

129 FERC ¶ 61,187
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Buckeye Power, Inc.

Docket No. EL09-75-000

v.

Midwest Independent Transmission
System Operator, Inc.

ORDER APPROVING UNCONTESTED SETTLEMENT AND
DISMISSING COMPLAINT

(Issued December 2, 2009)

I. Introduction

1. On September 11, 2009, pursuant to Rule 206 of the Commission's Rules of Practice and Procedure,¹ Buckeye Power, Inc. (Buckeye Power) filed a complaint (Complaint) against Midwest Independent Transmission System Operator, Inc. (Midwest ISO). The Complaint concerns the charges that Midwest ISO assessed Buckeye Power for certain ancillary services that Buckeye Power asserts are being provided under PJM Interconnection, L.L.C.'s (PJM) open access transmission tariff (OATT) for the portion of Buckeye Power's load located within Midwest ISO's boundaries. Buckeye Power states in the Complaint that it has reached an agreement in principle with Midwest ISO which, if approved by the Commission, would make direct Commission action on the Complaint unnecessary. On September 17, 2009, Midwest ISO filed pursuant to Rule 602 of the Commission's Rules of Practice and Procedure² an unexecuted settlement agreement memorializing its accommodation with Buckeye Power (Settlement) along with its answer on the merits. In this order, we approve the Settlement and dismiss the Complaint.

¹ 18 C.F.R. §385.206 (2009).

² 18 C.F.R. §385.602 (2009).

II. Background

2. Buckeye Power is a generation and transmission electric cooperative that is, along with each of its electric utility members, transmission-dependent. Buckeye Power states that it currently depends entirely upon PJM and Midwest ISO for open access transmission service. Most of Buckeye Power's load is located within the American Electric Power Service Corporation (AEP Service) zone of PJM. A small portion of Buckeye Power's load is located within Midwest ISO's boundaries, in the former balancing authority areas of Cinergy Corp. (now Duke Energy Corp.) and FirstEnergy Corp.

3. Buckeye Power states that in October 2004, as the result of AEP Service's integration into PJM, Buckeye Power, AEP Service, PJM, Midwest ISO, Cinergy Corp., and FirstEnergy Corp. reached an agreement about how the Buckeye Power load in the Cinergy/Duke Energy and FirstEnergy zones of Midwest ISO would be treated going forward (October 2004 Agreement). It was agreed that the Buckeye Power load would be dynamically scheduled by PJM to the Cinergy and FirstEnergy zones, with load meter data provided to PJM on a four-second basis and included in PJM's area control error calculation and adjustment. Buckeye Power further states that under the October 2004 Agreement, it was agreed that PJM would provide regulating reserve, spinning reserve, and supplemental reserve ancillary services for the Buckeye Power load via dynamic scheduling. Buckeye Power states that PJM began and continues to provide load-balancing ancillary services for Buckeye Power's load in the Cinergy/Duke Energy and FirstEnergy zones of Midwest ISO on a real-time basis.

4. Midwest ISO's ancillary services market (ASM) became operational on January 6, 2009, when Midwest ISO assumed balancing authority responsibility in the Duke Energy and FirstEnergy zones. Buckeye Power states that Midwest ISO began to charge Buckeye Power for regulating reserve, spinning reserve, and supplemental reserve ancillary services under Schedule 3, 5, and 6 of the Midwest ISO's Open Access Transmission, Energy and Operating Reserve Market Tariff (Midwest ISO Tariff), respectively.

III. Complaint

5. Buckeye Power alleges that since the beginning of 2009, it has been billed twice each month for the same ancillary services – once by PJM, and once by Midwest ISO. Buckeye Power asserts that Midwest ISO's ancillary services charges are improper because "Schedules 3, 5, and 6 under the MISO Tariff each provides, in pertinent part, that a load-serving entity must either purchase the service from the MISO balancing

authority or make alternative arrangements to satisfy its reserve obligation under the schedule. (Footnote omitted)”³

6. Buckeye Power also alleges that Midwest ISO’s decision to charge it for ancillary services is inconsistent with Midwest ISO’s agreement under the Capacity Portability Service Agreement (Portability Agreement) to which Midwest ISO and PJM are parties.⁴ According to Buckeye Power, the Portability Agreement explicitly recognizes that Buckeye Power’s load within Midwest ISO’s balancing authority “is currently being served under and will continue to be served under the terms and conditions set forth in the PJM [OATT].”

7. Buckeye Power states that it has reached an agreement with Midwest ISO concerning the provision of load-balancing ancillary services for the Buckeye Power load in the Duke Energy and FirstEnergy zones of the Midwest ISO balancing authority area which, if sanctioned by the Commission, would make it unnecessary for the Commission to act directly on the request for relief in the Complaint.

IV. Notice and Responsive Pleadings

8. Notice of Buckeye Power’s Complaint was published in the *Federal Register*,⁵ with comments, interventions or protests due on or before October 1, 2009. On September 17, 2009, Midwest ISO filed, pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure,⁶ the Settlement between it and Buckeye Power with its answer to the Complaint. Timely motions to intervene, without comments, were filed by FirstEnergy, Duke Energy, and Ameren Services Company. PJM filed a timely intervention and comments supporting the proposed Settlement.

V. Answer and Proposed Settlement

9. In its answer, Midwest ISO states that while it disagrees with Buckeye Power’s position on the underlying legal and technical issues, “based on equitable considerations, Midwest ISO agrees with Buckeye Power’s request for approval of the Settlement

³ See Complaint at 5, citing Original Sheet Nos. 1795, 1818, and 1832 of the Midwest ISO Tariff.

⁴ See Complaint at fn. 8. The Portability Agreement was accepted by unpublished letter order dated June 17, 2009, in Docket No. ER09-1074-000.

⁵ 74 Fed. Reg. 47936 (2009).

⁶ 18 C.F.R. §385.602 (2009).

Agreement.”⁷ Midwest ISO explains that, having engaged in informal dispute resolution procedures under Attachment HH of the Midwest ISO Tariff, the parties were able to successfully achieve a compromise solution which is documented in the Settlement. Midwest ISO states that if the Commission accepts the Settlement, Buckeye Power would be allowed to continue to procure certain ancillary services from PJM until June 1, 2013, at which time it will begin procuring required operating reserves from Midwest ISO pursuant to the requirements of the Midwest ISO Tariff.

VI. Discussion

10. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure,⁸ the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

11. Buckeye Power and Midwest ISO have negotiated an agreement to which no party objects. As noted above, Buckeye Power states that the Settlement, which Midwest ISO filed with its answer, makes direct Commission action on the relief requested in the Complaint unnecessary. Midwest ISO confirms that it has agreed to resolve this dispute in accordance with the Settlement attached to its answer, and requests that the Commission approve or accept the Settlement in lieu of resolving this matter on the merits.⁹

12. Section 6.4 of the Settlement states that the public interest standard of review shall govern any change to the Settlement proposed by a party. It also provides that any change proposed by a non-contracting third party, or the Commission acting sua sponte, shall be governed by the most stringent standard permissible by law.

13. The Settlement is fair, reasonable, and in the public interest and is hereby approved. The Commission retains the right to investigate the rates, terms, and conditions under the just and reasonable and not unduly discriminatory or preferential standard of section 206 of the Federal Power Act, 16 U.S.C. § 824e (2006). The Commission’s approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

⁷ Answer at 2.

⁸ 18 C.F.R. §385.214 (2009).

⁹ See Answer at 2, 13.

14. Consistent with Rule 206(j) of the Commission's Rules of Practice and Procedure,¹⁰ we will dismiss the Complaint.

The Commission orders:

(A) The Settlement is hereby approved.

(B) Buckeye Power's Complaint is hereby dismissed, as discussed in the body of this order.

By the Commission. Chairman Wellinghoff and Commissioner Kelly concurring in part with a separate joint statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁰ 18 C.F.R. §385.206(j) (2009).

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WELLINGHOFF, Chairman, and KELLY, Commissioner, *concurring in part*:

The proposed standard of review in the settlement would have the Commission apply the “most stringent standard permissible under applicable law” to any changes proposed by non-contracting third-parties or the Commission acting *sua sponte*.

The U.S. Supreme Court has held that whenever the Commission reviews certain types of contracts, the Federal Power Act (FPA) requires it to apply the presumption that the contract meets the “just and reasonable” requirement imposed by the FPA.¹ The contracts that are accorded this special application of the “just and reasonable” standard are those “freely negotiated wholesale-energy contract[s]” that were given a unique role in the FPA.² In contrast, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) determined that the proper standard of review for a different type of agreement, with regard to changes proposed by non-contracting third parties, was the “‘just and reasonable’ standard in section 206 of the Federal Power Act.”³ The agreement at issue in *Maine PUC* was a multilateral settlement negotiated in a Commission adjudication of a utility’s proposal to revise its tariff substantially to enable it to establish and operate a locational installed electricity capacity market. The D.C. Circuit’s rationale in *Maine PUC* applies with at least equal force to changes to an agreement sought by the Commission acting *sua sponte*.⁴

¹ *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733, 2737 (2008) (*Morgan Stanley*).

² *Id.*

³ *Maine Public Utilities Commission v. FERC*, 520 F.3d 464, 478, *petition for reh’g denied*, No. 06-1403, slip op. (D.C. Cir. Oct. 6, 2008) (*Maine PUC*).

⁴ *See Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,201 (2008) (Comm’rs Wellinghoff and Kelly dissenting in part).

Our review of the agreement in question here indicates that it more closely resembles the *Maine PUC* adjudicatory settlement than the *Morgan Stanley* wholesale-energy sales contracts, which, for example, were freely negotiated outside the regulatory process. Therefore, the standard of review that the Commission must apply to changes proposed by either non-contracting third-parties or the Commission acting *sua sponte* is the “just and reasonable” standard of review. In those instances, the Commission retains the right to investigate the rates, terms, and conditions of the settlement under the “just and reasonable” standard of review set forth under FPA section 206.⁵

For these reasons, we concur in part.

Jon Wellinghoff

Suedeem G. Kelly

⁵ 16 U.S.C. § 824e (2006).