NO. COA09-1273

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

IN THE MATTER OF
DUKE ENERGY CAROLINAS,
LLC's ADVANCE NOTICE
OF PURCHASE POWER AGREEMENT
with the CITY OF ORANGEBURG,
SOUTH CAROLINA and JOINT
PETITION FOR DECLARATORY
RULING.

N.C. Utilities Commission
No. E-7, Sub 858

Appeal by Duke Energy Carolinas, LLC and City of Orangeburg, South Carolina from order on advance notice and joint petition for declaratory ruling dated 30 March 2009 by the North Carolina Utilities Commission. Heard in the Court of Appeals 12 May 2010.

Duke Energy Corporation, by Lara Simmons Nichols; Law Office of Robert W. Kaylor, P.A., by Robert W. Kaylor; and K&L Gates LLP, by Kiran H. Mehta, for Appellant Duke Energy Carolinas, LLC.

Spiegel & McDiarmid LLP, by James N. Horwood, Peter J. Hopkins, and J.S. Gebhart; and Thomas J. Bolch, for Appellant City of Orangeburg, South Carolina.

Allen Law Offices, PLLC, by Dwight W. Allen and Britton H. Allen; and Progress Energy General Counsel Len S. Anthony, for Appellee Progress Energy Carolinas, Inc.; and Assistant Attorney General Leonard G. Green, for Appellee Roy Cooper, Attorney General.

Public Staff Executive Director Robert P. Gruber, by Chief Counsel Antoinette R. Wike and Staff Attorney Gisele L. Rankin, for Appellee Public Staff-North Carolina Utilities Commission.

West Law Offices, P.C., by James P. West, for Intervenor-

Appellee Public Works Commission of the City of Fayetteville, North Carolina.

Poyner Spruill LLP, by Michael S. Colo and W. Mark Griffith, for Electricities of North Carolina, Inc., amicus curiae.

McGEE, Judge.

This action was initiated when Duke Energy Carolinas, LLC (Duke) and the City of Orangeburg, South Carolina (Orangeburg) filed a joint petition for a declaratory ruling and an advance notice with the North Carolina Utilities Commission (Commission), on 20 June 2008. Duke and Orangeburg had negotiated a wholesale energy contract (the agreement) dated 23 May 2008 in which Duke agreed to supply Orangeburg with electrical power at native load priority. This meant that Duke agreed to charge Orangeburg, a municipality for which it had never supplied power, the same rates, and provide Orangeburg the same level and guarantee of service, as Duke charged and provided to its current retail native load customers. As defined by the Commission in Docket No. E-7, Sub 858, Order on Advance Notice and Joint Petition for Declaratory Ruling, 30 March 2009 (the order), retail native load customers are "the captive retail customers that Duke is obligated to serve under North Carolina Law." Retail native load customers - and some specific wholesale customers - are afforded certain protections and benefits by the Commission because they "have been on-system for years and have contributed to paying for [Duke's] present system facilities." Prior to entering into the agreement and initiating this action, Duke had sought authorization from the Commission for

a merger with another power company, Cinergy Corp. The Commission approved the merger, but made its approval contingent on Duke's acceptance of certain regulatory conditions. Pursuant to Docket No. E-7, Sub 795, Relevant Definition and Regulatory Conditions (Regulatory Conditions), Duke agreed that it would "continue to serve its Retail Native Load Customers in North Carolina with the lowest-cost power it can reasonably generate or purchase from other sources before making power available for sales to customers that are not Retail Native Load Customers." The regulatory conditions further mandated that "[b]efore granting native load priority to a wholesale customer . . . [Duke] must provide 30 days' advance notice of its intent to grant native load priority and to treat the retail native load of a proposed wholesale customer as if it were [Duke's] retail native load pursuant to [other regulatory conditions]."

Because the agreement contemplated that Duke would provide Orangeburg native load priority rates, Duke was required to provide the Commission with thirty days' notice in order to allow the Commission an opportunity to review the agreement and determine if it was in compliance with North Carolina law and the rules and regulations of the Commission. Duke filed the advance notice required on 20 June 2008, and Duke and Orangeburg simultaneously filed their joint petition for declaratory ruling (the petition) with the Commission. In the petition, Duke and Orangeburg asked the Commission to approve Duke's agreement to provide Orangeburg with native load priority. Duke and Orangeburg expanded the scope

of their petition in their joint proposed order and in their oral arguments, and requested the Commission to also issue a declaratory ruling allowing all "native load priority wholesale contracts [for terms of five years or more] entered into subsequent to March 24, 2006," whether or not they involved Duke or Orangeburg, to apply system average costs regardless of whether or not the purchaser had been a native load priority customer in the past. Duke and Orangeburg also argued that the Commission did not have authority to alter the rates Duke and Orangeburg had agreed upon in the agreement. Duke and Orangeburg contended that these rates were under the exclusive jurisdiction of the Federal Regulatory Energy Commission (FERC).

In the order, the Commission first stated that it would "not issue any declaratory ruling that purports to revise Duke's regulatory conditions or to apply to contracts beyond this docket[.]" In rejecting the request of Duke and Orangeburg for a sweeping declaratory ruling concerning future wholesale contracts, the Commission stated: "As the Commission has ruled before, a declaratory ruling should not be used as a substitute for another proceeding that must be filed in the future."

Concerning the agreement between Duke and Orangeburg, the Commission ruled that the Commission was not pre-empted by federal law from making its ruling. The Commission then ruled:

> Given the evidence . . ., allocating the costs of the [agreement] on a system average basis would be contrary to the lowest-cost power requirement of [certain regulatory conditions applicable to Duke] and to the least-cost and just-and-reasonable-rate responsibilities of

> this Commission. The Commission must act on the basis of the present evidentiary record in making this ruling. Any future ratemaking decision will of course be based upon the evidence presented in that future proceeding and upon what produces the lowest cost power and just and reasonable rates for retail native load customers.

The Commission ultimately ordered that: "Duke may proceed with the [agreement] at its own risk subject to the retail ratemaking ruling given in this [o]rder, but Duke may not treat the retail native load of Orangeburg as [Duke's] native load for purposes of Duke's" regulatory conditions. Duke and Orangeburg appealed by notice filed 29 April 2009. However, subsequent to the filing of the order, and prior to the filing of the notice of appeal in this matter, Orangeburg voluntarily withdrew from the agreement. Orangeburg entered into an agreement with its then current power supplier, South Carolina Electric & Gas Company (SCE&G), to obtain power from SCE&G through 31 December 2010. By an Orangeburg City Council resolution adopted 18 August 2009, Orangeburg was granted authority to further extend the SCE&G agreement through 31 December 2012.

I.

We must first determine whether this appeal is properly before us. Because we find that the issues argued on appeal are moot, we dismiss the appeal.

"'[T]he inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations.'" *Angell v. Raleigh*, 267 N.C. 387, 389-90, 148 S.E.2d 233, 235 (1966)

(citation omitted).

> "[W]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law."

J.S.W. v. Lee Cty. Bd. of Educ., 167 N.C. App. 101, 104, 604 S.E.2d 336, 337-38 (2004) (citation omitted); *see also Pearson v. Martin*, 319 N.C. 449, 451-52, 355 S.E.2d 496, 497-98 (1987).

> "When no genuine controversy presently exists between the parties," the courts cannot and should not intervene. *Angell v. City of Raleigh*, 267 N.C. 387, 391, 148 S.E.2d 233, 236 (1966); *see also Gaston Board of Realtors v. Harrison*, 311 N.C. 230, 234-35, 316 S.E.2d 59, 62 (1984). The rule applies with special force to prevent the premature litigation of constitutional issues. *City of Greensboro v. Wall*, 247 N.C. 516, 520, 101 S.E.2d 413, 416-17 (1958).

Granville Co. Bd. of Comrs. v. N.C. Haz. Waste Mgmt. Comm., 329 N.C. 615, 625, 407 S.E.2d 785, 791 (1991). "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citing *Black's Law Dictionary* 1008 (6th ed. 1990)).

> Although it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable. Mere apprehension or the mere threat of an action or a suit is not enough. Thus the Declaratory Judgment Act does not "require the court to give a purely advisory opinion which the

> parties might, so to speak, put on ice to be used if and when occasion might arise."

Gaston Bd. of Realtors v. Harrison, 311 N.C. 230, 234, 316 S.E.2d 59, 61-62 (1984) (internal citations omitted); *see also Calabria v. N.C. State Bd. of Elections*, __ N.C. App. __, __, 680 S.E.2d 738, 743 (2009).

II.

Appellants first argue this case is not moot. Orangeburg states in its reply brief that it "clearly and repeatedly establishes that [the present] proceeding is not about the parties' rights under the [agreement], but about the [o]rder's wide-reaching, ongoing, and unconstitutional impacts on interstate commerce and Duke's right to make wholesale power sales" pursuant to its rights granted by FERC. Orangeburg further states in its reply brief that this "unconstitutional policy established in the [o]rder . . . presents an ongoing harm to the wholesale power sales market in the Carolinas and participants in that market, such as Orangeburg." The order, however, specifically limits its effect to the parties and facts in the present case. The Commission stated: "Although Duke and Orangeburg request a ruling applicable to all utilities under the Commission's jurisdiction, Progress [Energy] opposes the request." The Commission then stated that it was refusing to make any broad statement of policy, and that it had

> concluded that, although it will not issue any declaratory ruling that purports to revise Duke's regulatory conditions or to apply to contracts beyond this docket, the Commission will give Duke and Orangeburg a declaratory ruling or policy statement regarding retail ratemaking applicable to this docket and to

> this Agreement, and based upon the present evidentiary record.
>
> The Commission emphasizes . . . important qualifications. [T]he present Commission cannot bind future Commissioners making ratemaking decisions in particular cases. Both Duke and Orangeburg have conceded as much. To the extent Duke seeks to alleviate uncertainty, the present order gives as much certainty as the Commission can provide in the present circumstances.

The order, by its clear terms, establishes no broad policy directly affecting the rights of any entities other than Duke and Orangeburg. Even with respect to Duke and Orangeburg, the order by its terms is limited to the facts before the Commission at the time the Commission made its decision. The Commission stated that any future orders of the Commission concerning the agreement or the order, involving Duke and Orangeburg, must be considered based upon the facts before the Commission at that time. By its express terms the order was never binding on any future ratemaking decisions of the Commission. Therefore, once the agreement was terminated by Orangeburg, the basis for this appeal dissolved. Contrary to Appellants' arguments, this case is now moot.

III.

Our determination that the issues brought forth in this appeal are moot does not end our inquiry. "Even if moot . . . this Court may, if it chooses, consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (citations omitted); *see also Granville Co.*, 329 N.C. at 623, 407 S.E.2d at 789-90.

We may also consider a moot issue on appeal pursuant to other established exceptions to the mootness doctrine. Relevant to the present appeal, cases which are "'"capable of repetition, yet evading review" may present an exception to the mootness doctrine.'" *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703 (2002) (citations omitted). "'There are two elements required for the exception to apply: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Id.* at 654, 566 S.E.2d at 703-04 (citation omitted).

IV.

Duke Energy, quoting *In re Investigation into Injury of Brooks*, 143 N.C. App. 601, 605, 548 S.E.2d 748, 751 (2001) (citations omitted), argues that our Court has a "'duty to "consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution."'" *Brooks* in turn cites *Randolph*, 325 N.C. at 701, 386 S.E.2d at 186. Our Supreme Court clearly stated in *Randolph* that North Carolina appellate courts *may* consider moot issues that involve matters of public interest in certain circumstances *if they so choose*. *Id.*; *see also Calabria*, __ N.C. App. at __, 680 S.E.2d at 746 (citation omitted). In the present case, we do not believe the moot issues are appropriate for consideration pursuant to the public interest exception, especially in light of the fact that deciding the issues

in this case would involve "the premature litigation of constitutional issues." *Granville Co.*, 329 N.C. at 625, 407 S.E.2d at 791 (citation omitted). We do not believe the order in this case, which the Commission expressly limited to the parties and the facts before it, and which is not binding on future ratemaking decisions by the Commission[1], implicates the public interest to such a degree that we should invoke this exception to the mootness doctrine. We also note that this matter became moot because Orangeburg decided to withdraw from the agreement – pursuant to terms of the agreement which permitted it to do so. The agreement included provisions protecting both Duke and Orangeburg should certain eventualities occur, and Orangeburg decided to exercise its right to withdraw from the agreement pursuant to the terms of the agreement. Finally, as discussed in detail below, Duke and Orangeburg have failed to demonstrate that they have no alternative forum available within which to litigate these issues. We do not believe public policy favors that we decide issues in a moot case if the issues may be properly decided while ripe in an alternative forum.

V.

Both Duke and Orangeburg contend that the "capable of repetition, yet evading review" exception should apply in this case, however, we are unconvinced. First, as with the public interest exception to the mootness doctrine, our decision to consider or not consider any issue pursuant to the "capable of

[1] *See* N.C. Gen. Stat. § 62-80 (2009).

repetition, yet evading review" exception to the mootness doctrine is discretionary. *Crumpler v. Thornburg*, 92 N.C. App. 719, 724, 375 S.E.2d 708, 711 (1989), citing *In re Jackson*, 84 N.C. App. 167, 171, 352 S.E.2d 449, 452 (1987).

Second, as stated above, this case would not be moot had Orangeburg not withdrawn from the agreement. This is unlike the election cases cited by Duke where the endpoint of a controversy, the election itself, is firmly set and beyond the control of litigants. *See* e.g. *Merle v. United States*, 351 F.3d 92, 95 (3d Cir. N.J. 2003). Further, Orangeburg acknowledges that if it were to negotiate a new agreement with Duke that provided Orangeburg with the more favorable system average cost rates, and submited the new agreement to the Commission for approval, the Commission would not necessarily reach the same result. Both Duke and Orangeburg conceded before the Commission that the order would not be binding on future Commissions. *See also* N.C.G.S. § 62-80; *State ex rel. Utilities Comm'n v. MCI*, 132 N.C. App. 625, 630, 514 S.E.2d 276, 280 (1999). Had Orangeburg not withdrawn from the agreement, the terms of the agreement would have remained in effect until at least 31 December 2018 – absent early termination by either Duke or Orangeburg – and this matter would still be ripe for appellate review.

Third, neither Duke nor Orangeburg argue that there is no other forum within which they could resolve the disputed issues while they are ripe for review. As Duke and Orangeburg conceded in the petition: "Orangeburg is under no constraints as to the

arguments it may advance in any forum." Orangeburg makes no argument that any condition prevented it from seeking a declaratory order or judgment in any other forum concerning the authority of the Commission to interfere with the rates it and Duke had agreed upon. Orangeburg has apparently not attempted to obtain any ruling - other than the one it appeals in this case - concerning the relative authorities of the Commission and FERC in deciding ratemaking issues such as those at issue in the agreement. *See Utah v. Federal Energy Regulatory Com.*, 691 F.2d 444, 446 (10th Cir. 1982). There is no evidence that Orangeburg unsuccessfully attempted to bring an action to settle these issues in any other forum.

Duke, pursuant to an earlier agreement with the Commission purported to contract away certain of its legal rights. Specifically, Duke agreed to the following restrictions, contained in Docket No. E-7, Sub. 795(7)(d), on its rights to challenge the ratemaking authority of the Commission:

> (iii) Duke Power shall not assert before the FERC or any federal or state court that (1) transactions entered into pursuant to Duke Power's cost- or market-based rate authority or (2) the filing with, or acceptance for filing by, the FERC of any wholesale power contract imply a cost allocation methodology that is binding on the Commission, require the pass-through of any costs or revenues under the filed rate doctrine, or preempt the Commission's authority to assign, allocate, make pro-forma adjustments to, or disallow the revenues and costs associated with, Duke Power's wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes.
>
> (iv) Duke Power shall not assert before any

> federal or state court that the exercise of authority by the Commission to assign, allocate, make pro[-]forma adjustments to, or disallow the costs and revenues associated with Duke Power's wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes in itself constitutes an undue burden on interstate commerce or otherwise violates the Commerce Clause of the United States Constitution. However, Duke Power retains the right to argue that a specific exercise of authority by the Commission violates the Commerce Clause based upon specific evidence of undue interference with interstate commerce.
>
> (v) Except as provided in the foregoing conditions, Duke Power retains the right to challenge the lawfulness of any Commission order issued in connection with the assignment, allocation, pro-forma adjustments to, or disallowances of the revenues and costs associated with Duke Power's wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes on any other grounds, including but not limited to the right outlined in G.S. [§] 62-94(b).

However, Duke does not argue that no other forum was available to it to decide the issues in the appeal before us. By its terms[2], Regulatory Condition 7(d)(iii) precludes Duke from arguing before FERC, or any federal or state court, that any agreement it entered into pursuant to its "cost- or market-based rate authority" should constitute binding authority on the Commission, or "preempt" the Commission's "authority to assign, allocate, make pro-forma

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[2] We note that Duke does not argue that it has challenged in any forum the provisions of Regulatory Conditions 7(d)(iii) and (iv) which, if effective, constitute a waiver of Duke's rights to bring certain actions in certain forums. *See Newton v. Rumery*, 480 U.S. 386, 94 L. Ed. 2d 405 (1987); *United States v. Purdue Pharma L.P.*, 600 F.3d 319, 329-30 (4th Cir. Va. 2010); *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1397-1400 (9th Cir. Cal. 1991).

adjustments to, or disallow the revenues and costs associated with, Duke Power's wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes." Our reading of Regulatory Condition 7(d)(iii) suggests that it only applies to *transactions* and *contracts*, *entered into* by Duke. We find nothing in Regulatory Condition 7(d)(iii) that would preclude Duke from attempting to obtain a declaratory order from FERC, or a declaratory judgment from a federal or state court, concerning the relative authorities of FERC and the Commission with respect to the broader issues in this appeal, including the preemption doctrine.

Regulatory Condition 7(d)(iv), on the other hand, purports to prevent Duke from bringing any action asserting that the Commission's exercise of authority over wholesale interstate ratemaking, such as was involved in this case, violates the Commerce Clause of the United States Constitution. However, Regulatory Condition 7(d)(iv) is limited by its terms to *federal and state courts*. Nothing in Regulatory Condition 7(d)(iv) would prevent Duke from pursuing a declaratory order, or any other appropriate remedy, from FERC. Furthermore, Regulatory Condition 7(d)(iv) states: "Duke Power retains the right to argue that a *specific exercise* of authority by the Commission violates the Commerce Clause based upon specific evidence of undue interference with interstate commerce." (Emphasis added).

Based upon the foregoing, we do not believe a showing has been made that "the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration[.]" *Boney*,

151 N.C. App. at 654, 566 S.E.2d at 703 (citation omitted). Because one of the prongs required to give us the discretion to apply the "capable of repetition, yet evading review" exception to the mootness doctrine has not been met, we hold that this is not an appropriate case in which to apply that exception. The case on appeal is moot, and we will not consider it. We therefore dismiss this action. *Roberts*, 344 N.C. at 398-99, 474 S.E.2d at 787.

Dismissed.

Judges STROUD and HUNTER, JR. concur.

Report per Rule 30(e).