>6</sup> Complaint at 2-3.

<sup>7</sup> *Id.* at 1.

<sup>8</sup> Order on Complaint, 151 FERC ¶ 61,079 at P 66.

WARN shown that Duke Energy violated Order No. 1000 or related orders or practices. Consequently, the Commission declined to act on the complaint.<sup>9</sup>

## II. Request for Rehearing

4. On May 14, 2015, NC WARN filed its request for rehearing, renewing its “petition for an investigation to fully assess the costs and benefits for Duke Energy’s involvement in a regional strategy.”<sup>10</sup> In support of its request, NC WARN argues that by denying its Motion to Allow Reply, the Commission failed to consider Duke Energy’s “misrepresentations” of NC WARN’s factual and legal position and the relief NC WARN sought.<sup>11</sup> NC WARN argues that this led directly to the Commission making fundamental errors in paragraphs 17, 65, and 66 of the Order on Complaint. NC WARN asserts that the Commission adopted Duke Energy’s position that the complaint failed to prove conclusively that Duke Energy’s rates were discriminatory, even though that determination cannot be made without the investigation NC WARN requested. NC WARN contends that it met its initial burden with enough evidence to show an investigation was needed to determine how rates could be lower through regional strategies. NC WARN asserts that “[a] reasonable position is that any time rates can be lowered, and are not, they are *de facto* unjust and unreasonable.”<sup>12</sup>

5. NC WARN states that the Commission’s “primary error” conflated the requested petition for an investigation into the potential benefits and costs that participation in an RTO or other regional strategy may provide, with the need for the complainant, NC WARN, to make the definitive case upfront that an RTO is the necessary remedy.<sup>13</sup> NC WARN states that “[p]aragraph 65 of the Order on Complaint summarizes this as ‘[r]ather, the standard is whether an RTO is necessary to remedy undue discrimination or preference.’”<sup>14</sup> NC WARN asserts that this is not the standard for initiating an investigation into whether the lack of RTO participation is causing undue discrimination or preference and/or unjust or unreasonable rates, which is the relief that NC WARN requested.

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<sup>9</sup> *Id.* PP 17, 36-41, 46-48, 60-66. The Commission expressly declined to investigate, fund a study, or hold a hearing on the allegations in the complaint. *Id.* P 66.

<sup>10</sup> Rehearing Request at 1.

<sup>11</sup> *Id.* (citing Order on Complaint, 151 FERC ¶ 61,079 at P 14).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* (quoting Order on Complaint, 151 FERC ¶ 61,079 at P 65).

6. NC WARN contends that the purpose of the requested investigation is to determine whether the rates are now, or will be, far greater than they need to be if Duke Energy does not take advantage of regional cooperative measures, such as joining an RTO.<sup>15</sup> NC WARN states that it expects that, given the data showing excess capacity throughout the Southeast region, coupled with the significant savings from Entergy joining Midcontinent Independent System Operator, Inc. (MISO), this investigation would more than likely show significant savings from Duke Energy and other southeastern utilities creating an RTO or other similar regional cooperative.

7. In addition, NC WARN states that, as noted in the complaint, the study of Entergy's integration into MISO, which was funded in part by the Commission, found that consumers will save \$1.4 billion over 10 years by joining MISO.<sup>16</sup> NC WARN asserts that such potential benefits, while not specifically quantifiable at this time by NC WARN, warrant a close look by the Commission. NC WARN adds that the Commission is not hampered by the confidentiality barriers that NC WARN faces and the Commission has the ability to require Duke Energy and other southeastern utilities to submit data that is proprietary in nature or contains trade secrets.<sup>17</sup> NC WARN maintains that, only after an investigation can parties debate whether Duke Energy's rates are unjust, unreasonable, or [unduly] discriminatory. NC WARN asserts that, if the savings available to Duke Energy customers are of the same magnitude as the savings to Entergy customers, then the Commission can make a determination that, if Duke Energy customers can save significantly on their electricity bills from Duke Energy joining an RTO, it is unjust and unreasonable for them to pay more.

8. NC WARN asserts that the purpose of regulatory reform by the Commission is to ensure that the rates, terms, and conditions of transmission and sales for resale in interstate commerce by public utilities are just, reasonable and not unduly discriminatory or preferential. NC WARN states that sections 205 and 206 of the FPA allow the Commission to restructure the electricity industry to foster competition and reduce unfair and unreasonable rates.<sup>18</sup> NC

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 2-3.

<sup>18</sup> *Id.* at 3 (citing 16 U.S.C. §§ 824d and 824e (2012)).

WARN asserts that one of the policies the Commission uses to foster fair and reasonable rates is RTO or independent system operator (ISO) formation and Order No. 2000<sup>19</sup> specifically states:

[W]e conclude that the Commission possesses both general and specific authorities to advance voluntary RTO formation. We also conclude that the Commission possesses the authority to order RTO participation on a case-by-case basis, if necessary, to remedy undue discrimination or anticompetitive effects where supported by the record.<sup>20</sup>

9. NC WARN states that the purpose of an investigation is to develop the record upon which the Commission can determine whether Duke Energy's rates would be lower under RTO participation. NC WARN's position is that, if the rates would be significantly lower under a regional strategy, Duke Energy's rates, now and in the future, are, without doubt discriminatory, unjust and unreasonable. In conclusion, NC WARN requests that, based on the allegations and evidence presented in its complaint, the Commission reconsider and initiate an investigation of the costs and benefits of Duke Energy's involvement in a regional strategy.<sup>21</sup>

10. On July 1, 2015, pursuant to Rule 212 of the Commission's Rules of Practice and Procedure,<sup>22</sup> Duke Energy filed a motion in response to the Commission's order granting rehearing for further consideration (Duke Motion). In the Duke Motion, Duke Energy asks the Commission to clarify that the order granting rehearing for the limited purpose of further consideration, i.e., the tolling order, did not determine that the NC WARN pleading met the requirements for rehearing under section 313 of the Federal Power Act<sup>23</sup> or Rule 713 of the Commission's Rules of Practice and Procedure.<sup>24</sup> In the alternative, if the Commission has made such a "preliminary" determination, Duke Energy asks the Commission to find that the

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<sup>19</sup> *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

<sup>20</sup> Rehearing Request at 3 (quoting Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,043).

<sup>21</sup> *Id.* at 4.

<sup>22</sup> 18 C.F.R. § 385.212 (2015).

<sup>23</sup> 16 U.S.C. § 825l (2012).

<sup>24</sup> 18 C.F.R. § 385.713 (2015).

NC WARN pleading failed to meet the requirements for a request for rehearing and instead should be treated as a request for reconsideration.

### III. Discussion

11. We deny rehearing. As noted above, insofar as NC WARN's pleading seeks to change the determination in the Order on Complaint, it is essentially a request for rehearing, and the Commission has discretion to treat it as a rehearing request.<sup>25</sup>

12. The Commission's Rules of Practice and Procedure require a rehearing request to adhere to certain requirements. Specifically, Rule 713(c)(2) requires a rehearing request to include a separate section entitled "Statement of Issues" listing each issue presented to the Commission in a separately enumerated paragraph that includes representative Commission and court precedent on which the participant is relying.<sup>26</sup> This requirement is not a mere formality. Rather, the purpose of this requirement is to ensure that the filer, the Commission, and all other participants understand the issues raised by the filer, and to enable the Commission to respond to these issues and avoid wasteful litigation.<sup>27</sup>

13. NC WARN's pleading does not contain the Statement of Issues required by Rule 713(c)(2), and, therefore, NC WARN's rehearing request fails to conform to the requirements spelled out in the Commission's Rules of Practice and Procedure. Under Rule

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<sup>25</sup> See *supra* n.1. With regard to Duke Energy's motion, we note that, while the Commission's Office of the Secretary issued a tolling order (Order Granting Rehearing for Further Consideration) on June 12, 2015, the issuance of a tolling order does not constitute a finding by the Commission on the merits that rehearing was properly sought or that rehearing indeed lies. Cf. *Valero Interstate Trans. Co. v. FERC*, 903 F.2d 364, 369 (5th Cir. 1990).

<sup>26</sup> 18 C.F.R. § 385.713(c)(2) (2015). See *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, FERC Stats. & Regs. ¶ 31,193 (2005), *order on reh'g*, Order No. 663-A, FERC Stats. & Regs. ¶ 31,211 (2006) (amending Order No. 663 to limit its applicability to rehearing requests).

<sup>27</sup> Order No. 663, FERC Stats. & Regs. ¶ 31,193 at PP 3-4. The Commission has explained that "a clearly articulated Statement of Issues ensures that issues are properly raised before the Commission and avoids the waste of time and resources . . . because the issues on appeal were not clearly identified before the Commission." *Union Elec. Co.*, 119 FERC ¶ 61,200, at 62,219 n.4 (2007) (citation omitted).

713, any issue not so listed will be deemed waived.<sup>28</sup> Accordingly, NC WARN's rehearing request is denied.<sup>29</sup>

14. In any event, even if we were to consider NC WARN's rehearing request, we conclude that the issues raised in NC WARN's rehearing request lack merit. At the outset, NC WARN contends that the Commission erred by denying NC WARN's Motion to Allow Reply, which directly led to certain alleged errors in the Order on Complaint. We disagree. In a complaint proceeding, the complainant is required to make its *prima facie* case in its complaint.<sup>30</sup> The Commission's Rules of Practice and Procedure do not allow answers to answers, such as the reply NC WARN filed in response to the respondents' answer to the complaint, unless otherwise ordered by the decisional authority.<sup>31</sup> While the Commission may exercise its discretion and accept answers to answers, in the Order on Complaint, the Commission was not persuaded to exercise its discretion and accept NC WARN's answer (and the answer filed by other parties) and allow a departure from its Rules of Practice and Procedure, and therefore rejected the answers, consistent with its Rules. It was incumbent upon NC WARN to make its *prima facie* case in its complaint, and not assume that it would be permitted to make its case belatedly in a generally unacceptable reply.

15. We also continue to find that NC WARN has failed to meet its burden under section 206 of the FPA to demonstrate that further investigation or study of the issues NC WARN raised in its complaint would reveal Duke Energy's rates to be unjust, unreasonable, or

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<sup>28</sup> 18 C.F.R. § 385.713(c)(2) (2015); *see also* *Midwest Indep. Trans. Sys. Op., Inc.*, 145 FERC ¶ 61,225, at P 10 (2013); *Utah Indep. Power*, 125 FERC ¶ 61,257 (2008); *S. Carolina Elec. & Gas Co.*, 116 FERC ¶ 61,218 (2006); *Duke Power Co., LLC*, 116 FERC ¶ 61,171, at 61,736 (2006).

<sup>29</sup> *See, e.g.,* *Midwest Indep. Trans. Sys. Op., Inc.*, 145 FERC ¶ 61,225 at P 10.

<sup>30</sup> 18 C.F.R. § 385.206(b)(8) (2015) (requiring complainant to "include all documents that support the facts in the complaint in possession of, or otherwise attainable by the complainant, including, but not limited to, contracts and affidavits."); *Michael Canales v. Edison Int'l, EIX and So. Cal. Edison*, 147 FERC ¶ 61,020, at P 26 (2014) ("A complainant must present a *prima facie* case demonstrating unjustness, unreasonableness or discriminatory nature of the existing practice before the Commission will grant relief under FPA § 206.").

<sup>31</sup> 18 C.F.R. § 385.213(a)(2) (2015) (prohibiting answers to protests and answers to answers unless otherwise ordered by the Commission).

unduly discriminatory,<sup>32</sup> and we see no basis to investigate further whether Duke Energy would be required to join an RTO, purchase power from neighboring utilities, or otherwise become involved in “a regional [power purchase] strategy.” First, regarding NC WARN’s manipulation claim, the Commission found that NC WARN had not explained how the conduct it complained of met the three elements of a manipulation claim. Thus, the Commission reasonably found that there existed nothing further to investigate.<sup>33</sup> Second, while NC WARN claimed that Duke Energy failed to comply with Order No. 1000, NC WARN did not point to any particular requirement or provision of Order No. 1000 that Duke Energy allegedly violated, or, for example, that would require Duke Energy’s affiliates to connect their utility systems to neighboring utilities.<sup>34</sup> Indeed, the Commission pointed out that it has emphasized that the focus of Order No. 1000 is “ensuring there is a fair regional transmission planning process, not substantive outcomes of that process.”<sup>35</sup> Thus, there is nothing further to investigate concerning Duke Energy’s compliance with Order No. 1000 as it relates to NC WARN’s claim. And, NC WARN provided no basis on rehearing to warrant changing our findings.

16. Furthermore, the Commission fully addressed NC WARN’s repeated assertion that Duke Energy has built, and continues to seek authority to build, generating facilities that NC WARN alleges are not needed and that lead to unjust and unreasonable rates.<sup>36</sup> The Commission evaluated the evidence NC WARN presented in its complaint<sup>37</sup> and determined that NC WARN had not shown that Duke Energy’s generation procurement, reserve margins,

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<sup>32</sup> 16 U.S.C. § 824e(b) (2012) (complainant has the burden of proof). While NC WARN asserts that “[a] reasonable position is that any time rates can be lowered, and are not, they are *de facto* unjust and unreasonable[,]” *see* Rehearing Request at 1, NC WARN ignores long-standing judicial precedent holding that “there is not a single ‘just and reasonable rate’ but rather a zone of rates that are just and reasonable; a just and reasonable rate is one that falls within that zone.” *Me. Pub. Utils. Comm’n v. FERC*, 520 F.3d 464, 470-71 (D.C. Cir. 2008), *rev’d in part on other grounds sub nom. NRG Power Mktg., LLC v. Me. Pub. Utils Comm’n*, 558 U.S. 165 (2010).

<sup>33</sup> Order on Complaint, 151 FERC ¶ 61,079 at PP 46-48.

<sup>34</sup> *Id.* P 62.

<sup>35</sup> *Id.* P 62 & n.109 (citation omitted).

<sup>36</sup> *See* Order on Complaint, 151 FERC ¶ 61,079, at PP 36-41.

<sup>37</sup> *See id.*

and related practices resulted in unjust and unreasonable rates.<sup>38</sup> The Commission also found that NC WARN had failed to demonstrate that Duke Energy's projected reserve markets were excessive and inconsistent with reliable resource planning.<sup>39</sup>

17. Specifically, among other things, the Commission found that Duke Energy's Integrated Resource Plans, which NC WARN relied on for its analysis, failed to support a claim that Duke Energy maintains excessive capacity.<sup>40</sup> Nor did the Commission find a projected load growth of 1.5 percent to be unreasonable or to necessarily lead to unjust or unreasonable rates.<sup>41</sup> The Commission also stated that Duke Energy had no authority over how much generation neighboring utilities have or will have or the resource procurement decisions they make.<sup>42</sup> And, while the Commission has jurisdiction over transmission rates and wholesale power sales/rates, the Commission does not, as a general matter, have jurisdiction over the "facilities used for the generation of electric energy."<sup>43</sup> Nothing NC WARN offers on rehearing warrants our reaching a different result.

18. In sum, NC WARN has provided no persuasive basis on rehearing to warrant changing our findings and investigating further the claims NC WARN raised in its complaint. Accordingly, we deny NC WARN's request for rehearing.

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<sup>38</sup> *Id.* P 36.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* P 38.

<sup>41</sup> *Id.* P 39.

<sup>42</sup> *Id.* P 41.

<sup>43</sup> 16 U.S.C. § 824(b)(1) (2012) (emphasis added). The only authority the Commission has is what is provided in the statutes passed by Congress. *E.g.*, *Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007) (Commission has no authority beyond that authorized by Congress; in the absence of statute conferring authority on Commission, Commission has none); *Cal. Indep. Sys. Op. Corp. v. FERC*, 372 F.3d 395, 398-99 (D.C. Cir. 2004) (same).

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The Commission orders:

NC WARN's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

Document Content(s)

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