

126 FERC ¶ 61,074  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Acting Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

Duquesne Light Co.	Docket Nos. ER08-194-000, ER08-194-001, ER08-194-002, ER08-194-003 and ER08-194-004
Midwest Independent Transmission System Operator, Inc. and Duquesne Light Co.	Docket Nos. ER08-1235-000 and ER08-1235-001
Midwest Independent Transmission System Operator, Inc. and Duquesne Light Co.	Docket No. ER08-1309-000
PJM Interconnection, L.L.C.	Docket Nos. ER08-1339-000, ER08-1339-001 and ER08-1339-002
PJM Interconnection, L.L.C.	Docket Nos. ER08-1345-000, ER08-1345-001 and ER08-1345-002
Midwest Independent Transmission System Operator, Inc. and Duquesne Light Co.	Docket No. ER08-1370-000

ORDER APPROVING SETTLEMENT AGREEMENT

(Issued January 29, 2009)

1. On December 10, 2008, Duquesne Light Company (Duquesne), PJM Interconnection, L.L.C. (PJM), and 15 intervenors in the above-captioned proceedings<sup>1</sup>

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<sup>1</sup> FirstEnergy Service Company (FirstEnergy); AES Beaver Valley; Allegheny Energy Supply Company, LLC; the Consolidated Edison Company; Constellation Energy; The Dayton Power and Light Company (Dayton); Dominion Resources Services, Inc. (Dominion); Duke Energy Corporation (Duke Energy); Edison Mission Energy; Exelon Corporation (Exelon); FPL Energy; the Mirant Companies (Mirant); the PJM

(continued)

(collectively, the Settling Parties) submitted for approval, pursuant to Rule 602 of the Commission's Rules of Practice and Procedure,<sup>2</sup> a Settlement Agreement proposing to withdraw from Commission consideration Duquesne's prior conditional request to: (i) terminate its membership in the PJM regional transmission organization (RTO); and (ii) establish its membership in the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) RTO.

2. Pursuant to the Settlement Agreement, Duquesne will remain a member of PJM. Duquesne will also be permitted to participate in PJM's upcoming Reliability Pricing Model (RPM) auctions and to satisfy all capacity commitments as set forth in PJM's RPM protocols. Finally, Duquesne's prior filings in the above-captioned proceedings, requesting the right to withdraw from PJM on a conditional basis, and all related filings, as submitted jointly by Duquesne and the Midwest ISO, in the proceedings noted above, or separately by PJM, in the proceedings noted above, will be withdrawn. Each of these proceedings will be terminated and all related appeals will be withdrawn.

3. For the reasons discussed below, we approve the Settlement Agreement and will permit the Duquesne zone RPM auction parameters to be included in PJM's upcoming RPM auction. The Settlement Agreement, by its terms, terminates each of the above-captioned proceedings. However, we also acknowledge that the terms pursuant to which Duquesne will be permitted to terminate its obligations to the Midwest ISO, including any obligation by Duquesne to pay an exit fee as a condition to its withdrawal from the Midwest ISO Transmission Owners Agreement, raise issues that cannot be resolved here. Accordingly, we will permit the Midwest ISO, or other affected parties, to make a separate filing addressing these issues.

## **Background**

### **A. The Duquesne Withdrawal Proceeding**

4. On November 8, 2007, Duquesne filed a petition, in Docket No. ER08-194-000 (the Duquesne Withdrawal Proceeding), requesting that the Commission approve a conditional request to withdraw from PJM. In an order issued January 17, 2008, the Commission found that Duquesne had, or will, satisfy the withdrawal requirements set

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Power Providers Group (P3); the PSEG Companies (PSEG); and Reliant Energy, Inc. (Reliant).

<sup>2</sup> 18 C.F.R. § 385.602 (2008).

forth in PJM's operating agreements, subject to conditions, including the submission of its RTO replacement arrangements and related filings.<sup>3</sup>

5. On July 3, 2008, in Docket Nos. ER04-194-000 and ER08-1235-000, Duquesne and the Midwest ISO made an integration filing in response to the January 17 Order. In an order issued September 3, 2008, the Commission accepted the integration filing subject to conditions.<sup>4</sup> Among other things, the Commission noted that approval of Duquesne's replacement arrangements and related filings addressing the terms of Duquesne's withdrawal from PJM had yet to be accomplished. The Commission also required that Duquesne provide 60 days advance notice of its final, non-contingent commitment to withdraw from PJM and join the Midwest ISO when, and if, Duquesne chose to finalize this course of action.<sup>5</sup> The Commission also denied Duquesne's request for rehearing regarding Duquesne's liability for RPM capacity payments (a cost issue tied to Duquesne's conditional request to withdraw from PJM).<sup>6</sup>

## **B. Related Proceedings**

6. In addition to the Duquesne Withdrawal Proceeding, Duquesne's conditional request to withdraw from PJM and join the Midwest ISO has been the subject of additional related filings made jointly by Duquesne and the Midwest ISO or made separately by PJM. Each of these proceedings would be terminated under the proposed Settlement Agreement. Except as otherwise noted in the bulleted summaries provided below, these proceedings, as of the date that the Settling Parties submitted their proposed Settlement Agreement, remained pending before the Commission:

- On July 25, 2008, in Docket No. ER08-1309-000, Duquesne and the Midwest ISO jointly submitted, pursuant to section 205 of the Federal Power Act (FPA),<sup>7</sup> revisions to the Midwest ISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (TEMT),

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<sup>3</sup> *Duquesne Light Company*, 122 FERC ¶ 61,039 (2008) (January 17 Order).

<sup>4</sup> *Duquesne Light Company*, 124 FERC ¶ 61,219 (2008) (September 3 Order).

<sup>5</sup> *Id.* P 2.

<sup>6</sup> On November 3, 2008, Duquesne filed a petition for review of the January 17 Order and September 3 Order at the Court of Appeals for the District of Columbia Circuit. *See Duquesne Light Company v. FERC*, D.C. Circuit Case No. 08-1350.

<sup>7</sup> 16 U.S.C. § 824d (2006).

reflecting the addition of Duquesne as a new Midwest ISO pricing zone.<sup>8</sup> The Midwest ISO subsequently requested that consideration of this filing be deferred, subject to its implementation of certain market revisions applicable to its proposed Ancillary Services Markets.<sup>9</sup>

- On July 31, 2008, in Docket No. ER08-1339-000, PJM submitted for filing, pursuant to FPA section 205, an executed agreement with Duquesne and 13 proposed unexecuted agreements between PJM and each of the remaining Load Serving Entities (LSEs) serving load in the Duquesne zone, addressing the Duquesne zone LSEs' obligations to pay capacity payment charges, as incurred under PJM's RPM protocols. In an order issued by the Commission on September 30, 2008 (a consolidated order addressing the filings made in both Docket No. ER08-1339-000 and ER08-1345-000, the proceeding addressed below), the Commission accepted PJM's filing, subject to conditions.<sup>10</sup> Duquesne sought rehearing, seeking to overturn the Commission's decision denying the right to resell RPM capacity that would not be required were Duquesne to join the Midwest ISO (another cost issue tied to Duquesne's conditional request to withdraw from PJM).
- On August 1, 2008, in Docket No. ER08-1345-000, PJM submitted an agreement entered into by PJM and the Midwest ISO addressing the portability of PJM's RPM capacity were Duquesne to withdraw from PJM. As noted above, the Commission accepted PJM's filing, subject to conditions, in the September 30 Order. As also noted above, Duquesne sought rehearing.
- On August 7, 2008, in Docket No. ER08-1370-000, Duquesne and the Midwest ISO submitted for filing, pursuant to FPA section 205, revisions to Midwest ISO's Attachment P (list of grandfathered agreements) of the Midwest ISO TEMT, to list Duquesne's grandfathered agreements were it

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<sup>8</sup> 73 Fed. Reg. 46,615 (2008).

<sup>9</sup> See *Midwest Independent Transmission System Operator, Inc.* Docket No. ER08-1309-000, *et al.*, "Notice of the [Midwest ISO's] Deferral of Effective Dates" (August 26, 2008) (Midwest ISO Deferral Notice).

<sup>10</sup> See *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,307 (2008) (September 30 Order).

to join the Midwest ISO.<sup>11</sup> The Midwest ISO, in the Midwest ISO Deferral Notice, requested that the effective date of this filing be deferred.

### **C. Proposed Settlement Agreement**

7. The Settling Parties state that the negotiations resulting in the Settlement Agreement were conducted pursuant to the Commission's Alternative Dispute Resolution process (ADR). The Settling Parties state that as a result of this process, Duquesne will remain a member of PJM, thus resolving and terminating all issues pending in each of the above-captioned proceedings, including all petitions for review of any Commission order issued in these proceedings.

8. Under article II.C.1 of the Settlement Agreement, PJM agrees to: (i) permit Duquesne to satisfy the capacity procurement commitment and obligations under the PJM Reliability Assurance Agreement (RA Agreement) for all load within the Duquesne zone for the 2011-12 delivery year (June 1, 2011 through May 31, 2012) through bilateral agreements with one or more capacity suppliers; and (ii) if necessary, develop and file any changes to its tariffs and/or make all necessary changes to its manuals and procedures necessary to implement the out-of-time Fixed Resource Requirement (FRR) Plan or incremental auction.<sup>12</sup>

9. Under article II.C.2 of the Settlement Agreement, Duquesne, among other things, agrees to: (i) pay in full for all RPM capacity which it is required to obtain as an LSE in PJM through May 31, 2011, provided, however, that nothing in the Settlement Agreement shall preclude Duquesne from offsetting its costs through voluntary bilateral financial arrangements with any entity; (ii) satisfy the capacity procurement obligations with respect to all load within the Duquesne zone for the 2011-12 delivery year pursuant to its out-of-time FRR Plan; (iii) submit its out-of-time FRR Plan to PJM on a timely basis; and (iv) take no action that would cause the load in the Duquesne zone to be excluded from the RPM capacity auction for the 2012-13 delivery year, and to the extent Duquesne or an affiliate of Duquesne serves load in PJM during the 2012-13 delivery year, pay all associated RPM charges.

10. Under article II.C.3 of the Settlement Agreement, Duquesne will enter into an out-of-time FRR Plan, as applicable to the 2011-12 delivery year. Pursuant to the FRR Plan, Duquesne will be required to obtain firm capacity from qualified capacity resources in an amount that satisfies the criteria for a FRR alternative capacity plan.<sup>13</sup> Article II.C.3

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<sup>11</sup> 73 Fed. Reg. 49,178 (2008).

<sup>12</sup> See PJM RA Agreement at schedule 8.1.

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

further provides, however, that if any LSE elects to opt out of Duquesne's out-of-time FRR Plan, it may do so. To opt out, the LSE will be required to provide written notice to Duquesne no later than April 1, 2009. The Settlement Agreement provides that, in that case, Duquesne will not procure capacity for that LSE but will include that LSE's FRR Plan as part of Duquesne's overall FRR Plan. The Settling Parties state that Duquesne will submit its out-of-time FRR Plan to PJM by no later than December 31, 2009.<sup>14</sup> The Settling Parties state that PJM may, at the request of Duquesne or other LSEs in the Duquesne zone, hold a special incremental auction for Duquesne or other LSEs in the Duquesne zone to obtain capacity to meet all or part of the 2011-12 delivery year capacity obligations, provided such request is made to PJM in writing by September 1, 2009.<sup>15</sup>

### **Notice of Filing and Responsive Pleadings**

11. Notice of the Settlement Agreement was published in the *Federal Register*, with initial comments due on or before December 30, 2008 and reply comments due on or before January 9, 2009. Initial comments were submitted by the Midwest ISO, the Pennsylvania Public Utilities Commission (Pennsylvania Commission), the Detroit Edison Company (Detroit Edison), Duquesne Industrial Intervenors (DII), Consumers Energy Company (Consumers Energy), and FirstEnergy.<sup>16</sup> Reply comments were submitted by Duquesne, PJM, the Midwest ISO, the PSEG Companies, the PPL Companies, FirstEnergy, the PJM Power Providers Group, and Reliant.<sup>17</sup>

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<sup>14</sup> When Duquesne submits its out-of-time FRR Plan to PJM, it will disclose the average price of procurement to LSEs in the Duquesne zone. Pursuant to the RA Agreement, Duquesne will be required to make capacity obtained under the out-of-time FRR Plan available to LSEs that did not opt out of Duquesne's out-of-time FRR Plan and that serve load in the Duquesne zone during the 2011-12 delivery year in amounts that are equal to the LSE supply obligations at Duquesne's verifiable average cost of procuring capacity under the out-of-time FRR Plan. *See id.* at schedule 8.1, section D.8.

<sup>15</sup> If timely requested, PJM will hold the incremental auction on October 15, 2009. The results of the incremental auction will be binding upon every entity requesting that PJM hold an incremental auction for the amount of load entered into the auction by that entity.

<sup>16</sup> FirstEnergy submitted comments in support of the proposed Settlement Agreement.

<sup>17</sup> We address the submission of additional pleadings below.

### A. Initial Comments

12. The Midwest ISO opposes the Settlement Agreement, absent the addition of a provision, or condition, addressing Duquesne's obligations incurred by signing the Midwest ISO Transmission Owners Agreement, including a contractual commitment to remain a member of the Midwest ISO for a minimum five-year term and satisfy its financial obligations incurred prior to the effective date of withdrawal. Even if the five-year moratorium for withdrawal were ignored, according to the Midwest ISO, Duquesne must satisfy its financial obligations to the Midwest ISO incurred prior to the effective date of withdrawal, including: (i) over \$2 million in costs incurred by the Midwest ISO in anticipation of Duquesne's integration into the Midwest ISO RTO; and (ii) an exit fee which the Midwest ISO estimates to be 7.1 million, based on the methodology used to establish the exit fee applicable to Louisville Gas and Electric Co. and Kentucky Utilities Co. upon their withdrawal from the Midwest ISO.<sup>18</sup> The Midwest ISO asserts that this payment obligation is required under the Midwest ISO Transmission Owners Agreement, which Duquesne executed on August 6, 2008.<sup>19</sup>

13. In support of its requested conditions, the Midwest ISO relies on article V of the Midwest ISO Transmission Owners Agreement. The Midwest ISO asserts that under article V, Duquesne is contractually banned from serving notice of its withdrawal from the Midwest ISO for five years.<sup>20</sup> The Midwest ISO further argues that given Duquesne's execution of the Transmission Owners Agreement, it must be presumed that Duquesne considered all conditions applicable to its withdrawal from PJM to have been fully satisfied and thus resolved, at least as these conditions might have applied to

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<sup>18</sup> See Midwest ISO comments at 17-18, citing *Louisville Gas and Electric Co.*, 114 FERC ¶ 61,282, at P 52-60, *order on reh'g*, 116 FERC ¶ 61,020 (2006).

<sup>19</sup> See also Consumers Energy comments at 3 (adopting the Midwest ISO's position and noting that the Midwest ISO's costs, if not paid by Duquesne, would be passed on to the Midwest ISO's rate payers); Detroit Edison comments at 3.

<sup>20</sup> Article V, section 1 provides, in relevant part:

A Member who is also an Owner may, upon submission of a written notice of withdrawal . . . commence a process of withdrawal of its facilities from the Transmission System. Such withdrawal shall not be effective until December 31 of the calendar year following the calendar year in which notice is given, nor shall any such notice of withdrawal become effective any earlier than five (5) years following the date that the Owner signed this Agreement[.]

Duquesne's entry into the Midwest ISO (and regardless of whether Duquesne facilities were ever, in fact, integrated).

14. The Midwest ISO argues that for any such conditions to survive Duquesne's execution of the Transmission Owners Agreement, express language to that effect would have been required to be included in the Transmission Owners Agreement. The Midwest ISO adds that the survival of these conditions, if claimed by Duquesne, must be supported by extrinsic evidence, given the fact that these conditions are not expressly referenced within the four corners of the Transmission Owners Agreement.

15. DII argues that the proposed Settlement Agreement fails to address the impact it may have on Duquesne zone customers, including: (i) the cost impact attributable to Duquesne's re-integration into PJM;<sup>21</sup> (ii) the continued ability of Duquesne zone customers to participate in PJM's load response programs; and (iii) Duquesne's commitment, if any, to procure demand resources to meet its capacity obligations.<sup>22</sup> DII and the Pennsylvania Commission further argue that the Settlement Agreement should be revised, or conditioned, on the obligation of Duquesne to hold its customers harmless for all costs attributable to the implementation of the Settlement Agreement.

16. The Pennsylvania Commission states that the Settlement Agreement was negotiated among only some of the parties in this case, and that other parties were excluded from these negotiations. The Pennsylvania Commission also argues that the proposed Settlement Agreement refers to existing or future material agreements or undertakings between and among the Settling Parties or others, the nature and scope of which are not included or specifically disclosed in the parties' agreement. Specifically, the Settlement Agreement does not identify from which sources and at what cost Duquesne will acquire generation capacity needed to reenter PJM in the 2012-13 capacity delivery year, the cost of Duquesne's efforts to integrate Duquesne into the Midwest ISO grid and markets, the cost of reintegrating Duquesne back into PJM markets, how Duquesne intends to recover the (presently unknown) costs of the Settlement Agreement, and the prudence of costs incurred by Duquesne. The Pennsylvania Commission asserts that these provisions should be included in the Settlement Agreement, to the extent they include material terms and conditions disposing of liabilities, obligations or benefits that will be passed through to Duquesne's wholesale and retail customers.

17. The Pennsylvania Commission also states that a demonstration has not been made that Duquesne's move back to PJM will benefit its customers. Further, the Pennsylvania

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<sup>21</sup> *See also* Pennsylvania Commission comments at 3.

<sup>22</sup> *See* PJM RA Agreement at section 1.8 (allowing qualified demand resources to serve as capacity resources in the context of an FRR Plan).

Commission contends that before the Commission can approve the contested Settlement Agreement, it must conclude that the Settlement Agreement is just and reasonable and in the public interest, based on findings of fact and conclusions of law.

**B. Reply Comments**

18. Duquesne responds to the Midwest ISO's argument that the Settlement Agreement, to be worthy of acceptance, must require Duquesne to pay an exit fee to the Midwest ISO. Duquesne argues that this asserted obligation does not arise under the Midwest ISO Transmission Owners Agreement, cannot be squared with Duquesne's right to determine its own means of RTO participation on a voluntary basis, and is otherwise inconsistent with Duquesne's conditional request to withdraw from PJM (the conditions to which, under Duquesne's express reservation of rights in the above-captioned proceedings, have not been satisfied). Duquesne states that these contingencies fully survived its execution of the Transmission Owners Agreement and were expressly acknowledged by: (i) the Midwest ISO in joint pleadings made by the Midwest ISO and Duquesne following Duquesne's execution of this agreement;<sup>23</sup> and (ii) the Commission itself on September 3, 2008.<sup>24</sup>

19. Duquesne also asserts that it never integrated its transmission facilities with the Midwest ISO,<sup>25</sup> never received any service from the Midwest ISO or provided any service as a Midwest ISO transmission owner, never has been charged any allocation of the Midwest ISO's costs, and never before has otherwise been treated by the Midwest ISO, or any other entity, as anything but what it reasonably considered itself to be – a prospective member that was engaged in the regulatory process required to join. Duquesne argues that its decision to remain in PJM, due to the weighing of benefits that would result from a move to the Midwest ISO, was exactly the type of final cost-benefit analysis that Duquesne consistently informed the Midwest ISO, the Commission, and all interested parties, that it would make (and would be entitled to make) once its withdrawal obligations were clarified and prior to its required submission of its final notice of intent to proceed.

20. Duquesne argues that even assuming that the Midwest ISO Transmission Owners Agreement, by its terms, makes Duquesne a Midwest ISO transmission owner, subject to

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<sup>23</sup> See Duquesne reply comments at 10, citing the Midwest ISO's and Duquesne's August 8, 2008 joint answer to protests in Docket No. ER08-1235-000.

<sup>24</sup> *Id.* at 11, citing September 3 Order, 124 FERC ¶ 61,219 at P 73 (requiring Duquesne to give at least 60 days notice of its firm commitment to withdraw).

<sup>25</sup> See also PJM reply comments at 4.

the withdrawal provisions of article V, Duquesne, when it e-mailed the executed signature pages applicable to this agreement, expressly stated that the signature pages were offered on a contingent basis only, subject to Duquesne's review of the final financial obligations applicable to its integration and thus could not be treated as binding, as of the date this agreement was executed.

21. Duquesne maintains that the Commission must resolve the question of whether it is obligated under the Midwest ISO Transmission Owners Agreement with respect to the need for a five-year agreement and the payment of a \$7.1 million exit fee. Duquesne states that the Commission's failure to address this issue would constitute unacceptable conditions to the Settlement Agreement. Duquesne notes that it takes this position only with regard to the alleged exit fee and not with regard to the alleged \$2 million of Midwest ISO integration costs.

22. Duquesne also responds to the requests made by DII and the Pennsylvania Commission regarding the imposition of a hold harmless provision applicable to Duquesne's reintegration into PJM. Duquesne asserts that the alleged costs at issue need not be the subject of speculation in this proceeding; rather, any such costs will become ripe for review in the rate proceedings in which these costs are sought to be recovered.

23. PJM responds to the Pennsylvania Commission's claim that the Settlement Agreement relies upon existing or future material agreements or undertakings between and among Duquesne and others that are not expressly explained or otherwise addressed in the Settlement Agreement. PJM explains that the agreements to which the Pennsylvania Commission alludes include: (i) bilateral arrangements in which third parties have agreed to provide capacity in substitution for Duquesne's participation in the 2012-13 RPM auction, and (ii) bilateral agreements covering Duquesne's liability under prior RPM auctions. PJM argues that Duquesne's confidential negotiations leading to the execution of these agreements were necessary due to antitrust obligations barring suppliers from participating jointly in negotiations. In response to the Midwest ISO's comments, PJM asserts that the Midwest ISO's claims related to Duquesne's alleged liability for a withdrawal fee are new and were never an issue presented for the Commission's consideration in these proceedings. According to PJM, the issues addressed by the Settlement Agreement and those raised by the Midwest ISO in its comments are entirely separate, could be addressed in a separate proceeding, and in any event, do not provide a basis for rejection of the Settlement Agreement.

24. Reply comments supporting the Settlement Agreement on the basis of arguments noted above were submitted by the PSEG, FirstEnergy, P3, and Reliant (each of whom is a Settling Party), and by the PPL Companies. These commenters also assert that the issues raised in this proceeding by the Midwest ISO, regarding Duquesne's obligations under the Midwest ISO Transmission Owners Agreement, are beyond the scope of the Settlement Agreement and should be addressed in a separate proceeding.

25. Finally, the Midwest ISO submitted reply comments reiterating arguments made in its initial comments.

**C. Additional Pleadings**

26. On January 16, 2009, answers to reply comments were filed by the Midwest ISO and a sub-group of the Settling Parties<sup>26</sup> (Indicated Settling Parties).

27. The Midwest ISO, in its answer, responds to Duquesne's assertion that Duquesne, when it e-mailed the executed signature pages to the Midwest ISO Transmission Owners Agreement, expressly conditioned its execution of the agreement, subject to Duquesne's review of the financial obligations applicable to its integration. The Midwest ISO responds that the e-mail at issue was sent to a Midwest ISO paralegal and cannot operate as a condition to the Midwest ISO Transmission Owners Agreement. The Midwest ISO adds that had Duquesne wanted to make its contract execution conditional, the nature and duration of the condition should have been stated in the agreement itself.

28. The Midwest ISO also asserts that a contested offer of settlement is an inappropriate vehicle to resolve Duquesne's obligation to the Midwest ISO. The Midwest ISO argues that this matter should be pursued in a separate proceeding, or in the context of a more comprehensive settlement. However, unless and until Duquesne's obligations to the Midwest ISO are established, according to the Midwest ISO, it would be premature for the Commission to consider the Settlement Agreement purporting to establish Duquesne's renewed obligations to PJM.

29. The Indicated Settling Parties, in their answer, respond to Duquesne's assertion that absent the Commission's express rejection of the Midwest ISO's exit fee claim, Duquesne will be permitted to terminate the Settlement Agreement. The Indicated Settling Parties argue that section II.B of the Settlement Agreement permits a Settling Party to terminate the Settlement Agreement only if the Commission conditions its approval of the Settlement Agreement or seeks to require a modification to the Settlement Agreement. The Indicated Settling Parties add that final Commission action of any sort to address the Midwest ISO's exit fee claim would not result in the modification of the Settlement Agreement or otherwise operate as a condition applicable to the Settlement Agreement's acceptance.

30. On December 16, 2008, the Midwest ISO submitted a motion to intervene out-of-time in Docket Nos. ER08-194-000 and ER08-1339-000.

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<sup>26</sup> First Energy, Dominion, Exelon, Mirant, P3, Dayton, Duke Energy, Reliant, and PSEG.

## **Discussion**

### **A. Procedural Matters**

31. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,<sup>27</sup> prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers submitted by the Midwest ISO and by the Indicated Settling Parties because they have provided information that assisted us in our decision-making process.

32. We will grant the Midwest ISO's unopposed late-filed intervention in Docket Nos. ER08-194-000 and ER08-1339-000, subject to our prior orders in these proceedings and for the limited purpose of participating in these proceedings on a going-forward basis only.<sup>28</sup>

### **B. Analysis**

33. We approve the Settlement Agreement, without modification, and will permit the Duquesne zone RPM auction parameters to be included in PJM's upcoming RPM auction. Duquesne will be bound to pay any obligations it incurs as a result of those auctions should it participate. We also find that the terms pursuant to which Duquesne will be permitted to terminate its obligations to the Midwest ISO, including Duquesne's obligation to pay financial obligations incurred prior to the effective date of its withdrawal from the Midwest ISO Transmission Owners Agreement, raise issues that cannot be resolved summarily in this proceeding. These issues are not addressed by the Settlement Agreement. Accordingly, the Midwest ISO or other affected parties may make a separate filing in a new proceeding raising these issues, or they may pursue these issues in an appropriate judicial forum.

#### **1. The Duquesne Withdrawal Proceeding and Related Filings**

34. The Settlement Agreement recognizes that Duquesne will remain a member of the PJM RTO, a status to which it is currently entitled (and in fact obligated), as a PJM transmission owner, under the PJM Consolidated Transmission Owner Agreement, and as an LSE, under the PJM RA Agreement. We find that this proposal is acceptable.

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<sup>27</sup> 18 C.F.R. § 385.213(a)(2) (2008).

<sup>28</sup> *Id.* § 385.214(d).

## 2. Duquesne's Re-Integration Into PJM's Capacity Market

35. The Settlement Agreement permits Duquesne to participate in PJM's upcoming RPM auctions and to otherwise satisfy PJM's capacity commitment protocols as they apply to future delivery years. The Settlement Agreement provides that Duquesne will pay in full for all RPM capacity which it is required to obtain as an LSE in PJM through May 31, 2011, provided, however, that nothing in the Settlement Agreement shall preclude Duquesne from offsetting its costs through voluntary bilateral financial arrangements with any entity.

36. Additionally, because Duquesne zone load was permitted to be removed from the RPM auction for the 2011-12 delivery year, the Settlement Agreement provides that the following exceptions will be made to the PJM rules and procedures in order to permit Duquesne to submit an out-of-time FRR plan to satisfy its obligations: (i) the applicable filing and approval deadlines shall be extended for Duquesne so that it may submit the out-of-time FRR Plan by December 31, 2009; (ii) the out-of-time FRR Plan will be applicable only for the 2011-12 delivery year; (iii) pricing shall be at the average cost of procurement pursuant to schedule 8.1, section D.8 of the RA Agreement; and (iv) PJM may, at the request of Duquesne or other LSEs in the Duquesne zone, hold a special incremental auction for Duquesne or other LSEs in the Duquesne zone to obtain all or part of their 2011-12 delivery year capacity obligations.<sup>29</sup> All other requirements

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<sup>29</sup> Schedule 8.1 requires parties to submit an FRR Plan no later than one month before the auction for the applicable delivery year. A party's election of the FRR alternative shall be for a minimum term of five consecutive delivery years, and a party that terminates its election of the FRR alternative shall not be eligible to re-elect the FRR alternative for a period of five consecutive delivery years following the date of such termination. Schedule 8.1, section D.8 addresses pricing. Specifically:

In the case of load reflected in the FRR Capacity Plan that switches to an alternative retail LSE, where the state regulatory jurisdiction requires switching customers or the LSE to compensate the FRR Entity for its FRR capacity obligations, such state compensation mechanism will prevail. In the absence of a state compensation mechanism, the applicable alternative retail LSE shall compensate the FRR Entity at the capacity price in the unconstrained portions of the PJM Region, as determined in accordance with Attachment DD to the PJM Tariff, provided that the FRR Entity may, at any time, make a filing with FERC under Sections 205 of the Federal Power Act proposing to change the basis for compensation to a method based on the FRR Entity's cost or such other basis

(continued)

applicable to FRR Plans will apply to the out-of-time FRR Plan.<sup>30</sup>

37. PJM, a Settling Party, concurs that the provisions set forth in the Settlement Agreement, as they relate to these issues, are: (i) feasible under the terms and conditions of PJM's RPM protocols, (ii) appropriate under the circumstances presented here, and (iii) that no evidence presented in this case by intervenors suggests otherwise. We agree. Specifically, while DII and the Pennsylvania Commission claim that Duquesne's re-integration into the PJM RPM process may have a detrimental cost impact on Duquesne zone customers, intervenors fail to present any evidence substantiating their concerns. We also agree with Duquesne that the alleged costs attributable to these concerns are not before the Commission in the instant proceeding. Rather, any and all issues relating to these asserted costs may be pursued by intervenors in the rate proceedings in which these costs are sought to be recovered. Accordingly, we grant PJM's request for waiver of the relevant provisions of the PJM RA Agreement and PJM Manuals, as necessary, in order to allow Duquesne to submit the out-of-time FRR Plan.

38. DII suggest that Duquesne's re-integration into the PJM RPM process may leave uncertain Duquesne's commitment to procure demand resources to meet its capacity obligations, and may jeopardize the right of Duquesne zone customers to participate in PJM's load response programs. However, we do not agree that the Settlement will affect DII's access to such programs. The PJM RA Agreement states that qualified Demand Resources may serve as Capacity Resources in the context of an FRR Plan.<sup>31</sup> The Settlement Agreement specifies that, although PJM is making certain exceptions to allow Duquesne to submit its FRR Plan out-of-time, PJM rules and procedures otherwise applicable to [such] plans will apply to the out-of-time FRR Plan. Accordingly, as Duquesne notes in its answer, demand resources will be incorporated in the FRR Plan. Further, under the terms of the Settlement Agreement, Duquesne remains a member of PJM with all rights and obligations of any other member. This includes the rights and obligations associated with demand response resources in the Duquesne zone.

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shown to be just and reasonable, and a retail LSE may at any time exercise its rights under Section 206 of the FPA.

<sup>30</sup> For example, if Duquesne fails to satisfy its daily unforced capacity obligation, Duquesne will be assessed a capacity deficiency charge consistent with the terms of the RA Agreement. *See* RA Agreement at schedule 8.1, section F.2.

<sup>31</sup> PJM RA Agreement at section 1.8.

### **3. Proposed Revisions to the Settlement Agreement**

39. We reject the claim advanced by the Pennsylvania Commission and DII that Duquesne's ratepayers, under the Settlement Agreement, should be held harmless with regard to amounts Duquesne expended in pursuing its plan to integrate into the Midwest ISO. We have held that, under the PJM agreements, there is no general obligation to hold parties harmless from costs occasioned by a withdrawal contemplated under such agreements.<sup>32</sup> Accordingly, we will not require that the Settlement Agreement be revised to include a hold harmless provision. We note, however, that in approving the Settlement Agreement, we make no finding that the costs that have been or will be incurred by Duquesne in the Duquesne Withdrawal Proceeding and in all related proceedings and/or endeavors were prudently incurred by Duquesne or that such costs should be recoverable in rates.

40. Finally, we reject the Pennsylvania Commission's argument that the Settlement Agreement must be revised, or conditioned, on the inclusion of additional provisions explaining, in detail, the terms and conditions of all bilateral agreements that Duquesne has executed, or may be required to execute, in satisfaction of its RPM supply commitments. Under the Settlement Agreement, Duquesne must submit its out-of-time FRR Plan for the 2011-12 delivery year to PJM by December 31, 2009, at which time Duquesne must disclose the average price of procurement to LSEs in the Duquesne zone. PJM must allow the Pennsylvania Commission access to this information at that time. Regarding any bilateral arrangements that Duquesne enters into to satisfy its obligations for the 2012-13 delivery year, or any future delivery year, these agreements must be treated consistent with PJM's RPM procedures. However, these bilateral agreements are not required for us to approve the Settlement Agreement. As noted above, the Pennsylvania Commission will have an appropriate forum to challenge any costs attributable to these supply commitments at such time as these costs become known and at such time as recovery of these costs is requested by Duquesne.

### **4. Duquesne's Obligations Under the Midwest ISO Transmission Owners Agreement**

41. The Settlement Agreement does not address the issue of potential liability to the Midwest ISO with respect to the Midwest ISO Transmission Owners Agreement. Accordingly, we agree with PJM, in its reply comments, and the Indicated Settling Parties, in their answer, that this issue does not prevent us from approving the Settlement Agreement as it relates to Duquesne's participation in PJM. The Midwest ISO or other

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<sup>32</sup> January 17 Order, 122 FERC ¶ 61,039 at P 134.

affected parties may, if they wish, pursue this issue in a separate proceeding before the Commission, or in an appropriate judicial forum.

The Commission orders:

The Settlement Agreement is hereby approved, without modification, as discussed in the body of this order.

By the Commission. Commissioner Kelliher not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.