

133 FERC ¶ 61,058  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Duke Energy Ohio, Inc. and  
Duke Energy Kentucky, Inc.

Docket Nos. ER10-1562-000  
ER10-2254-000

ORDER ADDRESSING RTO REALIGNMENT REQUEST

(Issued October 21, 2010)

1. On June 25, 2010, Duke Energy Ohio, Inc. (Duke Ohio) and Duke Energy Kentucky, Inc. (Duke Kentucky) (collectively, Duke) submitted a filing in Docket No. ER10-1562-000 as the first step of their proposed move from Midwest Independent Transmission System Operator, Inc. (Midwest ISO) to PJM Interconnection, L.L.C. (PJM). Duke Ohio and Duke Kentucky request authorization to depart Midwest ISO and join PJM effective January 1, 2012 (Regional Transmission Organization (RTO) Realignment), and to participate in PJM's Reliability Pricing Model auctions prior to their move.
2. On August 16, 2010, Duke submitted a filing in Docket No. ER10-2254-000 as the second step of its proposed move from Midwest ISO to PJM. In this filing, Duke submitted a Fixed Resource Requirement Integration Plan (FRR Integration Plan), which details its proposal to meet PJM resource adequacy requirements from the date of transmission system integration, January 1, 2012, up to the date of full participation in PJM's capacity market, June 1, 2014.
3. For the reasons discussed below, we authorize Duke to terminate its existing obligations to the Midwest ISO, subject to several conditions. We also accept Duke's proposed FRR Integration Plan and requested waivers, subject to conditions, as discussed below.

## **I. Background**

4. Three subsidiaries of Duke Energy Corporation are currently transmission owning members of Midwest ISO: Duke Ohio, Duke Kentucky, and Duke Energy Indiana, Inc. (Duke Indiana).<sup>1</sup> The Duke Ohio transmission system consists of approximately 403 circuit miles of 345 kV transmission lines and 724 circuit miles of 138 kV transmission lines. It interconnects with the transmission systems of American Electric Power Service Corporation (AEP), Dayton Power & Light Company (Dayton Power), East Kentucky Power Cooperative, Ohio Valley Electric Corporation, Louisville Gas and Electric Company, and Duke Indiana. (Of these, only Duke Indiana is a member of Midwest ISO.) The Duke Ohio transmission system connects to over 5,000 MW of installed commercial generation capacity, about half of which is owned by Duke Ohio. In addition, Duke Ohio co-owns 1,410 MW of capacity that is associated with jointly-owned units operated by PJM members.

5. Duke Kentucky owns three generation assets with a total capacity of 1,077 MW.<sup>2</sup> These assets are interconnected to Duke Ohio's transmission system and would, therefore, move with Duke Ohio to PJM even if Duke Kentucky did not. Duke Kentucky owns and operates a 69 kV distribution and transmission system to serve its retail load, and owns transmission facilities consisting of eighteen 138 kV "high side" connections including breakers and switches. Duke Kentucky's transmission system is not interconnected to any Midwest ISO utility other than Duke Ohio, so Duke Kentucky would have no direct interconnection to Midwest ISO if Duke Ohio moved to PJM but Duke Kentucky stayed in Midwest ISO.

### **A. RTO Realignment Request (Docket No. ER10-1562-000)**

6. Duke Ohio and Duke Kentucky propose to withdraw operational control of their transmission facilities from Midwest ISO and integrate their transmission facilities into PJM on January 1, 2012, the date that Duke Ohio's current Ohio rate plan expires.<sup>3</sup> The

---

<sup>1</sup> These three companies emerged following the 2005 merger between Duke Energy Corporation and Cinergy Corporation. *See Duke Energy Corp.*, 113 FERC ¶ 61,297 (2005).

<sup>2</sup> One of these units is co-owned with PJM member, Dayton Power.

<sup>3</sup> Duke states that December 31, 2011 is the earliest date permitted for withdrawal from the Midwest ISO consistent with the notice provisions of the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator (Midwest ISO TO Agreement).

move will trigger the need for generation and load connected to the Duke Ohio and Duke Kentucky transmission systems to realign their operations from Midwest ISO to PJM. Complete integration into the Reliability Pricing Model process cannot occur on January 1, 2012, however, because the Base Residual Auctions for the 2011-2012, 2012-2013, and 2013-2014 Delivery Years already have occurred. Duke therefore seeks to integrate the Duke Energy Zone load into PJM's Reliability Pricing Model auctions process for the 2014-2015 Delivery Year, which means that the Duke Energy Zone load needs to be committed into the May 2011 Base Residual Auction before February 1, 2011.

7. Duke also seeks authorization for all load and generation in the Duke Ohio and Duke Kentucky footprints to participate in the 2011 Base Residual Auctions for the 2014-2015 Delivery Year.

8. Duke requests that the Commission issue an order by November 1, 2010 that: (1) determines that the proposed RTO Realignment meets the standard for withdrawal from an RTO (subject to future filings); and (2) approves load and resources' participation in the combined Duke Ohio/Duke Kentucky footprint in the spring 2011 PJM Reliability Pricing Model auctions, which will result in commitments for the delivery year commencing June 1, 2014. Duke also submitted the Agreement to Implement Expansion of PJM Region for Duke Energy Ohio and Duke Energy Kentucky, executed on June 11, 2010 (Integration Agreement), which sets forth the technical implementation plan for integration into PJM. Duke states that Duke Indiana will remain a transmission owning member of Midwest ISO.

9. Duke states that it does not address the following issues in the instant filing: (1) the design for procuring capacity that can be used by load within the Duke Ohio and Duke Kentucky footprints to satisfy PJM resource adequacy requirements in the period from January 1, 2012 through May 31, 2014; (2) the calculation of Midwest ISO exit fees and any issues regarding pass-through of exit fees; and (3) the rates for transmission service for the zone that will be formed by Duke Ohio and Duke Kentucky within PJM (the Duke Energy Zone), including recovery of transmission expansion costs and any so-called hold harmless issues. Duke states that it does not address these issues at this time because: (1) it is focused on the initial approvals that are required at this time to meet the implementation schedule; and (2) additional time to consult with stakeholders and to refine proposals with respect to other issues may help to reduce controversy.

**B. Duke's Proposed FRR Integration Plan (ER10-2254-000)**

10. Duke Ohio and Duke Kentucky also propose an FRR Integration Plan, which they describe as the second of the series of filings required to complete the proposed RTO Realignment. The FRR Integration Plan concerns the process by which Duke Ohio and Duke Kentucky propose to satisfy their zonal capacity procurement commitments and obligations under the Reliability Assurance Agreement Among Load-Serving Entities in

the PJM Region (Reliability Assurance Agreement),<sup>4</sup> and under Attachment DD of the PJM open access transmission tariff (OATT).

11. The FRR Integration Plan addresses Duke Ohio and Duke Kentucky's obligations to procure capacity for all load in the proposed Duke Energy Zone from the period between January 1, 2012 through May 31, 2014. Duke requests approval for the aspects of the FRR Integration Plan that vary from PJM's ordinary FRR process, specifically the Fixed Resource Requirement Alternative contemplated by Schedule 8.1 of the Reliability Assurance Agreement. As detailed below, Duke also requests waivers of six specific provisions of the Reliability Assurance Agreement.

## **II. Notice of Filings and Responsive Pleadings**

12. Notice of Duke's June 25, 2010 filing (June 25 Filing) was published in the *Federal Register*, 75 Fed. Reg. 39,226 (2010), with interventions and protests due on or before July 26, 2010. Notices of intervention and timely motions to intervene and comments or protests, and motions to intervene out-of-time, were submitted by the entities listed in Appendix A to this Order. Duke, FirstEnergy, Midwest ISO, PJM, and Midwest ISO TOs submitted answers.

13. Notice of Duke's August 16 Filing was published in the *Federal Register*, 75 Fed. Reg. 51,990 (2010), with interventions and protests due on or before September 7, 2010. Notices of intervention and timely motions to intervene, comments and protests, and motions to intervene out-of-time, were submitted by the entities listed in Appendix B to this order. Duke, Dominion Resources, and the Ohio Consumers' Counsel submitted answers.

## **III. Discussion**

14. As discussed in detail below, the Commission continues to find that a utility may exit an RTO when it satisfies three requirements: (1) the withdrawal satisfies the terms of the applicant's contractual obligations as they relate to RTO withdrawal; (2) the

---

<sup>4</sup> PJM Reliability Assurance Agreement, Rate Schedule FERC No. 44. The PJM Reliability Assurance Agreement is a PJM agreement intended to ensure that adequate capacity resources will be planned and made available to provide reliable service to loads within the PJM Region, to assist other parties during emergencies, and to coordinate planning of such resources.

replacement arrangement complies with Order No. 888<sup>5</sup> and Order No. 890<sup>6</sup> and the standard of review under those orders for proposed tariff provisions that differ from the *pro forma* OATT; and (3) the replacement arrangements are just, reasonable and not unduly discriminatory.

15. In its initial filing in Docket No. ER10-1562-000, Duke describes how it has satisfied or plans to satisfy the requirements for withdrawal from Midwest ISO. Duke also seeks approval to participate in PJM's Reliability Pricing Model auctions prior to its move. As the Commission has previously acknowledged, there are a number of steps involved in proceeding with an orderly withdrawal from an RTO.<sup>7</sup> Accordingly, we will address and provide guidance herein on the preliminary matters presented by Duke's RTO Realignment request. We find, as detailed below, that the RTO Realignment Proposal has satisfied, or commits to satisfy, Duke's contractual arrangements regarding withdrawal from Midwest ISO, and we will accept it subject to the outcome of future proceedings. Additionally, due to the forward nature of the Reliability Pricing Model process, and consistent with our actions in *FirstEnergy*<sup>8</sup> and *Duquesne*,<sup>9</sup> we will grant approval for Duke to participate in PJM's May 2011 Base Residual Auction for the 2014-

---

<sup>5</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>6</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

<sup>7</sup> See *American Transmission Systems, Inc.*, 129 FERC ¶ 61,249 at P 29 (2009) (*FirstEnergy*), *order on reh'g*, 130 FERC ¶ 61,171 (2010); see also *Duquesne Light Co.*, 122 FERC ¶ 61,039 at P 29-30 (*Duquesne*), *order on reh'g*, 124 FERC ¶ 61,219 (2008).

<sup>8</sup> *First Energy*, 129 FERC ¶ 61,249.

<sup>9</sup> *Duquesne*, 122 FERC ¶ 61,039.

2015 Delivery Year. Finally, we will accept Duke's FRR Integration Plan, subject to a compliance filing.

16. Outside of these preliminary findings, we cannot make any final determinations regarding Duke's right to withdraw from the Midwest ISO. Nor can we determine, at this time, whether, or to what extent, applicant's anticipated arrangements comply, or will comply, with the Commission's *pro forma* OATT or the standard of review applicable to deviations from the *pro forma* OATT. Similarly, we cannot reach any final determinations regarding whether Duke's proposed replacement arrangements are just, reasonable and not unduly discriminatory. Additionally, while we address below certain concerns raised by intervenors, we reserve other issues for resolution in future proceedings regarding Duke's proposed RTO Realignment. With the preliminary guidance we provide in this order, Duke should have the information it will need to decide its future plans.

**A. Procedural Matters**

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. In addition, given the filing parties' interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay, we grant the unopposed late-filed interventions and accept the out-of-time motions to intervene and comments.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers filed by Duke, FirstEnergy, Midwest ISO, PJM, Midwest ISO TOs, Dominion Resources and the Ohio Consumers' Counsel, because they have provided information that assisted us in our decision-making process.

**B. Standard of Review**

**1. Duke's Filing**

19. Duke states that the Commission has found that there are three requirements that must be met for an RTO withdrawal request to be approved. First, the withdrawal must satisfy the terms of the applicant's contractual obligations as they relate to RTO withdrawal. Second, the replacement arrangement must comply with Order No. 888 and Order No. 890 and the standard of review under those orders for proposed tariff provisions that differ from the *pro forma* OATT. Third, the replacement arrangements must be just, reasonable and not unduly discriminatory.

## 2. Protests and Comments

20. Midwest ISO acknowledges that the Commission has in the past relied on the three-prong test mentioned above for evaluating RTO withdrawals. It urges the Commission, however, to take a closer look at the effect such moves have on the incumbent RTO and the Commission's RTO policy. In particular, Midwest ISO suggests either broadening the third prong of the test to expressly include review of adverse effects on the incumbent RTO or developing a separate prong for inter-RTO migrations.<sup>10</sup> The objective, Midwest ISO argues, is to ensure that when transmission-owning utilities swap one RTO for another, the choice is made for reasons that are consistent with the public interest, and that do not undermine the Commission's functional unbundling and RTO policies.

21. Midwest ISO contends that, since there is no prior state review (at least in Ohio) of retail rate impacts, the Commission should consider whether there are any benefits to Duke's retail customers and whether those benefits, if they exist, outweigh the harm to other market participants and the incumbent RTO's energy market operations.<sup>11</sup> Midwest ISO argues that the RTO Realignment: (1) will not provide any market efficiency benefit to ratepayers because the market operations of Midwest ISO and PJM are so similar as to constitute a joint and common market; (2) will not provide any transmission-related benefits because the two RTOs are compliant RTOs and both deliver commensurate Order No. 2000<sup>12</sup> benefits; and (3) will not create any electrical topology-

---

<sup>10</sup> While acknowledging that the Commission has applied this three-prong test to other inter-RTO withdrawal requests, Midwest ISO notes that the Commission first developed this test in the context of Louisville Gas and Electric Company's request to withdraw from Midwest ISO to operate as a stand-alone utility outside the footprint of any RTO, as opposed to an inter-RTO transfer such as the instant case. Midwest ISO July 26 Comments, Docket No. ER10-1562-000, at 12 (filed July 26, 2010) (citing *Louisville Gas & Electric Co.*, 114 FERC ¶ 61,282 (2006) (*LG&E*); *order on reh'g*, 116 FERC ¶ 61,020 (2006) (*LG&E Rehearing Order*)) (Midwest ISO July 26 Comments).

<sup>11</sup> Midwest ISO notes the Supreme Court's finding that, when a state authority cannot practicably regulate a given area, the federal authority governs. Midwest ISO July 26 Comments at 27 (citing *Federal Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972)).

<sup>12</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

(continued...)

related benefits to consumers because the elimination of regional through-and-out rates and the joint and common market initiative have largely removed economic barriers between the two RTOs by assuring the most efficient management of congestion.

22. The Indiana Commission argues that, at a minimum, a utility must state some benefit of its decision to switch RTOs. The Indiana Commission notes that in prior withdrawal applications, the withdrawing transmission owner explained its decision to leave.<sup>13</sup> Those explanations, according to the Indiana Commission, are in sharp contrast to Duke's filing, which contains no statement of expected benefits and does not state any reason for the proposed transfer of Duke to PJM. The Indiana Commission argues that Duke's proposal is contrary to the Commission's purpose and policy of encouraging greater interconnectedness and larger market efficiencies.

23. The Indiana Commission notes that public utilities have been granted significant rights and benefits, including the right to have the opportunity to make a reasonable rate of return on their investment. In return, according to the Indiana Commission, public utilities should act in the public interest, and it states that the regulators of public utilities bear the responsibility to require utilities to make some showing that their actions are in the public interest. The Indiana Commission argues that with regard to RTOs, Congress has authorized the Commission to "make such modifications thereof as in its judgment will promote the public interest."<sup>14</sup> Contending that transfers of utilities between RTOs with no stated purpose or benefit do not comport with this standard, the Indiana Commission recommends that the Commission apply a public interest standard to ensure that utilities demonstrate that there are net benefits to the utility's customers and to the wholesale markets generally. Midwest ISO agrees, arguing that an applicant seeking to switch RTOs should be required to demonstrate some public interest benefit accruing from the move. Specifically, Midwest ISO argues that there should be a public benefit commensurate with the derogation of Order No. 2000 objectives and the harm inflicted on the remaining members of the incumbent RTO.

---

(2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

<sup>13</sup> Indiana Commission July 26 Comments, Docket No. ER10-1562-000, at 4 (citing *LG&E*, 114 FERC ¶ 61,282 at P 12-14; *Duquesne Light Co.*, 122 FERC ¶ 61,039, at P 10-15 (2008) *Duquesne*; and *FirstEnergy Service Co. v. PJM Interconnection*, 129 FERC ¶ 61,249 at P 17-19 (2009) (*FirstEnergy*)).

<sup>14</sup> *Id.* at 5 (quoting 16 U.S.C. § 824a(a) (2006)).

24. Midwest ISO notes that the Commission has recently reiterated its view that membership stability is an important component of the “scope and configuration” element of Order No. 2000. In 2008, Midwest ISO submitted a proposal that would have, among other things, allowed entities to participate in the Midwest ISO energy markets without having to surrender functional control of their transmission assets. According to Midwest ISO, the Commission found the proposal unjust and unreasonable due to the potential adverse impact on Midwest ISO’s ability to perform regional transmission operations and the corresponding benefits that accrue to customers.<sup>15</sup> After noting that aspects of the proposal might encourage signatories to terminate their participation in the RTO, Midwest ISO states that the Commission concluded that departures would adversely affect Midwest ISO’s scope and configuration under Order No. 2000 and its ability to perform regional transmission obligations.<sup>16</sup>

25. The Indiana Utility Consumer Counselor argues that the cumulative effect of such RTO moves could raise increasing challenges as to the appropriateness of the scope and configuration of the two RTOs involved. It states that the Commission should look seriously into the tension between the voluntary nature of RTO membership and the need for stability and independence of these organizations. The Indiana Utility Consumer Counselor further states that it is concerned about the negative effects on consumers of a potential “race to the bottom” as transmission owners attempt to play the RTOs against one another. According to the Indiana Utility Consumer Counselor, the Commission must consider these factors, and not just the impact on the particular utility or its customers, to ensure that operations by regulated utilities are to be just, reasonable, and not unduly discriminatory or preferential.

26. The Ohio Commission asks the Commission to address the potential long-term consequences that come with frequent changing of RTOs and how those changes affect the planning process and reliability. It notes that various load-serving entities not affiliated with Duke plan the construction of generation facilities based on their RTO membership and the deliverability of generation to their load. Ambiguity in the timing of when transmission providers will choose to change RTOs, the Ohio Commission argues, creates further uncertainty. The Ohio Commission also argues that customers’ best interests are not served by allowing casual RTO migration based on a determination that one RTO may be more advantageous and/or more lucrative than another. Accordingly, the Ohio Commission asks the Commission to take immediate measures to enhance

---

<sup>15</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 126 FERC ¶ 61,139, at P 1 (2009).

<sup>16</sup> *Id.* P 63.

stability and predictability to mitigate RTO shopping. In the long term, it asks the Commission to initiate a comprehensive rulemaking to develop standards for RTO migration and to establish rules limiting companies' ability to change RTOs.

27. The Indiana Commission argues that only the Commission can safeguard wholesale markets' integrity against actions by transitory utility managements that could imperil reliability and efficient operations, and could result in discriminatory conduct. Allowing utility transfers that do not meet a public interest standard could compromise the RTOs' effectiveness and integrity, the Indiana Commission contends, as members would be allowed to leave with no regard for the ramifications for the wholesale markets. The Indiana Commission asserts that adverse consequences for the wholesale market will have adverse implications for retail markets, regardless of whether those retail markets are traditionally regulated like Indiana and Kentucky or include states that have undertaken efforts to promote retail competition. The Indiana Commission states that, due to the action Duke proposes, many other market participants will experience detrimental effects with no offsetting benefits.

28. Midwest ISO contends that Duke's true motivating force is economic gain for generation. It estimates that Duke's generation capacity could earn over \$350 million annually in capacity payments based on prevailing and projected Reliability Pricing Model auction prices in PJM. While Midwest ISO states that it does not disparage the profit motive, it argues that the just and reasonable standard requires the Commission to balance the corporate economic interests of a utility against the actual or potential harm to the operation of the incumbent RTO's energy and operating reserves markets.

29. Rather than allowing utilities to move from one RTO to another to take advantage of temporary market flaws, the Indiana Commission contends that the market flaws should be remedied. The Indiana Commission does not know of any market structure impediments to Duke's ability to sell into the PJM's Reliability Pricing Model auctions as members of Midwest ISO, but if such impediments exist, the Indiana Commission recommends rectifying those market flaws. Similarly, the Indiana Utility Consumer Counselor states that it regrets Duke has made a strategic business determination to change RTOs instead of continuing their full participation within Midwest ISO to resolve market issues for all.

30. The combined actions of FirstEnergy and Duke, Midwest ISO argues, suggest that destabilizing factors exist and will continue to erode the eastern border of Midwest ISO. Even without actual withdrawal, Midwest ISO points out that the possibility of a shifting seam has caused both current and potential members to express the concern that if they do join, or continue their membership, they may incur withdrawal obligations as they lose their transmission connections to Midwest ISO when neighbors withdraw. Midwest ISO therefore argues that, while the choice to join an RTO may be voluntary, "[m]ovement between RTOs should not be based on perceived economic advantage flowing to the

applicants' generation interests, particularly when those advantages may be temporal rather than structural."<sup>17</sup> Midwest ISO requests that the Commission expand its analysis to whether all of the elements contained in the filed arrangements meet the principles of Order No. 2000 and are just and reasonable under section 205 of the Federal Power Act (FPA). It argues that Duke has not made this showing, and thus its application should not be granted pending a demonstration that the proposed move: (1) will not degrade the scope and configuration of Midwest ISO; and (2) will produce measurable benefits to the transmission grid or wholesale markets.

### **3. Answers and Additional Pleadings**

31. Duke opposes Midwest ISO's and the Indiana Commission's requests that the Commission apply a public interest standard to review Duke's filing. Duke states that the public interest standard is applied by statute to mergers and acquisitions under section 203 of the FPA.<sup>18</sup> It contends that the Commission has no authority under section 203 to bar transmission owners from withdrawing from RTOs,<sup>19</sup> so it surely also lacks authority to use the section 203 statutory standard for that purpose. Duke also disagrees with Midwest ISO's suggestion that the Commission can conduct a public interest analysis in the course of determining whether replacement arrangements are just and reasonable. Duke asserts that FPA section 205 does not provide for a public interest test, and Midwest ISO cites no precedent to support bootstrapping the standard of review under an inapplicable statutory provision, such as section 203, into another statutory provision.

32. Duke argues that, contrary to Midwest ISO's assertions, the policies of Order No. 2000 are not applicable to individual RTO withdrawal requests where the withdrawing entity is not seeking to establish, or to operate as, a separate RTO. It asserts that the orders that Midwest ISO cites to support its request for the Commission to apply Order No. 2000 relate to the formation of RTOs and to the need for RTO agreements to have a withdrawal provision that requires Commission review of withdrawals. Duke argues that once the Commission accepts an RTO agreement as consistent with the policies of Order No. 2000 (as it did with the Midwest ISO TO Agreement), the Commission then evaluates withdrawal requests against the standards contained in the Commission-approved RTO agreement. Duke states that if Midwest ISO believes that

---

<sup>17</sup> Midwest ISO July 26 Comments at 21.

<sup>18</sup> Duke August 10 Answer at 17-18 (citing 16 U.S.C. § 824b (2006)).

<sup>19</sup> Duke August 10 Answer, Docket No. ER10-1562-000, at 17 (citing *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 12 (D.C. Cir. 2002); *Atlantic City Elec. Co. v. FERC*, 329 F.3d 856, 859 (D.C. Cir. 2003)).

the Midwest ISO TO Agreement is no longer just and reasonable, it can propose changes under section 206 of the FPA.<sup>20</sup> Absent such a change, Duke argues that Midwest ISO is bound by the contract it executed and is barred from collaterally attacking the withdrawal procedure that it agreed to and that the Commission approved.

33. Duke further argues that, even if the Commission applied the scope and configuration analysis of Order No. 2000 in this case (which Duke believes it should not), there are no actual scope and configuration concerns raised by its proposed withdrawal from Midwest ISO. Duke asserts that even if Duke and FirstEnergy withdraw, Midwest ISO's scope will be significantly larger than at its inception. Duke states that when the Commission found in 2001 that Midwest ISO had adequate scope and configuration, Midwest ISO had a generation capacity of about 59,000 MW and a peak load of 53,000 MW.<sup>21</sup> Duke states that after the noted withdrawals, Midwest ISO would still have a generating capacity of about 128,400 MW, and that Midwest ISO's post-withdrawal peak load of about 78,828 MW would still be the second largest of any RTO. Duke argues, therefore, that there is no scope issue raised by its move to PJM.

34. According to Duke, configuration issues will continue to be addressed by the elimination of the regional through-and-out rate between Midwest ISO and PJM, as well as the Midwest ISO/PJM Joint Operating Agreement. Duke adds that its transition from Midwest ISO to PJM neither creates nor exacerbates any seams issues between the two RTOs. If anything, according to Duke, the transition reduces certain seams issues, particularly with respect to generating facilities that are owned jointly with entities in PJM. In addition, Duke claims that Duke Ohio's transmission system is, by some measures, more tightly interconnected with PJM members AEP and Dayton Power than with any Midwest ISO transmission owners.

35. Duke notes that unlike seams between other RTOs, the border between Midwest ISO and PJM never featured a geographically contiguous boundary. Duke notes that the Commission found that Midwest ISO and PJM would nonetheless have an appropriate configuration, subject to certain conditions, including the elimination of the regional through-and-out rate between the two RTOs and coordination through a Joint Operating Agreement. Duke notes that Midwest ISO states in its protest that "[t]he elimination of [regional through-and-out rates] and the joint and common market initiative have largely

---

<sup>20</sup> 16 U.S.C. § 824e (2006).

<sup>21</sup> Duke August 10 Answer at 18-19 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 97 FERC ¶ 61,326, at 62,506 (2001)).

removed economic barriers by assuring the most efficient management of congestion.”<sup>22</sup> Duke states that although Midwest ISO further argues that the Joint Operating Agreement is no longer appropriately serving its purpose, this argument means (if anything) that the Joint Operating Agreement should be fixed, not that the proposed RTO realignment is unjust and unreasonable. Furthermore, Duke asserts that Midwest ISO’s request for the Commission to reform the Joint Operating Agreement in this proceeding is a collateral attack on the Commission orders approving the Joint Operating Agreement.

36. Duke argues that Midwest ISO’s estimates of the cost to consumers associated with PJM’s Reliability Pricing Model are unsubstantiated and that Midwest ISO itself notes that the estimates are neither proven nor reliable.<sup>23</sup> Duke adds that Midwest ISO does not actually compare the estimated costs of providing capacity to preserve reliability in PJM to analogous costs in Midwest ISO. Duke claims that Midwest ISO simply states the total amount of its cost estimate and implies that this figure is the amount of harm to be incurred by consumers, as if capacity is free in Midwest ISO, and as if every dollar paid for capacity in PJM is a consumer harm.

37. Duke also notes that, three months ago, in an effort to keep Duke Ohio and Duke Kentucky from withdrawing, Midwest ISO offered to change its Tariff<sup>24</sup> so that Duke would receive pricing exactly the same as FirstEnergy would receive, after it moves to PJM, under PJM’s Reliability Pricing Model construct. Duke states that Midwest ISO does not explain how the Reliability Pricing Model that, in May, represented a fair allocation to ratepayers in retail choice states of the value of capacity required to satisfy Midwest ISO resource adequacy requirements had, by July, transformed into new and unnecessary costs that could harm consumers.<sup>25</sup> Perhaps most fundamentally, according to Duke, Midwest ISO never addresses the basic legal question of how a rate such as the Commission-approved, market-determined Reliability Pricing Model rate could be unjust and unreasonable as applied to consumers in the Cincinnati region, but just and reasonable as applied to all of the other consumers in PJM’s vast footprint.

---

<sup>22</sup> Duke August 10 Answer at 23 (citing Midwest ISO July 26 Comments at 25).

<sup>23</sup> Duke August 10 Answer at 7 (citing Midwest ISO July 26 Comments at n.46 (declining to introduce evidence in support of its calculations because the exact amount is not material to this proceeding)).

<sup>24</sup> Midwest ISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Midwest ISO Tariff).

<sup>25</sup> Duke August 10 Answer at 8 (citing Midwest ISO July 26 Comments at 4-5, 30).

38. Duke states that it was out of respect for Midwest ISO, which Duke Indiana has no plans to exit, that it did not include in its filing any comparison of Midwest ISO and PJM. Duke contends that the legal standard does not require such a comparison,<sup>26</sup> nor should it, lest the Commission find itself in the business of determining which RTO is “more” just and reasonable than the other.

39. In its answer, FirstEnergy states that the established law is that RTO membership is voluntary; the terms of RTO exit are defined by section 205 of the FPA and by specific rights that are described in RTO tariffs and agreements. FirstEnergy maintains that Midwest ISO points to no statutes or changes to the Midwest ISO TO Agreement that support its proposed legal novations. FirstEnergy states that Midwest ISO’s new standards are unlawful, and if implemented, they will bring about a situation where utilities might enjoy the statutory right to leave, but as a practical matter, will never be able to.

40. In response to Duke’s answer, Midwest ISO states that it does not object to Duke’s withdrawal *per se* but is instead asking the Commission to revisit its definition of what is just and reasonable where a realignment is proposed rather than a proposal to operate on a stand-alone basis, as was the case in *LG&E*. It contends that the Commission’s policy-making duty under the FPA requires a periodic reassessment of the three-prong test established in *LG&E*, if warranted by new circumstances. Where a proposed realignment is involved, Midwest ISO argues that the Commission should consider how a trend in RTO movement may negatively affect RTO borders, markets, and transmission expansion plans, and whether a particular withdrawal may be motivated by economic gain to generation as opposed to efficiencies in transmission. With that information, Midwest ISO asserts, the Commission can consider whether any claimed benefits can be achieved by other means, such as closer integration of the joint and common market, and what restrictions, remedies, or hold harmless conditions may be necessary if the totality of the proposal is deemed not to be just and reasonable.

41. While RTO membership is voluntary, Midwest ISO asserts that it is still subject to the Commission’s review to assure that bilateral agreements do not result in rates, terms or conditions of service that are unjust, unreasonable, or unduly discriminatory. In support of its argument, Midwest ISO cites a recent Commission order that, according to Midwest ISO, states that agreement among parties should not defenestrate the

---

<sup>26</sup> Duke August 10 Answer at 6 (citing, *e.g.*, *LG&E*, 114 FERC ¶ 61,282 at P 29; *Duquesne*, 122 FERC ¶ 61,039 at P 133; *FirstEnergy*, 129 FERC ¶ 61,249 at P 121, 136).

Commission's obligation to review the underlying policy implications of a proposal.<sup>27</sup> Midwest ISO also asserts that the requirement of the Commission's approval is ingrained in the Midwest ISO TO Agreement under Article 5.<sup>28</sup> According to Midwest ISO, the Commission has consistently required Independent System Operator and RTO transmission owner agreements to include this requirement, which has been sustained by the courts.<sup>29</sup> Furthermore, Midwest ISO notes that the courts have agreed that the Commission's review does not implicate *Mobile-Sierra*<sup>30</sup> concerns and is consistent with a transmission owner's voluntary decision to organize an RTO.<sup>31</sup>

42. Midwest ISO also argues that, contrary to FirstEnergy and Duke's claim, it is not proposing that the Commission import the public interest standard from section 203 of the FPA. Instead, Midwest ISO explains that it was referring to the Commission's broader duty under the FPA to regulate, in the public interest, the business of transmitting electricity in interstate commerce and selling electric energy at wholesale. Furthermore, Midwest ISO asserts that section 205 of the FPA endows the Commission with all the necessary tools to conduct a searching review of Duke's application. Midwest ISO argues that the third prong of the test the Commission established in *LG&E*, which focuses on the just and reasonableness of the proposed transaction, does not include a standard list of items for the Commission to review. Although the Commission has focused its review under this prong on the new transmission arrangements, Midwest ISO argues that there is no sound legal reason why the Commission review should be limited in such a way in all circumstances. Thus, the Commission should now broaden its review, argues Midwest ISO, to consider what the departing member is leaving behind.

---

<sup>27</sup> Midwest ISO August 25 Answer, Docket No. ER10-1562-000, at 9 (citing *ISO New England Inc.*, 132 FERC ¶ 61,122, at P 22 (2010)) (Midwest ISO August 25 Answer).

<sup>28</sup> Midwest ISO August 25 Answer at 9 (citing Article Five, Section I of the Midwest ISO TO Agreement, which states that a transmission owner's withdrawal "may become effective only if FERC approves the withdrawal.").

<sup>29</sup> Midwest ISO August 25 Answer at 10 (citing *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 286 (D.C. Cir. 2006) (*Maine PUC*)).

<sup>30</sup> *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

<sup>31</sup> Midwest ISO August 25 Answer at 10 (citing *Maine PUC*, 454 F.3d at 285, 287).

43. Midwest ISO states that state regulators, consumer advocates, and Midwest ISO's Independent Market Monitor share its concerns that a significant RTO realignment may be approved with no showing of the impact on consumers, for whose benefit the Commission adopted both Order No. 888 and Order No. 2000. It also highlights its Independent Market Monitor's specific concerns, which include degradation of the RTOs' configuration along the Midwest ISO's eastern border; substantial externalities to existing participants; retardation of future investment and other long-term decisions.<sup>32</sup> Midwest ISO also draws attention to its Independent Market Monitor's statement that the benefit of higher capacity prices "would not exist absent substantial barriers preventing the import and export of capacity between PJM and Midwest ISO."<sup>33</sup> To not take these concerns into consideration is untenable, argues Midwest ISO.

44. Midwest ISO disagrees with Duke's narrative regarding Midwest ISO's efforts to adopt mechanisms that would allow Duke to realize benefits equivalent to those FirstEnergy enjoys in PJM's capacity market.<sup>34</sup> Midwest ISO states that it planned to achieve this result principally by facilitating Duke's ability to bid its capacity into PJM's capacity market. It argues that it has several initiatives already underway that show Midwest ISO's good faith attempts to meet the needs of its individual members. Midwest ISO notes that Duke could have chosen to stay and to participate in the stakeholder process or filed a section 206 action to challenge the justness and reasonableness of Midwest ISO's tariff, but instead chose to avoid constraining circumstances through the simple expedience of changing RTOs.

45. Midwest ISO Transmission Owners state that while they take no position on the merits of Duke's proposed RTO Realignment, they support a strong and vigorous Midwest ISO and are concerned whenever a transmission owner elects to depart from Midwest ISO. In addition, Midwest ISO Transmission Owners state that they strongly believe in the voluntary, contractual nature of RTO participation, and that the *LG&E* standard of review is adequate and appropriate. They state that they disagree with Midwest ISO's assertion that the Commission should adopt a stricter standard when a departing transmission owner proposes to join a different RTO than when it plans to function on a stand-alone basis. A stricter standard, according Midwest ISO Transmission Owners, is contrary to the Commission's policy in favor of RTO

---

<sup>32</sup> Midwest ISO August 25 Answer at 11-12 (citing Potomac Economics' August 19 Comments at 3).

<sup>33</sup> Midwest ISO August 25 Answer at 5.

<sup>34</sup> *Id.* at 12-14.

participation, and could serve as a deterrent to joining an RTO when withdrawing from another.

#### 4. Commission Determination

46. We reject intervenors' requests that, in evaluating Duke's application, we change the manner in which we evaluate applications for RTO withdrawal.

47. The Commission first enunciated how it would evaluate an application to withdraw from an RTO in *LG&E*, where it applied the three-prong test mentioned above.<sup>35</sup> The Commission found in *LG&E* that the effect of the applicants' withdrawal on third parties would be fully addressed by the consumer protection provisions of Article Five of the Midwest ISO TO Agreement.<sup>36</sup> The Commission otherwise rejected parties' requests for the Commission to require any sort of cost/benefit analysis or a showing that the replacement arrangements were consistent with the policy objectives of Order No. 2000.<sup>37</sup> In *Duquesne*, the Commission followed its analysis from *LG&E* and reiterated that RTO participation is voluntary and that a withdrawing entity does not need to provide evidence demonstrating that the costs of remaining a member are greater than the benefits of withdrawing.<sup>38</sup> The Commission has further emphasized that the Midwest ISO TO Agreement expressly defines the requirements applicable to a member's withdrawal from Midwest ISO.<sup>39</sup>

48. In evaluating Duke's application, we will apply the above-noted three-prong test in the same manner as reflected in our precedent.<sup>40</sup> We also reiterate that RTO

---

<sup>35</sup> The Commission employed a fourth prong in *LG&E* to address merger issues that are not at issue here.

<sup>36</sup> *LG&E*, 114 FERC ¶ 61,282 at P 28.

<sup>37</sup> *Id.* P 29-30; *LG&E Rehearing Order*, 116 FERC ¶ 61,020 at P 8-13.

<sup>38</sup> *Duquesne*, 122 FERC ¶ 61,039 at P 133 (citing *LG&E*, 114 FERC ¶ 61,282 at P 29).

<sup>39</sup> *LG&E Rehearing Order*, 116 FERC ¶ 61,020 at P 13 (citing *RTO Guidance Order*, 104 FERC ¶ 61,248 (2003)).

<sup>40</sup> *FirstEnergy*, 129 FERC ¶ 61,249; *Duquesne*, 122 FERC ¶ 61,039; *LG&E*, 114 FERC ¶ 61,282.

participation is voluntary.<sup>41</sup> In Order No. 2000, the Commission stressed that it was adopting a voluntary approach to the formation of RTOs.<sup>42</sup> Subsequently, the Commission has followed this approach when evaluating requests to withdrawal from an RTO.<sup>43</sup> The Midwest ISO TO Agreement provides a contractual right for parties to withdraw from Midwest ISO,<sup>44</sup> and no party has challenged that contractual right. We find no evidence in the Midwest ISO TO Agreement to suggest that the transmission owners intend for RTO member departures to receive the more stringent review that commenters propose.

49. Moreover, similar to the Commission's finding in *LG&E*, we hold that Duke's fulfillment of its contractual arrangements – namely the provisions set forth in Article Five of Midwest TO Agreement – will, when completed and approved by the Commission, mitigate concerns regarding the effect Duke's withdrawal will have on third parties. We reject intervenors' arguments that the Commission should require Duke to demonstrate that the benefits of withdrawal would exceed the costs. Imposing such a requirement would negate the voluntary nature of RTO membership. We note, however, that nothing in this order should be interpreted as interfering with state regulatory authority or requirements.

**C. Whether Duke's Withdrawal Proposal Has Satisfied, or Will Satisfy, Duke's Midwest ISO TO Agreement Obligations**

**1. Duke's Proposal**

50. Duke asserts that its withdrawal from Midwest ISO is permitted, subject to the following requirements of the Midwest ISO TO Agreement: (1) written notice, under Article Five, Section I; (2) availability of continued transmission service for Duke's

---

<sup>41</sup> See, e.g., *LG&E*, 114 FERC ¶ 61,282 at P 29; *LG&E Rehearing Order*, 116 FERC ¶ 61,020 at P 1. For this reason, applications to join or to depart an RTO are filed under FPA section 205. We do not evaluate them under FPA section 202(a) or under the public interest presumption associated with the Mobile-Sierra doctrine.

<sup>42</sup> Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 30,995.

<sup>43</sup> See *FirstEnergy*, 129 FERC ¶ 61,249 at P 7, 114; *Duquesne*, 122 FERC ¶ 61,039 at P 133 (citing *LG&E*, 114 FERC ¶ 61,282 at P 29).

<sup>44</sup> Midwest ISO TO Agreement, Article Five, Section I; see *LG&E Rehearing Order*, 116 FERC ¶ 61,020 at P 13.

existing customers, under Article Five, Section II.A; (3) payment of all financial obligations, under Article Five, Section II.B; (4) negotiated resolution, as between Duke and Midwest ISO, regarding Duke's obligation to construct new facilities, under Article Five, Section II.C; and (5) receipt of all applicable federal and state regulatory approvals, under Article Five, Section III.

51. Duke states that it has satisfied its notice of withdrawal obligations under the Midwest ISO TO Agreement by: (1) a written notice that Duke submitted to Midwest ISO on May 20, 2010, identifying a proposed withdrawal date of January 1, 2012;<sup>45</sup> and (2) Duke's completion of its five-year initial commitment to remain in Midwest ISO.

52. Duke asserts that it will be able to satisfy its obligations regarding the availability of continued transmission service for Duke's existing customers principally by maintaining the same approach to zonal transmission rate design that it has today.<sup>46</sup> Duke expects to file rates for transmission service in the Duke Energy Zone by approximately July 2011. While Duke expects that filing to closely track the existing Duke Ohio and Duke Kentucky zonal rate formula, some changes are necessary, such as rate de-coupling of the Duke Indiana and Duke Ohio/Duke Kentucky transmission facilities and changes to accommodate differences between Midwest ISO and PJM billing practices. In addition, Duke states that the Joint Operating Agreement between PJM and Midwest ISO addresses loop flows sufficiently to meet the requirement that a withdrawing transmission owner address financial transmission rights and loop flow.

53. Duke also asserts that Duke Ohio and Duke Kentucky will pay the exit fees for their respective footprints in Midwest ISO. Duke notes that, under Article Five, Section II.B, "[a]ll financial obligations incurred and payments applicable to time periods prior to

---

<sup>45</sup> See Notice of Withdrawal of Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc., dated May 20, 2010 (Duke June 25 Filing at Ex. 3).

<sup>46</sup> Article Five, Section II.A of the Midwest ISO TO Agreement states:

Users taking service which involves the withdrawing Owner and which involves transmission contracts executed before the Owner provided notice of its withdrawal shall continue to receive the same service for the remaining term of the contract at the same rates, terms, and conditions that would have been applicable if there were no withdrawal. The withdrawing Owner shall agree to continue providing service to such Users and shall receive no more in revenues for that service than if there had been no withdrawal by such Owner.

the effective date of [the withdrawing Owner's] withdrawal shall be honored by the Midwest ISO and the withdrawing Owner." Duke further notes that, under Article Five, Section II.D, "[o]ther obligations between the Midwest ISO and the withdrawing Owner shall be renegotiated as between the Midwest ISO and the withdrawing Owner." Duke commits to working with Midwest ISO to confirm the appropriate fees and a plan for payment of these fees, as well as credits for Duke against future incurrence of fees under schedules 10, 16, and 17 of Midwest ISO Tariff. Duke further states that it is not seeking approval of any rate for recovery of an exit fee at this time, and thus contends that raising associated preemption issues is premature.

54. Duke states that it will satisfy its obligations under the Midwest ISO TO Agreement regarding the construction of new facilities. It notes that, under Article Five, Section II.C, "obligations relating to the construction of new facilities pursuant to an approved plan of Midwest ISO shall be renegotiated as between Midwest ISO and the withdrawing Owner."<sup>47</sup> Duke further notes that the Midwest ISO Tariff similarly provides that "[a] Party that withdraws from Midwest ISO shall remain responsible for all financial obligations incurred pursuant to this Attachment FF while a Member of Midwest ISO . . . ."<sup>48</sup> Duke states that it will enter into the contemplated discussions with Midwest ISO to address its financial obligations.

55. Duke also asserts that it will satisfy all applicable regulatory approval obligations under the Midwest ISO TO Agreement. It notes that, under Article Five, Section III, "the withdrawal by an Owner of its facilities from Midwest ISO shall be subject to applicable federal and state regulatory approvals or procedures." Duke asserts that this requirement will be satisfied by the Commission's approval of its June 25 filing. Furthermore, Duke Kentucky has made a filing with the Kentucky Public Service Commission requesting approval of the RTO Realignment as it pertains to Duke Kentucky. Duke also states that it has commenced discussion with the Ohio Commission and the Indiana Commission regarding cost recovery issues, although no regulatory approvals are required in Ohio or Indiana for the transaction.

---

<sup>47</sup> *See also* Midwest ISO Tariff at Attachment FF, Section III.A.2.i ("A party that withdraws from the Midwest ISO shall remain responsible for all financial obligations incurred pursuant to this Attachment FF while a Member of the Midwest ISO.").

<sup>48</sup> Duke June 25 Filing at 17 (citing Midwest ISO Tariff at Schedules 10, 16, and 17).

## 2. Protests

56. The Ohio Commission argues that Duke's filing is vague and lacks sufficient detail to allow for Commission approval. It contends that Duke failed to identify its obligation to make Midwest ISO Transmission Expansion Plan (MTEP) payments, the ensuing obligation to PJM for Regional Transmission Expansion Plan (RTEP) payments, and exit fees to Midwest ISO. The Ohio Commission argues that the issue of cost recovery must be addressed up front prior to making a determination that the filing is just and reasonable. The Ohio Commission maintains the Commission should determine whether, when applied together, the PJM and Midwest ISO cost allocation methods yield a just and reasonable end result for Duke Ohio and Duke Kentucky in this particular situation. According to the Ohio Commission, the vague nature of Duke's filing causes it to violate the reasonable notice requirement of the FPA.<sup>49</sup> It therefore recommends that the Commission require Duke to revise its application to include estimated additional costs associated with Midwest ISO's exit fees, MTEP, and RTEP and to delineate how Duke proposes to recover such additional costs.

57. If the Commission chooses to move forward without requiring this information, the Ohio Commission argues that retail customers must be held harmless from any additional costs and charges associated with Duke's decision to switch RTOs. Furthermore, the Ohio Commission asks the Commission to require Duke to determine and weigh the impact of its proposed move to PJM on all of its business units, especially its local distribution company and retail customers.

58. Hamilton states that Duke has failed to demonstrate that it will continue transmission service for existing customers. Hamilton contends that the only way to make such a demonstration is by submitting the plan to ensure service is continued, along with the proposed replacement terms of service, which Duke has not done. Hamilton maintains that Duke's requests in this filing would require it and other load-serving entities to participate in an auction for an RTO market before they are likely to have become market participants in PJM and before material components of rate treatments have been determined. Hamilton asserts that if the Commission does not reject the proposal, it should state that Hamilton's service should not be terminated until a demonstration that service of equal or superior quality will be provided under the PJM tariff. Along similar lines, according to Hamilton, its ability to self-supply ancillary services must be maintained.

---

<sup>49</sup> Ohio Commission Protest at 4 (citing 16 U.S.C. § 824d (2006)).

59. Wabash is concerned that exit fees will be borne by Duke Indiana or the Duke Indiana transmission facilities, which would adversely impact Wabash. Wabash, as a party to a transmission agreement with Duke Indiana (November 1982 Transmission Agreement),<sup>50</sup> maintains that it could be negatively impacted by any fees borne by Duke Indiana because all costs borne by Duke Indiana may be proportionally allocated to Wabash under the November 1982 Transmission Agreement. Wabash also wants to ensure that its interest in the Duke Indiana joint transmission system is not negatively impacted by the steps that are taken to unwind all or parts of the joint transmission system planning and operating agreement, which was originally entered into by Public Service of Indiana and Cincinnati Gas & Electric Company (now known as Duke Ohio), along with Cinergy Services, Inc. (acting as an agent on behalf of Public Service of Indiana and Cincinnati Gas & Electric Company).

60. With respect to the “hold harmless” provision, Midwest ISO urges the Commission to consider regulatory scrutiny to protect not only ultimate consumers but all other market participants. Accordingly, Midwest ISO suggests that the memorandum of understanding between the Commission and the Commodity Futures Trading Commission could provide the mechanism for coordinated review of the impact on energy markets, energy futures, and the trading of transmission rights resulting from moving generation from one market to another and dislocating a major energy trading hub.<sup>51</sup> It contends that shifting Duke Ohio transmission facilities to PJM will disrupt established trading patterns and existing contractual agreements of other market participants that have taken positions at the Cinergy Hub. Midwest ISO also states that some delivery points within the Cinergy Hub, consisting of transmission delivery points first established on the Cinergy (now Duke) transmission system, will either shift to PJM’s functional control or have to be reconfigured.<sup>52</sup> The Commission may need to implement necessary remedies to address this circumstance or impose hold harmless conditions sufficient to protect the public interest, Midwest ISO states.

61. With regard to holding Indiana customers harmless, the Indiana Commission states that Duke’s response to the Indiana Commission is that Indiana customers will

---

<sup>50</sup> Wabash, Public Service of Indiana, Inc. (now Duke Indiana), and Indiana Municipal Power Agency entered into the November 1982 Transmission Agreement on November 5, 1982. The agreement was subsequently amended on December 4, 1985 and on December 16, 1994.

<sup>51</sup> See Midwest ISO July 26 Comments at 31-32.

<sup>52</sup> Midwest ISO states that this possibility raises a number of questions. *Id.* at 32-34.

incur some costs because of the interconnectedness of Duke's operations in Ohio, Indiana, and Kentucky. The Indiana Commission states that Duke offers no metrics to ensure the hold harmless result and that this unwillingness to quantify benefits and costs does not reassure the Indiana Commission that Duke can hold Indiana customers harmless from Duke's decision.

### 3. Answers and Additional Pleadings

62. Duke states that Duke Ohio will honor legitimate hold harmless claims that fall within the narrow confines established by the Commission in *LG&E*.<sup>53</sup> Duke argues, however, that, as the Commission held in *FirstEnergy*, issues regarding the hold harmless obligations should be deferred until new rates for the Duke Energy Zone of PJM are filed.<sup>54</sup> Duke states that without the new rate to compare to the old rate, it is fruitless to try and evaluate whether existing customers will receive service at the same rates, level of service, and quality of service that they would have received absent Duke's withdrawal. Between now and then, Duke states that it will continue its stakeholder outreach efforts in hopes that parties can arrive at mutual understanding without litigation.

63. In response to comments regarding the recovery or pass-through of any costs associated the RTO Realignment, including MTEP and RTEP costs and Midwest ISO exit fees, Duke argues that the Commission can and should defer addressing those issues until filings relating to them are made. Duke expects that the Commission will condition approval of the RTO Realignment on resolution of the proceedings resulting from the future filings. Nevertheless, it addresses two comments having to do with the allocation of transmission expansion costs. First, Duke agrees with the Ohio Consumers' Counsel's following statement:

In keeping with the Commission's focus on rate design and cost allocation in the PJM-[Midwest ISO] Combined Region, the Commission should determine whether, when applied together, the PJM and [Midwest ISO] cost allocation methods yield a just and reasonable end result for the Companies in this particular situation. If the Commission determines that the combined application of the PJM and [Midwest ISO] cost allocation methods results in an unjust and unreasonable

---

<sup>53</sup> Duke August 10 Answer at 30 (citing *LG&E*, 114 FERC ¶ 61,282 at P 44, 49-50).

<sup>54</sup> Duke August 10 Answer at 31 (citing *FirstEnergy*, 129 FERC ¶ 61,249 at P 50).

result, the Commission should not require the Companies to pay any costs that are found to be unjust and unreasonable.<sup>55</sup>

Duke believes, however, that such issues can await resolution of the Duke zonal rate filing, at which time the issues could be mooted by the outcome of the rehearing requests filed in response to *FirstEnergy*.<sup>56</sup>

64. Second, Duke states that it is sympathetic to FirstEnergy's argument that "the cost of transmission projects in the former RTO that were approved by the RTO board after the date that the Commission approves the withdrawal should not be assigned to the customers in the departing transmission owner's zone," and conversely that "transmission owning utilities should not be assigned cost responsibility for transmission projects planned prior to their entry into the new RTO or participation in the new RTO's planning process unless there is a clear demonstration that the entering transmission owner benefits from a particular project."<sup>57</sup> Duke states that it will be vigilant in detecting and challenging cost allocations that are artificially accelerated in order to trap Duke Ohio and Duke Kentucky into paying unfairly for costs for expansions that were not legitimately planned for them. In general, however, Duke believes that these issues should be addressed in future proceedings.

65. Duke disputes the notion that maintenance of the Cinergy Hub in Midwest ISO is Duke Ohio's responsibility, as heir to Cinergy.<sup>58</sup> Duke states that a hub is defined as "[a] Commercial Pricing Node [CP Node] developed for financial and trading purposes,"<sup>59</sup> that such CP Nodes are not linked to any market participant and that, "CPNodes representing the Hubs are not related to any specific Asset Owner."<sup>60</sup> Duke claims that Midwest ISO, not Duke Ohio, is charged with "Implement[ing] and maintain[ing] the

---

<sup>55</sup> Duke August 10 Answer at 33-34 (citing Ohio Consumers' Counsel July 26 Protest, Docket No. ER10-1562-000, at 17).

<sup>56</sup> Duke August 10 Answer at 34.

<sup>57</sup> *Id.* (citing FirstEnergy July 26 Comments, Docket No. ER10-1562-000, at 3-4).

<sup>58</sup> Duke August 10 Answer at 28 (citing Midwest ISO July 26 Comments at 32 and Hoosier July 26 Protest, Docket No. ER10-1562-000, at 4).

<sup>59</sup> Duke August 10 Answer at 28 (citing Midwest ISO Tariff, Section 1.304).

<sup>60</sup> Duke August 10 Answer at 28 (citing Midwest ISO Network and Commercial Models Business Practices Manual, Effective March 18, 2010, Section 4.2.6 – Hubs).

Commercial Pricing Nodes for Load and Generation Resources that comprise Hubs . . . and modify[ing] each to meet the needs of Market Participants.”<sup>61</sup> Thus, Duke argues that Duke Ohio is not responsible for impacts that its withdrawal may have on the Cinergy Hub, or any related theoretical impacts on the liquidity and viability of Midwest ISO market.<sup>62</sup> Duke adds, however, that Duke Ohio and Duke Kentucky are only withdrawing a small portion of Midwest ISO’s generation and load, suggesting that the departure of these entities should have little or no impact on the liquidity and viability of Midwest ISO’s market.

66. Regarding the hold harmless obligation under the Midwest ISO TO Agreement, FirstEnergy states that this obligation applies to existing transmission arrangements and that Duke, the departing transmission owner, is required to provide the same service for the same rates to the customers that have this arrangement or arrangements. FirstEnergy maintains that the settled rule is that withdrawing transmission owners are not obligated to hold parties harmless from all costs occasioned by a withdrawal that is contemplated under an RTO’s tariffs and agreements. FirstEnergy contends that there is no open-ended obligation to provide additional hold harmless provision to Midwest ISO or its remaining members. FirstEnergy asserts that the Commission is not at liberty to ignore this contractual limit on a departing utility’s hold harmless obligation.

67. FirstEnergy contends that transmission-owning utilities that withdraw from one RTO and realign with another should not be subject to duplicative charges as a part of the exit and entry process. To address the RTO Realignment proposal, FirstEnergy states that the Commission should adopt guidelines that ensure that transmission-owning utilities that have obtained Commission approval to withdraw from one RTO and enter another will no longer be included in the RTO transmission planning process of its former RTO at the point of Commission approval. FirstEnergy also maintains that the costs of transmission projects in the former RTO that were approved by the RTO board after the date that the Commission approved the withdrawal should not be assigned to the customers in the departing transmission owner’s zone. FirstEnergy states that transmission-owning utilities should not be assigned cost responsibility for transmission projects planned prior to their entry into their new RTO or participation in the new RTO’s planning process unless there is a clear demonstration that the entering transmission owner benefits from a particular project.

---

<sup>61</sup> Duke August 10 Answer Duke August 10 Answer at 28 (citing Midwest ISO Tariff, Section 38.1.1.j).

<sup>62</sup> Duke August 10 Answer at 29 (citing *LG&E*, 114 FERC ¶ 61,282 at P 49).

68. FirstEnergy argues that these findings are necessary to provide clarity to the RTO, transmission-owning utilities, and other stakeholders. FirstEnergy also maintains that these findings will provide cost signals that promote RTO participation, enhance efficiency, are consistent with the Commission's policy of encouraging RTO membership, and ensure that that new transmission construction costs match causation and/or benefits.

69. Finally, Midwest ISO states that in its July 26 Comments, it questioned whether the Commission's review of the ancillary impacts of Duke's proposed move should be included in its analysis. In response, Duke argued, according to Midwest ISO, that "[it] is not responsible for impacts that [its] withdrawal may have on the Cinergy Hub, or any related theoretical impacts on the liquidity and viability of Midwest ISO market."<sup>63</sup> Midwest ISO notes that while it is true that it identified no specific harm, it had only meant to pose a series of unanswered questions that it argues the Commission should ask. Furthermore, Midwest ISO argues that the Commission should be asking questions similar to those that the Kentucky Commission posed to Duke Kentucky.

#### **4. Commission Determination**

70. We find that, subject to conditions, Duke has satisfied, or commits to satisfy, the requirements for withdrawal from Midwest ISO as established under the Midwest ISO TO Agreement. Withdrawal from the Midwest ISO TO Agreement requires: (1) written notice; (2) the availability of continued transmission service for Duke's existing customers; (3) payment of all financial obligations; (4) negotiated resolution, as between Duke and Midwest ISO, regarding Duke's obligations to construct new facilities; and (5) receipt of all applicable federal and state regulatory approvals. We discuss each of these requirements below.

71. First, we find that Duke has satisfied the written notice requirement applicable to its withdrawal request under Article Five, Section I of the Midwest ISO TO Agreement.<sup>64</sup> Duke provided the required written notice to Midwest ISO on May 20, 2010, proposing to leave Midwest ISO as of January 1, 2012.<sup>65</sup>

---

<sup>63</sup> Midwest ISO August 26 Answer at 15 (citing Duke August 10 Answer at 28-29).

<sup>64</sup> See *supra* note 45.

<sup>65</sup> See Duke June 25 Filing at Ex. 3.

72. We also find that Duke has committed to make the necessary filings to comply with the “Users Held Harmless” obligation under Article Five, Section II.A of the Midwest ISO TO Agreement. Duke plans to maintain the same approach to zonal transmission rate design in PJM that it has in Midwest ISO, and it commits to honor “hold harmless” claims.<sup>66</sup> As the Commission has previously found, this commitment extends to existing transmission arrangements, including grandfathered agreements.<sup>67</sup> Assuming that Duke finalizes these commitments and they are approved by the Commission, existing customers will be entitled to enjoy the same service and pricing to which they would have been entitled absent Duke’s withdrawal. While intervenors raise additional concerns regarding these obligations, including the manner in which these obligations will be honored, we will not prejudge these issues here or otherwise speculate on matters not before us at this time. Rather, these issues, should they arise in the context of Duke’s anticipated future submittals, should be addressed in those proceedings. Similarly, we will not rule on Hamilton’s assertion that Duke must address continued service to Hamilton and Hamilton’s ability to self-supply ancillary services. These issues will be ripe for consideration once Duke submits its proposed replacement arrangements for Commission review.<sup>68</sup>

73. We find that Duke further commits to meet the financial obligations required of Article Five, Section II.B of the Midwest ISO TO Agreement. It has committed to a future proceeding considering its payment to Midwest ISO of an exit fee. Duke also commits to working with Midwest ISO regarding the appropriate fees and a plan for payment of these fees, and it notes that it is not seeking approval of any rate for recovery of an exit fee at this time. We find that this approach is an appropriate basis on which to proceed with Duke’s proposed withdrawal and that any specific issues or concerns relating to Duke’s exit fee need not be addressed here.<sup>69</sup>

74. FirstEnergy requests that the Commission provide guidance regarding a transmission-owning utility’s transmission planning obligations as it transitions from its former RTO to a new RTO. The Commission declines to make a general statement regarding a withdrawing transmission-owning utility’s transmission planning and cost obligations to its former RTO and new RTO. In this instance, the Midwest ISO TO Agreement requires a withdrawing transmission owning utility to pay for “all financial

---

<sup>66</sup> *See id.* at 14.

<sup>67</sup> *See LG&E*, 114 FERC ¶ 61,281 at P 44-46, 49-50.

<sup>68</sup> *See FirstEnergy*, 129 FERC ¶ 61,249 at P 50.

<sup>69</sup> *LG&E*, 114 FERC ¶ 61,282 at P 52-60.

obligations incurred and payments applicable to time periods prior to the effective date of such withdrawal.”<sup>70</sup> The Commission has interpreted this provision to include transmission cost allocations made under Attachment FF of Midwest ISO Tariff.<sup>71</sup> Thus, under the terms of the Midwest ISO TO Agreements, Duke and Midwest ISO will negotiate, as part of the exit fee, any costs of transmission projects that Duke is responsible for prior to the date of its withdrawal.

75. Similarly, with respect to the Ohio Commission’s argument that retail customers must be held harmless from any additional costs and charges associated with Duke’s decision to switch RTOs, we note that Duke does not propose in this proceeding to recover any costs associated with an exit fee. As such, the appropriate time to raise this concern would be when Duke files proposed transmission rates. In addition, we will not require that Duke file a determination of the costs and benefits of proposed RTO Realignment for all of its business units, as this is not a requirement for withdrawal under the Midwest ISO TO Agreement. With respect to Wabash’s assertion that exit fees will be borne by Duke Indiana or the Duke Indiana transmission facilities, and its statements about the harm that proportional allocation could cause, we find again that this issue is not before us since Duke does not propose to recover any costs associated with an exit fee in this proceeding.

76. Regarding Duke’s obligations to construct new facilities, Duke has committed to satisfy its obligations under Article Five, Section II.C of the Midwest ISO TO Agreement.<sup>72</sup> This commitment, once carried out and approved by the Commission, will satisfy the requirements of the TO Agreement, subject to Duke and Midwest ISO formalizing a negotiated agreement and subject to the outcome of a proceeding on such a filing.

77. Finally, we agree with Duke that it will have satisfied applicable regulatory approvals pursuant to Article Five, Section III of the TO Agreement with our approval of this initial filing in Docket No. ER10-1562-000, subject to Duke meeting the conditions

---

<sup>70</sup> Midwest ISO TO Agreement at Art. Five, § II.B.

<sup>71</sup> *Midwest Independent Transmission System Operator, Inc.*, 118 FERC ¶ 61,209 (2007), *order on reh’g and compliance filing*, 120 FERC ¶ 61,080, at P 83 (2007).

<sup>72</sup> Article Five, Section II.C of the Midwest ISO TO Agreement provides that “[o]bligations relating to the construction of new facilities pursuant to an approved plan of the Midwest ISO shall be renegotiated as between the Midwest ISO and the withdrawing Owner.”

discussed herein, the outcome of Duke's future filings with this Commission, and the outcome of the pending filing with the Kentucky Commission.

**D. Whether Duke's Withdrawal Proposal Has Satisfied, or Will Satisfy, Its Midwest ISO Balancing Authority Agreement Obligations**

**1. Duke's Proposal**

78. Duke states that Duke Ohio and Duke Indiana currently are, jointly, a Local Balancing Authority under the Midwest ISO Balancing Authority Agreement. Duke further states that after the RTO Realignment, Duke Indiana will remain in Midwest ISO and will remain a Local Balancing Authority. Duke commits to working with Midwest ISO to determine the appropriate mechanics for this Local Balancing Authority configuration.

**2. Protests and Comments**

79. No party filed adverse protests or comments on this topic.

**3. Commission Determination**

80. Since Duke Indiana will remain a Local Balancing Authority in Midwest ISO, we agree that no notice is required, and that Duke Ohio has satisfied its withdrawal obligations under Midwest ISO Balancing Authority Agreement.

**E. Duke's Proposed FRR Integration Plan (Docket No. ER10-2254-000)**

**1. Duke's Proposal**

81. On August 16, 2010, Duke filed its proposed FRR Integration Plan as the second step of its proposed move from Midwest ISO to PJM. Duke seeks approval of its FRR Integration Plan to meet PJM resource adequacy requirements from the date of transmission system integration, January 1, 2012, up to the date of full participation in PJM's capacity market, June 1, 2014.

82. Duke explains that only Duke Ohio has FRR obligations, because only it has an integrated transmission system. While Duke Kentucky owns discrete limited transmission assets, it is essentially a transmission-dependent utility of Duke Ohio, and it will therefore be subject to the requirements for wholesale loads on the Duke Ohio system. Duke states that Duke Ohio proposes to adhere to the existing Reliability Assurance Agreement provisions governing FRR plans, except in certain limited respects related primarily to the out-of-time nature of the RTO-integration context. Duke Ohio seeks approval for the limited provisions of the Duke FRR Integration Plan that depart from the FRR Alternative contemplated by Schedule 8.1 of the Reliability Assurance

Agreement. Duke explains that Duke Ohio will obtain firm capacity from qualified capacity resources in an amount that would satisfy the criteria for a FRR Alternative Capacity Plan, under Schedule 8.1 of the Reliability Assurance Agreement and PJM's applicable rules and manuals, with respect to the entire Duke Energy Zone. It states that, after factoring in load-serving entities' decisions about whether to self-supply, Duke Ohio will procure capacity resources in an amount sufficient to satisfy the remaining requirements of: (1) Duke Ohio's default retail load; (2) alternative retail electric suppliers serving switched retail load; and (3) other wholesale loads, including Duke Kentucky.

83. Under Schedule 8.1 of the Reliability Assurance Agreement, Duke Ohio is required to fulfill the FRR capacity needs of alternative retail electric suppliers serving switched load. Duke Ohio states that it will serve such load at the Reliability Pricing Model price, as provided for in Section D.8 of Schedule 8.1, unless the alternative retail load-serving entity supplies its own capacity under an election and commitment made under Section D.9 of Schedule 8.1. Specifically, Duke states that, to be consistent with the capacity price paid by other load within the PJM region, the price paid by wholesale load under its plan will be the Final Zonal Capacity Price for the unconstrained portions of the PJM region.

84. Duke states that other wholesale load eligible to enter into its own FRR plan can choose to take supply from Duke Ohio at the Reliability Pricing Model price or can choose from among two "self-supply" options: (1) enter into a traditional FRR Integration plan, per the terms of the Reliability Assurance Agreement; or (2) with the Commission's permission, which Duke seeks here on load's behalf, enter into an out-of-time FRR Integration Plan designed to last through the approximately two-and-a-half years before load can participate in Reliability Price Model auctions, with all of the waivers and adjustments that Duke seeks in the instant filing. Under either of these options, Duke explains, the wholesale load would become directly responsible to PJM for its own resource adequacy requirement.

85. Duke notes that Schedule 8.1 of the Reliability Assurance Agreement provides a price for providing capacity to alternative retail suppliers, as mentioned above, but it does not specify the price for providing capacity to the remaining wholesale load that is eligible for, but does not select, one of the self-serve options. Duke therefore proposes to allocate the cost of serving load within its footprint equally among all loads by having all loads pay the price established by Schedule 8.1 of the Reliability Assurance Agreement for each applicable delivery year. Duke contends that this proposal is presumptively just and reasonable because the product being obtained by load will be used to satisfy the same resource adequacy requirement that is satisfied via the Reliability Price Model process.

86. Duke Ohio also seeks several waivers. First, it requests, on behalf of itself and any independent FRR entities, that the Commission waive Section C.1 of Schedule 8.1 of the Reliability Assurance Agreement and any corresponding or related provisions to the extent that these provisions would have required Duke to submit a FRR plan prior to the relevant Base Residual Auctions. It also requests a waiver of Section C.2 of Schedule 8.1 of the Reliability Assurance Agreement regarding notice of termination to the extent that such waivers are necessary given the pre-determined termination date for the FRR plans. Third, it seeks waiver of the provisions of Section D.1 of Schedule 8.1 of the Reliability Assurance Agreement regarding updating the FRR plan one month prior to the Base Residual Auction because these auctions for the relevant years have already occurred.

87. Duke Ohio also requests waiver of Section D.2 of Schedule 8.1 of the Reliability Assurance Agreement regarding the Preliminary Peak Load Forecast used so that Duke Ohio can use a forecast that takes into account summer 2010 peaks. It further seeks waiver of the Schedule 8.1, Section E.2 limit on sale of capacity resources above the threshold quantity into auctions conducted under Attachment DD to the PJM open access transmission tariff, solely to the extent necessary to exclude from calculation of that limit capacity resources of Duke Ohio or any independent FRR entity that have already cleared in an Reliability Price Model auction conducted before the RTO Realignment.

88. Finally, Duke Ohio requests waiver of the requirements regarding summer compliance period testing of demand resources and measurement and verification of energy efficiency resources referenced in Schedule 8.1, Section E.4, solely for the partial-year period from January 1, 2012 through May 31, 2012 to permit participation of such resources in the FRR Plan of Duke Ohio or any independent FRR entity for that time period to the extent deemed appropriate by PJM. Duke Ohio also seeks waiver of the provisions of Section F.2 of Schedule 8.1 of the Reliability Assurance Agreement to the extent that it would impose an FRR capacity deficiency charge on a demand resource provider when its resources are no longer available to support the demand resource provider's capacity obligation because of the permanent departure of the load resource associated with the obligation.

## **2. Comments**

89. The Ohio Consumers' Counsel asks the Commission to reject Duke's proposal to price capacity at the Reliability Pricing Model price for the 2011-12 period.<sup>73</sup> It claims that such a pricing proposal is unjust and unreasonable because it inappropriately uses the

---

<sup>73</sup> The clearing price set in May 2008 for the 2011-2012 Delivery Year is \$110/MW-day.

price that cleared in the Base Residual Auction for the 2011-2012 Delivery Year, which is based on a 12-month period that includes the summer peak, whereas Duke's proposal is only for a five-month, non-summer period from January 1, 2012 through May 31, 2012.<sup>74</sup> Noting that summer peak loads are generally much higher than the rest of the year, the Ohio Consumers' Counsel argues that the price for the period from January 1, 2012 through May 31, 2012 should be lower than the annual average. Requiring Ohio customers to pay this price of capacity, the Ohio Consumers' Counsel argues, would therefore result in unjust and unreasonable prices for load within Duke's footprint.

90. Aside from the seasonal issue mentioned above, the Ohio Consumers' Counsel also contends that the proposed price for the January 1, 2012 – May 31, 2012 period is inflated because the value of annual capacity is now much lower than the price set in May 2008. It notes that the clearing price for PJM's First Incremental Auction for the 2011-2012 Delivery Year, held in June 2009, cleared at \$55/MW-day. The 2012-2013 and 2013-2014 Delivery Year Base Residual Auctions also cleared at substantially lower prices than the \$110/MW-day price, the Ohio Consumers' Counsel states.<sup>75</sup> The Ohio Consumers' Counsel argues that these more recent auction prices more accurately reflect the current value of capacity for the 2011-2012 period.

91. Finally, the Ohio Consumers' Counsel argues that PJM has no need for additional capacity for the 2011-2012 delivery year even when considering Duke's wholesale load joining PJM for the latter part of that delivery year.

92. Dominion argues that retail competition in Ohio could be seriously harmed if the Commission accepts Duke's proposal without additional information. Specifically, Dominion states that its subsidiary, Dominion Retail, must understand what rate will be charged to Duke Ohio's retail customers after December 31, 2011 before it can fairly judge Duke Ohio's proposal.

---

<sup>74</sup> PJM's capacity market operates on an annual basis, not a monthly or seasonal basis. Duke's transition period begins on its proposed integration into PJM on January 1, 2012 and ends on May 31, 2014, the day before Duke may participate in the 2014-2015 Base Residual Auction. Therefore, Duke's FRR Integration Plan will only be in effect for five months of the 2011-2012 Delivery Year, from January 1, 2012 through May 31, 2012.

<sup>75</sup> The Ohio Consumers' Counsel contends, however, that the recent FRR integration auction for 2011-2012, which cleared at \$108.89/MW-day, is less indicative of the current value of capacity. *See* Ohio Consumers' Counsel September 7 Protest, Docket No. ER10-2254-000, at 9-10.

93. Accordingly, Dominion requests that the Commission require Duke Ohio to commit to charge its own load no less than the Reliability Pricing Model Price for the time period from January 1, 2012, the date of proposed integration of Duke into PJM, through May 31, 2014, the date of proposed full integration of resources and load into PJM. Alternatively, Dominion asks the Commission to require Duke Ohio to explain how it will maintain a level playing field for all alternative load-serving entities with respect to retail rate issues related to the implementation of the FRR Integration Plan.

94. FirstEnergy Solutions states that, while Duke's proposal is sound in many respects, additional information is needed. Specifically, FirstEnergy Solutions maintains that Duke presents two options for wholesale and retail suppliers that operate in Duke's zone: (1) buy capacity from Duke at an indexed price; or (2) self-serve from the supplier's own resources. FirstEnergy Solutions contends that Duke offers little detail as to how its process would work. It states that Duke does not explain whether it will factor its index price into the prices that it will charge its retail ratepayers who purchase energy from Duke. FirstEnergy Solutions also maintains that Duke does not explain how its proposed index price would be factored into the "price to compare" that its retail customers in Ohio will use to evaluate offers from third-party suppliers. Finally, according to FirstEnergy Solutions, Duke does not explain how it will bill its proposed index price to third-party suppliers who serve load (wholesale or retail) in Duke's Ohio footprint.

95. PSEG Companies request further explanation from Duke for its request for waiver of summer compliance testing of Demand Resources and measurement and verification of Energy Efficiency Resources for the January 1, 2012 through May 31, 2012 period.

96. The PSEG Companies further ask about Duke's requested waiver of a FRR Capacity Deficiency Charge imposed on Demand Resource Providers in circumstances where "its resources are no longer available to support the Demand Resource Provider's capacity obligation because of the permanent departure of the load resource associated with the obligation . . ." They note that Duke's request does not specify whether the waiver would apply only during the transition period or whether it would be a permanent waiver for all demand resource providers in the Duke Ohio and Duke Kentucky zones. The PSEG Companies ask the Commission to require Duke to clarify the scope of its request and to further explain how applying the existing FRR rules to its FRR Integration Plan would not be just and/or reasonable under the circumstances.

97. FirstEnergy Solutions states that the Commission should ask Duke to clarify that third party suppliers can self-supply for the entire period described in Duke's pleading, or for single Delivery Year blocks (including the partial Delivery Year that runs from January 1, 2012 through May 31, 2012) that are within the 29-month period covered by Duke's FRR Integration Plan. This option, according to FirstEnergy Solutions, is consistent with analogous portions of the ATSI Utilities FRR Plan – where third-party

suppliers had the option to opt-out of one or both of the Delivery Years covered by that auction. American Municipal similarly asks if load serving entities will be allowed to satisfy a portion of their capacity obligations with their own resources and the remaining with resources acquired from Duke Ohio through the Duke FRR Integration Plan.

98. American Municipal also asks for further information on several issues. It asks the Commission to require Duke to inform load serving entities of their transition period capacity obligations by a date certain and when affected resources will be notified of their deliverability status. It further seeks assurances that existing resources Midwest ISO has deemed “deliverable” to its load in the Duke Energy Zone will be deemed “deliverable” in PJM following the RTO Realignment. American Municipal also argues that Duke should be required to address the allocation of nonperformance penalties in a future filing. It further seeks more information about the proposed agreement that opt-out entities will have to enter into with Duke Ohio reflecting the commitments and obligations of the opt-out provision.<sup>76</sup>

99. Buckeye states that, as recognized in the Capacity Portability Service Agreement, it already has a Commission-approved plan to satisfy its capacity requirements in the Duke Energy Zone for the 2011-2012 and 2012-2013 Delivery Years.<sup>77</sup> As a result of the Capacity Portability Service Agreement, Buckeye states that it expects to be excused from inclusion in Duke’s FRR Integration Plan for those delivery years. According to Buckeye, based on discussion between PJM and Duke, Duke agrees with Buckeye’s characterization of Buckeye’s position for the 2011-2012 and 2012-2013 Delivery Years.<sup>78</sup> As for the final delivery year to be covered by Duke’s FRR Integration Plan, Buckeye states that the options posed in the Duke FRR Integration Plan are reasonable and acceptable to Buckeye.

100. Wabash states that Duke’s FRR Integration Plan filing does not address exit fees or any specifics regarding the Transmission Agreement and the separation of Duke Ohio and Duke Kentucky facilities from the Duke Indiana facilities. To the extent these are addressed in this filing, Wabash states that it would protest to the extent that such factors would negatively shift costs to, and fees from, the Duke Indiana joint transmission

---

<sup>76</sup> Duke Filing at n. 25.

<sup>77</sup> *Midwest Indep. Transmission Sys. Operator*, Docket No. ER09-1074-000 (June 17, 2009) (unpublished letter order).

<sup>78</sup> Buckeye September 7 Comments, Docket No. ER10-2254-000, at 9 (citing Duke August 16 Filing at 12 n. 17).

system or cause other negative impact on the facilities served by the Transmission Agreement.

101. Indiana Municipal argues that it should be held harmless for all costs that may result from the creation of a seam between its existing network load in the Village of Blanchester, Ohio (Blanchester) and the Midwest ISO-area fleet of generating resources on which Indiana Municipal relies to serve that load's full requirements. Indiana Municipal explains that it provides full requirements power supply service under a long-term contract to Blanchester, and that Duke Ohio owns the transmission facilities to which Blanchester is directly interconnected. Thus, if Duke Ohio integrates into PJM, those facilities would be placed under PJM's operational control and access to those facilities would be offered only through PJM's tariff. Indiana Municipal argues that Duke Ohio and Duke Kentucky must provide protections such that Indiana Municipal is held harmless for any consequences in PJM capacity markets related to Duke Ohio and Duke Kentucky's proposal to change the existing service to Indiana Municipal's Blanchester load.

### 3. Answers

102. Duke argues that concerns about using the Reliability Pricing Model price are misplaced because this price is a market-determined price reviewed by the PJM Market Monitor prior to filing and required by tariff.<sup>79</sup> With respect to the seasonality argument about the Reliability Pricing Model price, Duke asserts that the price paid for capacity is the same for every day of the entire year, notwithstanding the possible fluctuations in capacity prices in secondary markets. Further, Duke explains that the need for capacity exists in both PJM and the Midwest ISO; however, the only real difference is that the level of price transparency provided by Reliability Pricing Model does not exist in the Midwest ISO.

103. Responding to the Ohio Consumers' Counsel's argument that the PJM Reliability Pricing Model price should be lower after Duke Ohio's entry into PJM when compared to the PJM Incremental Auction, Duke argues that the savings have already been factored into Duke Ohio's proposal; it chose to charge the Final Zonal Capacity Price, a weighed average blending the price from the Base Residual Auction with the prices obtained in the Incremental Auctions, rather than the clearing price from the Base Residual Auction. Duke explains that PJM has been able to secure some portion of the capacity requirement for the 2011-2012 period at lower costs through the Incremental Auctions.

---

<sup>79</sup> Reliability Assurance Agreement Among Load-Serving Entities in the PJM Region, Rate Schedule FERC No. 44, Schedule 8.1, Section D.8.

104. Duke notes that it has not asked the Commission to require Duke Ohio to “charge itself” the Reliability Pricing Model Rate because that would be premature in light of the fact that Duke Ohio has not initiated a ratemaking proceeding to set retail electric generation rates for the FRR Integration Plan period. With respect to the contentions of Dominion Resources and FirstEnergy Solutions, Duke notes that these comments also are premature, particularly given the fact that alternative retail suppliers can choose to self-supply if they do not want to pay Duke Ohio the Reliability Pricing Model price.

105. Duke states that all loads will have the option to self-supply and that alternative retail suppliers have the option to “opt-out” with the Reliability Assurance Agreement specifically providing that such elections may be made on a delivery year basis. Further, Duke maintains that other wholesale load may self-supply by entering into their own FRR Integration plans either by entering into a traditional plan, per the terms of the Reliability Assurance Agreement, or by entering into an out-of-time Plan designed to see them through the 29-month transition period.

106. With respect to the billing of the proposed index price to third-party suppliers who serve load in Ohio, Duke clarifies that it will serve such load at the Reliability Pricing Model price unless the alternative retail load serving entity supplies its own capacity pursuant to an election and commitment, as provided for in Schedule 8.1 of the Reliability Assurance Agreement. Duke maintains that such sales will be made under its market-based rate tariff with PJM acting as the billing agent for Duke for sales of capacity to such alternative retail suppliers.

107. Regarding summer compliance testing of demand resources and measurement of energy efficiency resources for the partial year, Duke states that it is not clear how PJM could test these demand resources since they will still be in Midwest ISO. It proposes for PJM to use its reasonable judgment in determining which resources can satisfy reliability requirements. Duke maintains that PJM is in the process of comparing its testing measures to that of Midwest ISO to ensure that participation by these resources in the FRR Integration Plan will not cause PJM to fail to satisfy its reliability requirements.

108. With respect to the requested waiver of Section F.2 of Schedule 8.1 of the Reliability Assurance Agreement, Duke states that no parties have expressed interest in that particular waiver request. As a result, Duke proposes to withdraw this waiver request.

109. Duke references a discussion of capacity portability in the Duquesne withdrawal proceeding,<sup>80</sup> explaining that the Commission could use this process to provide Indiana Municipal (or other similarly situated entities) with comfort on the topic of use of Midwest ISO capacity resources for reliability purposes in PJM. With respect to Indiana Municipal's Blanchester load, Duke recommends that the Commission direct the Midwest ISO and PJM "to support reasonable arrangements to permit" any load with capacity under contract or owner for reliability purposes as of the date that Duke gave notice of its intent to withdraw from the Midwest ISO, May 20, 2010, to utilize capacity in satisfying its reliability obligations in PJM after Duke joins PJM. Duke believes that this option will be particularly helpful to entities such as Indiana Municipal because it does not believe that the Midwest ISO TO Agreement will be found, when the time comes, to hold them harmless with respect to resource adequacy requirements.

110. Both Dominion Resources and the Ohio Consumers' Counsel disagree with Duke's argument that concerns about the impact of Duke's proposal on Duke Energy Ohio retail ratepayers are fundamentally state issues rather than issues for this Commission. The Ohio Consumers' Counsel argues that Duke has raised a wholesale pricing issue in this proceeding, and thus it disagrees with Duke's assertion that issues involving the ultimate retail impact of Duke's proposal are state issues. Dominion Resources argues that Duke fails to provide adequate and reasonable assurances that competitive retail service providers in Ohio will not be "price squeezed" if the Commission accepts Duke's FRR Integration Plan. It contends that Duke has the ability to price squeeze alternative retail providers because Duke will know the price that alternative retail providers will pay for capacity before Duke files its retail rates with the Ohio Commission. While Dominion Resources acknowledges that the Commission cannot set retail rates, it states that the Supreme Court, in *FPC v. Conway Corp.*,<sup>81</sup> held that the Commission may and should take into consideration whether wholesale prices may be discriminatory or anticompetitive with regard to wholesale customers that compete at retail when it establishes wholesale rates.<sup>82</sup> Accordingly, Dominion Resources argues that, rather than wait for the Ohio Commission to establish Duke's rates for retail electric generation, the Commission should act now and establish the principle that Duke will charge itself and its affiliate the same Reliability Pricing Model rate as it will charge other competitive retail service providers in Duke's service area.

---

<sup>80</sup> See *Duquesne*, 122 FERC ¶ 61,039 at P 93.

<sup>81</sup> *FPC v. Conway Corp.*, 426 U.S. 271 (1976) (*Conway*).

<sup>82</sup> Dominion Resources October 7 Answer at 2-3 (citing *Conway*, 426 U.S. 271).

111. Dominion Resources also argues that Duke has failed to provide sufficient information regarding the Reliability Pricing Model price it will charge alternative retail providers. Dominion Resources notes that the western portion of PJM has cleared at different prices in different years,<sup>83</sup> and argues that Duke has failed to specify whether one of these prices or some other prices will be charged for capacity. Thus, Dominion Resources requests that the Commission direct Duke to specify the Reliability Pricing Model rate to be charged to competitive retail service providers that do not self-supply.

#### **4. Commission Determination**

112. We accept Duke's proposed FRR Integration Plan, subject to a compliance filing, as explained below. As a general proposition, we agree that the use of the FRR Integration Plan proposed by Duke provides an appropriate basis for the Duke Energy Zone to be integrated into PJM's capacity markets. Under this plan, Duke Ohio will acquire sufficient capacity to meet its reliability requirements. We agree that this FRR Integration Plan is generally consistent with our authorizations granted in the cases of ATSI's realignment and Duquesne's recent re-integration into PJM's capacity markets.<sup>84</sup>

113. We grant Duke's requested waivers of Sections C.1, C.2, and D.1 of Schedule 8.1 of the Reliability Assurance Agreement. We will further accept, subject to a compliance filing to be filed within 30 days of the date of this order, Duke's requested waivers of Sections D.2, E.2, and E.4 of the same agreement. With respect to the waiver of Section E.4, which involves summer compliance period testing of Demand Resources and measurement and verification of Energy Efficiency Resources, Duke explains that PJM is in the process of comparing its testing measures to that of Midwest ISO to ensure that participation by these resources in the FRR Integration Plan will not cause PJM to fail to satisfy its reliability requirements. We will require Duke to consult further with PJM on this issue and to include in its compliance filing either a complete description of how PJM plans to make this determination or a timeline detailing when it will know how PJM plans to make this determination. We further condition our acceptance of Duke's waivers of Sections D.2 and E.2 on Duke providing in its compliance filing a more thorough explanation of the need for these particular waivers. Duke has withdrawn its request for waiver of Section F.2, as explained in its answer.

---

<sup>83</sup> *Id.* at 4 (listing clearing prices for the western portion of PJM for three different delivery year Base Residual Auctions).

<sup>84</sup> See *FirstEnergy*, 129 FERC ¶ 61,249; *Duquesne Light Co.*, 126 FERC ¶ 61,074 at P 37 (2009) (approving a settlement agreement that, among other things, withdrew Duquesne's request to leave PJM and join Midwest ISO, and set forth Duquesne's out-of-time Fixed Resource Requirement (FRR) Plan).

114. We accept Duke's proposal to use the Final Zonal Capacity Price to price capacity for wholesale loads. The Reliability Assurance Agreement requires Duke Ohio to sell capacity to alternative retail suppliers at the Reliability Pricing Model price if such resources do not self-supply.<sup>85</sup> While we found reasonable FirstEnergy's proposal to hold separate integration auctions to procure capacity for the load in its footprint,<sup>86</sup> Duke's filing, in this respect, more closely follows the Reliability Assurance Agreement by pricing the capacity at the Reliability Pricing Model price. Nevertheless, we note that FirstEnergy's integration auctions cleared within a few dollars of the Reliability Pricing Model price for the respective years in question.<sup>87</sup>

115. We reject the Ohio Consumers' Counsel's argument that Duke's proposal inappropriately uses the price that cleared in the Base Residual Auction for the 2011-2012 delivery year – a 12-month period that includes the summer peak – to price capacity for a five-month, non-summer period of the FRR Integration Plan, from January 1, 2012 through May 31, 2012. We reiterate that the price for capacity is the same for every day of the year in PJM. As Duke notes in its answer, if a load switches to an alternative provider under the Reliability Pricing Model in the middle of the delivery year, the new alternative provider would still pay the full capacity price for each month of the remainder of the delivery year, even if, as here, it was not providing capacity to that load during the summer peak period. Load serving entities must supply the same quantity of capacity to meet reliability requirements every day of the year, and they pay the same price for capacity every day of the year that they serve load.

116. We also reject the Ohio Consumers' Counsel's argument that the proposed price for the January 1, 2012 – May 31, 2012 period is inflated because the value of annual capacity is now much lower than the price set in May 2008. The Ohio Consumers' Counsel states, among other things, that the clearing price for PJM's First Incremental Auction for the 2011-2012 Delivery Year, held in June 2009, was much lower than the Base Residual Auction clearing price for the same delivery year. We emphasize here that Duke proposes to price capacity for wholesale load not at the Base Residual Auction clearing price but at the Final Zonal Capacity Price, which reflects a weighted average of

---

<sup>85</sup> Reliability Assurance Agreement, Rate Schedule FERC No. 44, Schedule 8.1, Section D.8 (“[T]he 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 . . .”).

<sup>86</sup> *FirstEnergy*, 129 FERC ¶ 61,249 at P 78.

<sup>87</sup> Duke Answer at n.24.

the price from the Base Residual Auction with prices obtained in the Incremental Auctions. Thus, to the extent that PJM secured some portion of the capacity requirement at lower costs through the Incremental Auctions, the Final Zonal Capacity Price will reflect these savings.

117. We find Dominion's and the Ohio Consumers' Counsel's concerns regarding the rate that Duke Ohio will propose to charge its retail customers, and FirstEnergy Solution's requests for more information in the calculation of Duke Ohio's retail rates to be beyond the scope of this proceeding. Duke Ohio has not yet initiated a ratemaking proceeding to set retail electric generation rates for the time period of the FRR Integration Plan. Dominion Resources' cite to *Conway* is therefore inapplicable. In *Conway*, the Commission was setting a wholesale rate from which a price squeeze resulted. Here, we are not setting a wholesale rate, and Ohio has not yet set a retail rate; therefore, it is premature for us to consider whether there may be a discriminatory effect between Commission- and state-jurisdictional rates. Furthermore, we note that alternative retail suppliers, such as Dominion Resources, have the option to self-supply if they do not want to pay the Reliability Pricing Model price to Duke Ohio.

118. FirstEnergy Solutions seeks clarification about whether Duke proposes to allow an entity to opt-out or self-supply a portion of its capacity obligations, if it so chooses, while having the right to procure the remainder of its obligations in the Duke proposal. American Municipal similarly asks if load serving entities will be allowed to satisfy a portion of their capacity obligations with their own resources and the remaining portion with resources acquired from Duke Ohio through the Duke FRR Integration Plan. Duke notes that the Reliability Assurance Agreement specifically provides that alternative retail suppliers have an option, on a delivery year basis, to procure their own supply.<sup>88</sup> We accept Duke's proposal, put forth in its answer, to further allow alternative retail suppliers such as FirstEnergy Solutions to opt-out for partial loads in a particular delivery year to promote flexibility for these resources.<sup>89</sup> We agree that these entities in Duke's zone should have this flexibility, consistent with our finding in *FirstEnergy*<sup>90</sup> and with incremental auction rights applicable under PJM's Manuals.<sup>91</sup> Other wholesale loads may self-supply by entering into their own FRR Integration Plans, as outlined in Duke's

---

<sup>88</sup> Duke Answer at 14, citing Reliability Assurance Agreement, Schedule 8.1, Section D.9.

<sup>89</sup> Duke September 22 Answer at 14-15.

<sup>90</sup> FirstEnergy, 129 FERC ¶ 61,249 at P 85.

<sup>91</sup> See PJM Manual 18.

proposal. Duke clarifies that it did not intend to constrain the ability of independent FRR entities to make alternative waiver requests on their own behalf.

119. American Municipal raised a number of questions and asked for assurances on certain issues from Duke.<sup>92</sup> Based on the information posted on PJM's website pertaining to the September 17, 2010 stakeholder meeting, Duke answered some of the questions raised by American Municipal. For example, Duke explained that load serving entities serving wholesale load will be notified of their wholesale area capacity obligation by January 31, 2011.<sup>93</sup> To complete the record, we will require Duke to file responses to address American Municipal's concerns in the above-ordered compliance filing. Specifically, we will require Duke to: confirm the date by which wholesale load will be notified of their wholesale area obligations; clarify the deliverability status of existing resources that Midwest ISO has deemed "deliverable" and the date by which resources will be notified of their deliverability statuses; address the allocation of nonperformance penalties; and provide more information about the proposed agreement that opt-out entities will have to enter into with Duke Ohio reflecting the commitments and obligations of the opt-out provision.

120. Finally, as stated above, we will not address in this order any protests or comments concerning the payment of exit fees.

## **F. Remaining Issues**

### **1. Duke's Proposal**

121. In addition to the approvals requested by Duke in its filing, Duke states that its integration into PJM will also require: (1) approval of Duke's FRR Plan to meet PJM's resource adequacy requirements from the date of transmission system integration through the date of full participation in the Reliability Pricing Model (June 1, 2014);<sup>94</sup> (2) a revised market power analysis to support a "change of status" filing within 60 days of the integration date, as required by 18 C.F.R. § 35.42(a); (3) PJM zonal transmission rates for the Duke footprint, and any other revisions to the PJM open access transmission tariff

---

<sup>92</sup> See *supra* P 96.

<sup>93</sup> See <http://pjm.com/~media/committees-groups/stakeholder-meetings/duke/20100917/20100917-meeting-presentation.ashx> at 30.

<sup>94</sup> Duke filed its proposed FRR Integration Plan on August 16, 2010 in Docket No. ER10-2254-000.

that may be necessary to effectuate integration into PJM;<sup>95</sup> (4) the execution of certain required PJM agreements, including the PJM Reliability Assurance Agreement, the PJM Transmission Operator Agreement, and the PJM Operating Agreement; (5) execution or modification of various network integration transmission service agreements and/or point-to-point transmission service agreements among PJM and the appropriate transmission customers in the Duke footprints; (6) execution of new generator and load agreements among PJM, Duke, and third-party generators and loads; and (7) a filing regarding payment to Midwest ISO of an exit fee. Duke further states that filings also will be made to address transition of generator and load interconnection queues, and grandfathered agreements.

122. Duke states that, under Schedule 3.2.5 of the Integration Agreement, Duke and PJM commit to conducting a stakeholder process for the purpose of identifying and educating customers required to execute new or modified transmission and interconnection service agreements for the period beginning January 1, 2012. Duke states that customers taking transmission from that point forward, other than customers with grandfathered transmission agreements, will be required to do so under the PJM OATT.<sup>96</sup> Duke adds that customers in the queue for Midwest ISO transmission or interconnection service will be transitioned to the PJM queue. Duke states that each customer's position in the PJM queue will be based on the time stamp upon its initial request to Midwest ISO.

123. Duke also states that, under Schedule 3.2.5 of the Integration Agreement, Duke will conduct stakeholder meetings for the purpose of educating stakeholders regarding changes in registration and compliance with the Reliability Standards. Duke asserts that registered entities in the Duke Ohio and Duke Kentucky footprints will continue to be bound by Northern American Electric Reliability Corporation's Reliability Standards and will continue to operate within the Reliability *First* region. However, Duke notes that there will be modest changes associated with PJM becoming the Transmission Operator for the transmission facilities in the Duke footprints.

---

<sup>95</sup> Duke asserts that these rates are expected to largely mirror rates established through the current Midwest ISO Attachment O transmission rate formula (a two-tiered voltage differentiated rate), with changes made only to the extent necessary to accommodate PJM billing practices and to reflect the de-coupling of Duke Indiana.

<sup>96</sup> Duke states that it will work with customers that have grandfathered transmission agreements that are listed in Attachment P to the Midwest ISO Tariff to modify or replace these customers' arrangements with comparable service in PJM.

## 2. Protests and Comments

124. Hamilton and the Ohio Commission argue that Duke's application is insufficient and should be rejected. Hamilton contends that Duke's proposal lacks fundamental information and is structured such that this initial approval would be tantamount to achieving overall approval. In particular, Hamilton states that Duke has not demonstrated that it has satisfied its contractual requirements for withdrawal from Midwest ISO. Hamilton requests that the Commission reject the filing until Duke can demonstrate that it has fulfilled the Commission's requirements for withdrawal (as distinct from promising to fulfill the requirements) and a complete proposal is submitted for consideration. The Ohio Commission argues that Duke's application does not include information regarding the extent of fees and costs, and thus violates the reasonable notice requirements of the FPA and should be considered void due to vagueness.

125. Similarly, should the Commission grant the initial approvals that Duke has requested, American Municipal states that such approvals should in no way pre-determine the outcome of any issues related to the RTO Realignment that will be the subject of future filings by Duke. Furthermore, American Municipal maintains that future filings should provide a comprehensive and detailed plan to implement any proposal described in the filing, thereby ensuring that affected parties will be able to fully evaluate the impact of Duke's proposal.

126. If the Commission does not reject Duke's filing, Hamilton requests that the Commission take certain steps to protect consumers. For instance, Hamilton argues even though Duke has not submitted a replacement rate proposal, the Commission should provide guidance in this order finding that Duke's wholesale customers should not bear the costs related to Duke's withdrawal from Midwest ISO. According to the Ohio Commission, for the Commission to approve Duke's application as just and reasonable, Duke's retail customers must be held harmless from any additional costs and charges associated with the realignment.

127. The Ohio Consumers' Counsel argues that Duke Ohio and Duke Kentucky's shareholders should be required to pay for all costs resulting from the proposed RTO move. Ohio Consumers' Counsel argues that, consistent with the FPA, the Duke Ohio and Duke Kentucky shareholders should pay for the costs of PJM transmission projects approved to be part of PJM's Regional Transmission Expansion Plan prior to the Applicants proposed entry into PJM on January 1, 2010 (Legacy RTEP costs); Midwest ISO exit fees; and PJM Implementation Agreement costs.

128. In support, Ohio Consumers' Counsel asserts that, as stated in Order No. 2000, the goal of RTO formation was "to ensure that electricity consumers pay the lowest price possible."<sup>97</sup> Ohio Consumers' Counsel states that Duke has not demonstrated any benefit to consumers from the proposed RTO Realignment, and that there is evidence available showing that it may increase costs for consumers because of the higher cost of capacity in PJM.<sup>98</sup> Ohio Consumers' Counsel states that the Commission has held that "principles of fairness in ratemaking support the concept that those who are responsible for the incurrence of costs be the ones who bear those cost burdens."<sup>99</sup> Ohio Consumers' Counsel stresses that the RTO Realignment is a business decision made by Duke without a meaningful opportunity for its customers to provide input. Therefore, Duke's shareholders should be responsible for the costs that Duke will incur because of the proposed RTO Realignment.

129. Ohio Consumers' Counsel also argues that requiring shareholders to pay the costs is consistent with the Commission's statement that "transmission owners that seek to change RTOs should be prepared to assume the costs attributable to their decisions."<sup>100</sup> Ohio Consumers' Counsel contends that allowing Duke to pass through all of the costs to consumers creates an incentive to RTO members to withdraw, which jeopardizes the configuration and survival of existing RTOs. Ohio Consumers' Counsel states that Duke Kentucky committed to not pass Midwest ISO exit fees or overlapping transmission expansion costs on to Kentucky retail consumers.<sup>101</sup> Ohio Consumers' Counsel contends that it would be discriminatory and unjust and unreasonable for the Commission to not extend the same protection to Ohio consumers.

130. If the Commission does not decide whether shareholders should be required to bear the costs of the proposed RTO Realignment, then Ohio Consumers' Counsel argues that the Commission should expressly state that it is not preempting the Ohio Commission from making a determination as to the recovery of these costs in the retail rates of Duke's operative companies. Ohio Consumers' Counsel claims that there is ambiguity as to whether the filed rate doctrine bars the Ohio Commission's authority to

---

<sup>97</sup> Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 30,994.

<sup>98</sup> Ohio Consumers' Counsel July 26 Protest at 6.

<sup>99</sup> *Id.* at 5 (citing *System Energy Resources, Inc.*, 41 FERC ¶ 61,238, at 61,616 (1987)).

<sup>100</sup> *FirstEnergy*, 129 FERC ¶ 61,249, at P 113.

<sup>101</sup> *Id.* P 8.

review the rates that result from the RTO Realignment. According to Ohio Consumers' Counsel, there is precedent to suggest that a state commission should have the authority to determine the prudence of RTO Realignment decisions; however, to remove any ambiguity, the Commission should explicitly state that in its order.

131. In addition, Ohio Consumers' Counsel states that the Commission should determine whether Schedule 12 of PJM's OATT, which addresses the assignment of cost responsibility for transmission system expansions and upgrades under the PJM Regional Transmission Expansion Plan, is reasonably applied to Duke's particular situation. Ohio Consumers' Counsel contends that the Commission has focused on rate design and cost allocation issues in the PJM-Midwest ISO combined region, and should consider whether the two RTO's cost allocation rules are reasonable as applied to Duke. Ohio Consumers' Counsel requests that the Commission not require Duke to pay any costs that are found to be unjust and unreasonable under these circumstances.

### 3. Answer

132. Duke agrees with the Ohio Commission's and the Ohio Consumers' Counsel's suggestion that that the Commission reserve judgment on any prudence determination of the proposed RTO switch, especially since Duke has not requested any such determination. In addition, Duke argues that addressing the Ohio Commission's and Ohio Consumers' Counsel's concerns regarding recovery from retail ratepayers of costs related to the proposed RTO switch would be premature. Duke states that neither Duke Ohio nor Duke Kentucky has made any rate filing with respect to transmission expansion costs, exit fees, or integration costs. According to Duke, these issues should be addressed only after Duke Ohio and Duke Kentucky make subsequent filings related to those costs. Duke argues that if the Commission declines to defer resolution of these issues, it should reject them. It states that there is ample Commission precedent finding that federal Commission authority preempts a state's prudence review of RTO rates and charges, particularly wholesale transmission service and capacity issues.<sup>102</sup>

---

<sup>102</sup> Duke August 10 Answer at 31-32.

#### 4. Commission Determination

133. We reject Hamilton's and the Ohio Commission's arguments that Duke's application is insufficient or unacceptably vague. As discussed above, and as the Commission recognized in *FirstEnergy*, "there are a number of steps involved in proceeding with an orderly withdrawal from an RTO" and there is a "legitimate need and basis for [a withdrawing RTO member] to pursue its RTO membership interests on an orderly, phased-in sequence."<sup>103</sup> In its filing, Duke explains that it is seeking these initial approvals to meet the implementation timeline, and that it did not address other issues because additional time to consult with stakeholders and refine proposals may help reduce controversy.<sup>104</sup> We find that Duke's initial filing in Docket No. ER10-1562-000 provides sufficient information for the Commission to make an initial determination that Duke commits to satisfy those obligations. We stress, however, that this is an initial determination, and that any final approval will depend on the outcome of future proceedings.

134. Furthermore, we agree with American Municipal that we should not prejudge the issues that will be the subject of future filings, and that we should consider each future filing on its own merits. Thus, at this time, we decline to provide guidance as to whether Duke may recover any RTO Realignment costs from its wholesale or retail customers. The Commission will address these issues as they arise in Duke's anticipated future filings. Similarly, Duke explains that it did not address issues regarding potential preemption of state rates with respect to exit fee costs and transmission costs because it wishes to hold further discussions with the affected state commissions. Again, the Commission will consider this issue when it arises in Duke's anticipated future filings.

#### The Commission orders:

(A) Duke's RTO Realignment proposal, as submitted in Docket No. ER10-1562-000, is hereby conditionally accepted as discussed in the body of this order, subject to the submission of certain future filings discussed herein.

---

<sup>103</sup> *FirstEnergy*, 129 FERC ¶ 61,249 at P 29 (citing *Duquesne*, 122 FERC ¶ 61,039 at P 29).

<sup>104</sup> Duke June 25 Filing at 4.

(B) Duke's FRR Integration Plan, as submitted in Docket No. ER10-2254-000, is hereby accepted, subject to the submission of a compliance filing within 30 days of the date of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

## Appendix A

### List of Intervenors In Docket No. ER10-1562-000

American Electric Power Service Corporation (AEP)\*\*  
 American Municipal Power, Inc. (American Municipal)\*  
 Buckeye Power, Inc. (Buckeye)\*  
 City of Hamilton, Ohio (Hamilton)\*  
 Coalition of Midwest Transmission Customers  
 Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.  
 Dayton Power and Light Company (Dayton Power)\*\*  
 Dominion Resources Services, Inc. (Dominion Resources)  
 Dynegy Power Marketing, Inc.\*\*  
 East Kentucky Power Cooperative, Inc.\*\*  
 EnerNOC, Inc.\*\*  
 Exelon Corporation\*\*  
 FirstEnergy Affiliates<sup>105</sup>\*  
 Hoosier Energy Rural Electric Cooperative (Hoosier)\*  
 Indiana Municipal Power Agency (Indiana Municipal)\*  
 Indiana Office of Utility Consumer Counselor (Indiana Utility Consumer Counselor)\*  
 Indiana Utility Regulatory Commission (Indiana Commission)\*  
 IPA Central, LLC  
 Kentucky Public Service Commission (Kentucky Commission)  
 MidAmerican Energy Company  
 Midwest ISO Transmission Owners<sup>106</sup>

---

<sup>105</sup> FirstEnergy Service Company filed on behalf of certain of its public utility affiliates, including: FirstEnergy Solutions Corp.; American Transmission Systems, Incorporated; the Cleveland Electric Illuminating Company; Jersey Central Power & Light Company; Metropolitan Edison Company; Ohio Edison Company; Pennsylvania Electric Company; and the Toledo Edison Company (collectively, FirstEnergy).

<sup>106</sup> The Midwest ISO Transmission Owners, for the purposes of this filing, include: Ameren Services Company; American Transmission Company LLC; City Water, Light & Power; Dairyland Power Cooperative; Great River Energy; Indianapolis Power & Light Company; Michigan Public Power Agency; MidAmerican Energy Company; Minnesota Power; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern

(continued...)

Midwest Independent Transmission System Operator, Inc. (Midwest ISO)\*  
Monitoring Analytics, LLC\*\*  
NextEra Energy Generators  
Office of the Ohio Consumers' Counsel (Ohio Consumers' Counsel)\*  
Ohio Energy Group  
PJM Interconnection, LLC (PJM)  
Potomac Economics, Ltd. (Potomac Economics)\*\*\*  
PSEG Companies\*\*  
Public Service Commission of Maryland\*\*  
Public Utilities Commission of Ohio (Ohio Commission)\*  
RRI Energy, Inc.  
Wabash Valley Power Association (Wabash)\*  
Wisconsin Electric Power Company

\* Protests and/or Comments

\*\* Motion to intervene out-of-time

\*\*\* Comments and Motion to intervene out-of-time

---

Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and  
Wolverine Power Supply Cooperative, Inc.

## **Appendix B**

### **List of Intervenors** **In Docket No. ER10-2254-000**

Allegheny Energy Companies  
American Electric Power Service Corporation (AEP)  
American Municipal Power, Inc. (American Municipal)\*  
Buckeye Power, Inc. (Buckeye)\*  
City of Hamilton, Ohio  
Dayton Power and Light Company (Dayton Power)  
Dominion Resources Services, Inc. (Dominion Resources)\*  
East Kentucky Power Cooperative, Inc.  
Exelon Corporation  
FirstEnergy Solutions Corporation (FirstEnergy Solutions)\*  
Hoosier Energy Rural Electric Cooperative, Inc.  
Industrial Energy Users-Ohio\*\*  
Indiana Municipal Power Agency (Indiana Municipal)\*  
Indiana Utility Regulatory Commission\*\*  
IPA Central, LLC\*\*  
Maryland Public Service Commission\*\*  
Midwest Independent Transmission System Operator, Inc. (Midwest ISO)  
Monitoring Analytics LLC  
Office of the Ohio Consumers' Counsel (Ohio Consumers' Counsel)\*  
PJM Interconnection, LLC (PJM)  
PSEG Power Companies<sup>107</sup>\*  
Public Utilities Commission of Ohio  
RRI Energy, Inc.\*\*  
Shell Energy North America, LP  
Wabash Valley Power Association (Wabash)\*

\* Protests and/or Comments

\*\* Motion to intervene out of time

---

<sup>107</sup> PSEG Companies includes Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC.