

132 FERC ¶ 61,268
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.

Commonwealth Edison Company	Docket Nos. ER10-209-000
Commonwealth Edison Company of Indiana, Inc.	ER10-209-001
	EL10-12-000
	EL10-12-001

Midwest Independent Transmission System Operator, Inc.	Docket No. ER10-640-000
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ORDER DENYING REHEARING, REJECTING PROPOSED SETTLEMENT
AND ESTABLISHING HEARING PROCEEDINGS

(Issued September 27, 2010)

1. On December 30, 2009,¹ the Commission accepted in part, rejected in part, and nominally suspended, subject to refund, Commonwealth Edison Company's and Commonwealth Edison Company of Indiana, Inc.'s (collectively, ComEd) proposed Assignment Rate Schedule to its tariff describing ComEd's assignment to Ameren Services Company (Ameren) of certain credits (Section 4.8 Credits) under the 2001 "Settlement Agreement Involving the Midwest Independent Transmission System Operator, Inc. [(Midwest ISO)], Certain Transmission Owners in the Midwest ISO, the Alliance Companies and Other Parties" (Withdrawal Settlement Agreement). The Commission also consolidated ComEd's proposed Assignment Rate Schedule with ComEd's Petition for Declaratory Order seeking a Commission order requiring Midwest ISO to recognize ComEd's assignment of its Section 4.8 Credits. The Commission set both filings for hearing and settlement judge procedures.

2. On January 29, 2010, The Cleveland Electric Illuminating Company, Ohio Edison Company, Pennsylvania Power Company, The Toledo Edison Company, and FirstEnergy Solutions Corp. (collectively, FirstEnergy) submitted a request for rehearing or, in the

¹ *Commonwealth Edison Co.*, 129 FERC ¶ 61,298 (2009) (December 30 Order).

alternative, request for clarification of the December 30 Order. In this order, we deny FirstEnergy's request for rehearing.

3. On March 26, 2010,² the Commission accepted in part, rejected in part, and set for hearing and settlement judge procedures Midwest ISO's proposed revisions to modify Attachment I of the Midwest ISO tariff to remove Ameren and Illinois Power Company (Illinois Power) and their affiliates from the list of entities that are eligible to use Schedule 10-A. The Commission also consolidated Midwest ISO's filing with the proceedings regarding ComEd's proposed Assignment Rate Schedule and Petition for Declaratory Order.

4. On May 21, 2010, ComEd submitted a proposed Settlement Agreement (Proposed Settlement) on behalf of Ameren, Midwest ISO, and certain transmission owners in Midwest ISO (Midwest ISO TOs) (each a Settling Party and, collectively, the Settling Parties). The Proposed Settlement is contested. In this order, we reject the Proposed Settlement and direct the Chief Judge to commence hearing procedures or further settlement judge procedures, as appropriate, on the issues set for hearing in the December 30 Order.

I. Background

5. Prior to the operation of Midwest ISO, Illinois Power,³ ComEd,⁴ and Ameren⁵ (collectively, Departing Companies) each filed a Notice of Withdrawal from Midwest ISO, with the intent to join the Alliance Regional Transmission Organization (Alliance). Pursuant to the Withdrawal Settlement Agreement, the Departing Companies agreed to pay a withdrawal fee to Midwest ISO in the amount of \$60 million, representing their share of the capital portion of Midwest ISO's start-up costs, and were permitted to withdraw from Midwest ISO. Recognizing that transmission customers would typically pay their share of Midwest ISO start-up costs over time through the Midwest ISO

² *Midwest Indep. Transmission Sys. Operator, Inc.*, 130 FERC ¶ 61,243 (2010) (March 26 Order).

³ *See* Dynegy Inc. October 13, 2000 Notice of Withdrawal, Docket No. ER01-123-000. Dynegy Inc. filed the notice on behalf of Illinois Power. At the time of the filing, Illinois Power was not yet affiliated with Ameren.

⁴ *See* Exelon Corp. and ComEd December 22, 2000 Notice of Withdrawal, Docket No. ER01-780-000.

⁵ *See* Union Electric Co. and Central Illinois Public Service Co. January 16, 2001 Notice of Withdrawal, Docket No. ER01-966-000.

administrative charge (rather than paying such costs up-front), the Withdrawal Settlement Agreement provides in section 4.8 that the Departing Companies would receive credits against the capital cost component of future Midwest ISO administrative charges as they take transmission service from Midwest ISO (Section 4.8 Credits). The Withdrawal Settlement Agreement provides for some transferability of the Section 4.8 Credits by allowing the credits to be applied against the charges owed for transmission services taken by the Departing Companies “or their current affiliates (or their successors or assigns).”⁶

6. The Commission accepted the Withdrawal Settlement Agreement on May 8, 2001.⁷ In December 2001, the Commission found that Alliance did not satisfy the criteria to be declared a Regional Transmission Organization.⁸ Ameren and Illinois Power then rejoined Midwest ISO,⁹ at which time Midwest ISO returned their respective portions of the withdrawal fee that they had paid pursuant to the Withdrawal Settlement Agreement, with interest. ComEd, on the other hand, elected to join PJM Interconnection, LLC (PJM) and, therefore, did not receive a refund of the portion of the withdrawal fee it had previously paid to Midwest ISO.¹⁰

7. To implement the Section 4.8 Credits provided under the Withdrawal Settlement Agreement, Midwest ISO subsequently amended its tariff to add Schedule 10-A, which details how Midwest ISO would assess its administrative charges against holders of the Section 4.8 Credits. Attachment I to Schedule 10-A lists those entities entitled to take service under Schedule 10-A.¹¹

⁶ See Withdrawal Settlement Agreement, Docket No. ER01-123-000, *et al.*, section 4.8.

⁷ *Illinois Power Co.*, 95 FERC ¶ 61,183, *reh’g denied*, 96 FERC ¶ 61,026 (2001).

⁸ *Alliance Companies*, 97 FERC ¶ 61,327 (2001).

⁹ See *Alliance Companies*, 100 FERC ¶ 61,137 (2002).

¹⁰ See *PJM Interconnection, L.L.C.*, 106 FERC ¶ 61,253 (2004).

¹¹ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,193 (2003) (approving contested Offer of Settlement on Schedule 10-A); *Midwest Indep. Transmission Sys. Operator, Inc.*, 103 FERC ¶ 61,205 (2003) (accepting revisions to Schedule 10-A based on Offer of Settlement); *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,160 (2007) (accepting further revisions to Schedule 10-A).

8. On November 3, 2009, ComEd submitted two concurrent, related filings. In Docket No. ER10-209-000, ComEd filed a proposed Assignment Rate Schedule to its tariff¹² describing ComEd's assignment to Ameren of \$20 million of ComEd's Section 4.8 Credits under the Withdrawal Settlement Agreement. In Docket No. EL10-12-000, ComEd filed a Petition for Declaratory Order requiring Midwest ISO to recognize the assignment of Section 4.8 Credits and to allow Ameren to take service under Schedule 10-A of the Midwest ISO tariff.
9. In the December 30 Order, the Commission accepted in part, rejected in part, and nominally suspended ComEd's proposed Assignment Rate Schedule, subject to refund, consolidated the Assignment Rate Schedule filing with ComEd's Petition for Declaratory Order, and set both filings for hearing and settlement judge procedures, finding that the two filings raise issues of material fact that could not be resolved based on the record and that the proposed Assignment Rate Schedule has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Settlement conferences were held on January 19, 2010, and February 2, 2010.
10. On January 29, 2010, FirstEnergy submitted a request for rehearing or, in the alternative, request for clarification of the December 30 Order. Among other things, FirstEnergy contends that the assignment of ComEd's Section 4.8 Credits is not authorized by the Withdrawal Settlement Agreement. FirstEnergy also requests that the Commission clarify that its acceptance of the Assignment Rate Schedule did not indicate the Commission's agreement with ComEd's argument that its Section 4.8 Credits are assignable.
11. On January 25, 2010, in Docket No. ER10-640-000, Midwest ISO filed proposed revisions to modify Attachment I (Index of Transmission Customers Eligible for Schedule 10-A) of the Midwest ISO tariff to remove Ameren and Illinois Power and their affiliates from the list of entities that are eligible to use Schedule 10-A.
12. In the March 26 Order, the Commission accepted in part, rejected in part, and nominally suspended Midwest ISO's proposed tariff revisions, subject to refund, set the filing for hearing and settlement judge procedures, and consolidated the proceeding with the ongoing proceedings in Docket Nos. ER10-209-000 and EL10-12-000.

¹² ComEd, FERC Electric Tariff, Original Vol. No. 7.

13. On May 21, 2010, ComEd submitted the Proposed Settlement on behalf of Ameren,¹³ Midwest ISO, and Midwest ISO TOs.¹⁴ The Proposed Settlement is contested and is discussed in detail below.

II. Procedural Matters

14. Comments on the Proposed Settlement were filed by FirstEnergy, Commission Trial Staff, and Consumers Energy Company (Consumers).

15. Reply comments were filed by Midwest ISO, FirstEnergy, and Midwest ISO TOs. Joint reply comments were filed by ComEd and Ameren.

16. FirstEnergy filed a motion for leave to answer and answer responding to the reply comments filed by Midwest ISO and Midwest ISO TOs and to the joint reply comments of ComEd and Ameren. ComEd and Ameren filed a joint answer to FirstEnergy's motion for leave to answer and answer.

17. 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 FirstEnergy's answer and ComEd's and Ameren's joint answer because they have provided information that assisted us in our decision-making process.

¹³ Ameren accepted the Proposed Settlement for and on behalf of Union Electric Co., Central Illinois Public Service Co., Illinois Power, and Ameren Energy Marketing Co.

¹⁴ For purposes of this proceeding, Midwest ISO TOs include: City of Columbia Water & Light Department (Columbia, MO); City Water, Light & Power (Springfield, IL); Duke Energy Corp. for Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Co.; Manitoba Hydro; Michigan Public Power Agency; MidAmerican Energy Co.; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Co.; Northern States Power Co., a Minnesota corporation, and Northern States Power Co., a Wisconsin corporation; Northwestern Wisconsin Electric Co.; Otter Tail Power Co.; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Co.; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

III. Request for Rehearing (Docket Nos. ER10-209-001 & EL10-12-001)

A. FirstEnergy's Rehearing Request

18. FirstEnergy seeks rehearing and/or clarification of the December 30 Order setting for hearing the issue of whether ComEd's Section 4.8 Credits are properly assignable to Ameren pursuant to the Withdrawal Settlement Agreement. FirstEnergy argues that the assignment of Section 4.8 Credits is not authorized by the Withdrawal Settlement Agreement, ComEd's filings are procedurally defective, and the proposed assignment would produce an unjust, unreasonable, and unduly discriminatory and preferential decrease in Ameren's transmission rate and increase in the transmission rate for all other Midwest ISO transmission owners. In the alternative, FirstEnergy requests that the Commission clarify that, although the December 30 Order accepted in part ComEd's Assignment Rate Schedule, the Commission's acceptance of the filing did not indicate the Commission's agreement with ComEd's arguments on the merits that its Section 4.8 Credits are assignable nor that Midwest ISO is required to recognize and effectuate the proposed assignment of ComEd's Section 4.8 Credits to Ameren.

19. FirstEnergy argues that the Withdrawal Settlement Agreement clearly and unambiguously precludes the assignment ComEd proposes. FirstEnergy argues that the inclusion of the term "assigns" in section 4.8 of the Withdrawal Settlement Agreement is not dispositive and that the Withdrawal Settlement Agreement contains no broad grant of authority to assign rights. In support, FirstEnergy "interprets" the use of the word "assigns" in a manner that, FirstEnergy argues, is consistent with "the rest of the [Withdrawal] Settlement Agreement and with fundamental tenants of contract interpretation."¹⁵ To do so, FirstEnergy looks to the remaining contract provisions,¹⁶ the Restatement (Second) of Contracts,¹⁷ the contemporaneous actions of the parties at the time that the Withdrawal Settlement Agreement was agreed upon and effected,¹⁸ and contemporaneous filings by Midwest ISO.¹⁹ Based on these arguments, FirstEnergy argues that the Withdrawal Settlement Agreement is clear that the Section 4.8 Credits may not be assigned to unaffiliated third parties, such as Ameren, and that the

¹⁵ FirstEnergy Request for Rehearing at 7.

¹⁶ *Id.* at 5-7.

¹⁷ *Id.* at 4-5, 8.

¹⁸ *Id.* at 8-9.

¹⁹ *Id.* at 9.

Commission erred by finding that the ComEd filings raised issues of material fact that must be resolved at hearing.

20. FirstEnergy also argues that neither ComEd's Assignment Rate Schedule nor its Petition for Declaratory Order is a procedurally adequate means of allowing Ameren to make use of ComEd's Section 4.8 Credits because Schedule 10-A of the Midwest ISO tariff would need to be modified. FirstEnergy notes that the Commission acknowledged this by rejecting section 4 of the Assignment Rate Schedule, which purports to direct Midwest ISO to charge its administrative costs to Ameren under Schedule 10-A. FirstEnergy argues that ComEd would need to file a complaint pursuant to section 206 of the Federal Power Act in order to get the relief that it seeks.

21. Finally, FirstEnergy argues that ComEd's proposal to assign Section 4.8 Credits to Ameren would cause a decrease in the jurisdictional charges for transmission service provided by Midwest ISO to Ameren and a corresponding increase in such charges to all other Midwest ISO transmission customers, resulting in unjust and unreasonable and unduly discriminatory and preferential rates.

B. Commission Determination

22. We will deny FirstEnergy's request for rehearing. FirstEnergy has not shown that ComEd's Section 4.8 Credits are not assignable. To the contrary, the fact that FirstEnergy, in its attempt to construe the meaning of the term "assigns" in section 4.8, must look to the context of the Withdrawal Settlement Agreement, secondary sources on contract interpretation, and contemporaneous actions and filings made by the parties to the Withdrawal Settlement Agreement supports the Commission's conclusion to set the issue for hearing. As the Commission indicated in the December 30 Order, this issue cannot be resolved based on the record before us and is more appropriately addressed via hearing and settlement judge procedures. Therefore, FirstEnergy's request that the Commission grant rehearing and find that the Withdrawal Settlement Agreement "clearly" prohibits the proposed assignment is hereby denied.

23. Second, we will deny FirstEnergy's request to grant rehearing and reject ComEd's Assignment Rate Schedule and Petition for Declaratory Order as procedurally defective. ComEd acted within its rights to make a filing under section 205 of the Federal Power Act acknowledging its proposed assignment to Ameren and to submit a Petition for Declaratory Order with respect to whether the assignment should be acknowledged by Midwest ISO pursuant to the Withdrawal Settlement Agreement. The Commission's regulations allow a tariff or rate filing as a means to establish a rate schedule or contract established by and for the applicant.²⁰ The Commission's regulations also allow for

²⁰ 18 C.F.R. § 385.205 (2010).

petitions for declaratory order to terminate a controversy or remove uncertainty.²¹ As FirstEnergy notes, the Commission rejected the portion of the Assignment Rate Schedule that purports to direct Midwest ISO to recognize the assignment. However, to the extent that FirstEnergy is arguing that section 4 of the Assignment Rate Schedule makes the entire filing defective, we disagree. The Commission consistently accepts parts of filings that meet the standards set forth in Commission regulations and rejects those portions that are improper.²² In the December 30 Order, the Commission properly rejected section 4 of the Assignment Rate Schedule. The Commission further noted that ComEd and/or Ameren can exercise their rights under section 206 of the Federal Power Act to enforce or amend the Midwest ISO tariff as necessary to recognize the assignment. Nothing in the December 30 Order improperly directed Midwest ISO to recognize the assignment.

24. Third and finally, we will deny FirstEnergy's rehearing request that the Commission reject ComEd's filings because, according to FirstEnergy, they would result in unjust and unreasonable rates or undue discrimination. FirstEnergy raises essentially the same arguments on rehearing that it raised in its comments on ComEd's filings. In response, the December 30 Order specifically acknowledged that aspects of ComEd's Assignment Rate Schedule may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. However, the Commission could not make a final determination on the record because there were genuine issues of material fact and, therefore, properly set the matter for hearing.

IV. Proposed Settlement (Docket No. ER10-209-000, *et al.*)

A. Description of Proposed Settlement

25. The Settling Parties contend that the Proposed Settlement resolves all issues pending in Docket No. ER10-640-000, *et al.* regarding ComEd's use of its Section 4.8 Credits that are currently set to expire on December 15, 2013. They argue that the Proposed Settlement does not affect any pending cases and is consistent with Commission policy and precedent. The Settling Parties request that the Commission accept the Proposed Settlement without modification or condition. The general provisions of the Proposed Settlement are summarized below.

²¹ 18 C.F.R. § 385.207 (2010).

²² *See, e.g., Westar Energy Inc.*, 131 FERC ¶ 61,183 (2010) (conditionally accepting in part, and rejecting in part, proposed tariff revisions); *see also Entergy Services, Inc.*, 131 FERC ¶ 61,067 (2010) (accepting in part, and rejecting in part, proposed tariff revisions).

26. Under section 2 of the Proposed Settlement, Midwest ISO would pay ComEd \$10 million,²³ and ComEd's balance of Section 4.8 Credits would be reduced by \$10 million. ComEd would forfeit and release any and all rights that it may have to assign its Section 4.8 Credits to unaffiliated third parties, so that only ComEd, ComEd's affiliates as of March 21, 2001, and any successor to ComEd (as defined in section 2.2.4.4) could apply ComEd's remaining Section 4.8 Credits for costs owed to Midwest ISO for transmission service taken until December 15, 2013. If ComEd has Section 4.8 Credits remaining after that date, ComEd, its affiliates, and its successors could apply up to \$10 million of remaining Section 4.8 Credits for costs owed to Midwest ISO for transmission service taken until December 15, 2018, provided that no more than \$2 million of Section 4.8 Credits could be used during any year.

27. Under section 3, ComEd's Assignment Rate Schedule in Docket No. ER10-209-000 and Petition for Declaratory Order in Docket No. EL10-12-000, as well as the protests filed by the Settling Parties in those proceedings, would be deemed withdrawn. Midwest ISO's proposed revisions to Attachment I of its tariff in Docket No. ER10-640-000 would become effective on March 27, 2010, and ComEd's protest in that proceeding would be deemed withdrawn.

28. Under section 4, the Proposed Settlement would be effective on the date on which the Commission accepts the Proposed Settlement without modification or condition, or, if the Commission orders a modification or condition to the Proposed Settlement, the date on which the Settling Parties agree in writing to such modification or condition. Under section 5, the Proposed Settlement would be deemed withdrawn if it is not accepted or approved in its entirety without modification or condition, unless the Settling Parties agree in writing to such modification or condition.

29. Under section 6, the standard of review for all challenges or proposed changes to the Proposed Settlement by the Settling Parties would be the "public interest" standard of review,²⁴ absent the agreement of all of the Settling Parties to a proposed change. Section 6 of the Proposed Settlement also provides that "[t]he standard of review for any challenge or proposed change to the [Proposed Settlement], whether by complaint or on initial review of the [Proposed Settlement], and whether by [the Commission] acting *sua*

²³ In particular, Midwest ISO would pay ComEd \$7.1 million in equal monthly installments through December 2013 and the remaining \$2.9 million in equal monthly installments from January 2014 through December 2018. Proposed Settlement, section 2.1.1.

²⁴ Proposed Settlement, section 6 (citing *e.g.*, *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) (*Mobile-Sierra*)).

sponte or by anyone other than a Settling Party, shall be the most stringent standard permissible under applicable law.”²⁵

B. Comments in Opposition to the Proposed Settlement

30. Consumers and FirstEnergy maintain that the Proposed Settlement does not describe the mechanism by which Midwest ISO would recover the costs of the Proposed Settlement, including the \$10 million upfront payment to ComEd. They infer that Midwest ISO would likely recover the costs through Schedule 10 of the Midwest ISO tariff, and they object to using Schedule 10 to recover the costs. Consumers argues that recovering the costs of the Proposed Settlement through Schedule 10 would impose costs on Consumers and other non-transmission owning members of Midwest ISO that would not derive any benefit from the Proposed Settlement, and therefore, the Proposed Settlement is unjust and unreasonable. Consumers requests that the Commission reject the Proposed Settlement or, in the alternative, that the Commission require that a hearing be held to establish the method by which Midwest ISO would recover the associated costs. Similarly, FirstEnergy argues that the Settling Parties’ failure to address the likely rate impact on Midwest ISO transmission customers makes it impossible for the Commission to determine whether the Proposed Settlement is just and reasonable, and not unduly discriminatory and preferential. FirstEnergy requests that the Commission reject the Proposed Settlement or, in the alternative, that the Commission rule that Midwest ISO cannot recover the costs of the Proposed Settlement from FirstEnergy or other non-settling Midwest ISO transmission customers.

31. FirstEnergy also argues that the Proposed Settlement fails to satisfy any of the approaches set forth in *Trailblazer*²⁶ under which the Commission can approve a contested settlement.²⁷ With respect to the first approach, FirstEnergy contends that the record is insufficiently developed to permit the Commission to meaningfully evaluate and determine that FirstEnergy’s objections to the Proposed Settlement are unfounded. Specifically, FirstEnergy maintains that the Proposed Settlement does not describe the mechanism that Midwest ISO would use to collect the costs of the Proposed Settlement, and therefore, the Commission cannot reject as unfounded FirstEnergy’s concern relating to the allocation of the costs of the Proposed Settlement. FirstEnergy also argues that the

²⁵ *Id.*

²⁶ *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh’g*, 87 FERC ¶ 61,110, *reh’g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

²⁷ FirstEnergy contends that the Commission’s review of the Proposed Settlement should apply the requirements of *Trailblazer* and not the “public interest” standard of *Mobile-Sierra*.

Settling Parties have not demonstrated that such a cost recovery would be just and reasonable.

32. FirstEnergy also argues that the Commission cannot find that the overall result of the Proposed Settlement would be just and reasonable as demonstrated by a “detailed and independent cost benefit analysis of approving the settlement versus continued litigation” under the second approach of *Trailblazer*.²⁸ FirstEnergy contends that its Request for Rehearing demonstrates that ComEd has no right to assign its Section 4.8 Credits to unaffiliated third parties, and therefore, litigation would likely produce a result that, apart from each party incurring some additional litigation costs, essentially maintains the status quo created in the Withdrawal Settlement Agreement whereby ComEd could not assign its Section 4.8 Credits to unaffiliated third parties. FirstEnergy also provides an analysis of other potential outcomes in the affidavit of Christopher Constantine.²⁹ Among other things, FirstEnergy states that, under its worst-case litigated scenario (where a hearing results in a finding that ComEd can assign its Section 4.8 Credits to unaffiliated third parties), FirstEnergy’s Schedule 10 charges would likely increase by \$550,000,³⁰ which is less than FirstEnergy’s expected impact of the Proposed Settlement of approximately \$1,050,000.³¹ Based on FirstEnergy’s calculations, FirstEnergy argues that the Commission cannot find that the overall result of the Proposed Settlement would be just and reasonable.

33. Finally, FirstEnergy maintains that the third approach of *Trailblazer* is not applicable to the circumstances. FirstEnergy argues that its interest in the proceeding is hardly attenuated, and FirstEnergy would incur substantial costs if the Proposed Settlement is approved.

34. FirstEnergy also makes several legal and procedural arguments in opposition to the Proposed Settlement. First, FirstEnergy argues that the Settling Parties have no right

²⁸ FirstEnergy Comments at 10 (citing *Trailblazer*, 85 FERC at 62,342).

²⁹ *Id.*, Attachment I, Constantine Aff.

³⁰ *Id.* at 11 (citing Constantine Aff. at P 9. The \$550,000 litigated loss calculation does not include the cost of litigation. FirstEnergy contends that protracted litigation is unnecessary in this case because there is substantial evidence in the record that the Section 4.8 Credits are not assignable).

³¹ In particular, FirstEnergy argues that under the Proposed Settlement it would pay approximately \$150,000 in increased Schedule 10 fees and \$900,000 in increased withdrawal fees to Midwest ISO when FirstEnergy withdraws from Midwest ISO on June 1, 2011. *Id.* (citing Constantine Aff. at P 6-7).

to withdraw or otherwise terminate FirstEnergy's pending Request for Rehearing and that FirstEnergy has a right to obtain a ruling on the merits. Second, FirstEnergy contends that the Proposed Settlement is barred by the Midwest ISO Transmission Owners Agreement³² because it retroactively modifies the financial obligations and payments ComEd incurred as a Midwest ISO transmission owner as required under the Transmission Owners Agreement. FirstEnergy states that the Proposed Settlement would refund \$10 million to ComEd, thereby modifying the Withdrawal Settlement Agreement and retroactively reducing ComEd's withdrawal fee to \$25.5 million. FirstEnergy argues that the Proposed Settlement is not a simple payment of money to end a dispute, but an attempt to circumvent the requirement that ComEd pay the full amount it owed as a Departing Company, which can be accomplished only by modifying Article V, section II.B of the Transmission Owners Agreement,³³ and such modification would require the consent of FirstEnergy pursuant to Article II, section IV.C.8. Third, FirstEnergy states that the Proposed Settlement raises the novel factual and legal issue of whether a Regional Transmission Organization can incur and impose on a withdrawing member costs that the Regional Transmission Organization would not pay until after the member's withdrawal. FirstEnergy is concerned that its withdrawal fee when it withdraws from Midwest ISO on June 1, 2011, would increase if the withdrawal fee calculation considers the \$10 million payment to ComEd under the Proposed Settlement. Finally, FirstEnergy maintains that the Proposed Settlement would not yield just and reasonable rates because the \$10 million payment and contract concessions would be gratuitous and would increase the burden on other Midwest ISO transmission customers. FirstEnergy argues that the Withdrawal Settlement Agreement does not allow ComEd to assign its Section 4.8 Credits, and therefore, the forfeiture of that right cannot constitute adequate consideration for the \$10 million payment to ComEd under the Proposed Settlement.

C. Comments in Support of Proposed Settlement

35. Commission Trial Staff, Midwest ISO, Midwest ISO TOs, and ComEd and Ameren submitted comments in support of the Proposed Settlement, urging the

³² Midwest ISO, FERC Electric Tariff, Rate Schedule No. 1, Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation (Transmission Owners Agreement).

³³ FirstEnergy states that the Transmission Owners Agreement requires that a departing transmission owner and Midwest ISO honor "[a]ll financial obligations incurred and payments applicable to time periods prior to the effective date of such withdrawal." FirstEnergy Comments at 16 (citing Transmission Owners Agreement, Article V, section II.B).

Commission to accept it without modification. Commission Trial Staff, Midwest ISO TOs, and ComEd and Ameren argue that litigation of the issues presented in this proceeding would likely be protracted and consume time and resources of the parties and the Commission that could be focused on other matters. Commission Trial Staff argues that the Proposed Settlement would preserve ComEd's ability to realize the value of some of its Section 4.8 Credits, while providing Midwest ISO with a firm date upon which redemption of the credits would end. Likewise, ComEd and Ameren argue that, by paying only \$10 million in return for relinquishment of ComEd's assignment rights on \$30 million worth of credits, Midwest ISO ends up far better off than it would if ComEd prevailed in litigation. Midwest ISO TOs similarly argue that the Proposed Settlement reflects a fair and reasonable resolution of the dispute in light of the risks presented by a litigated outcome and renders a result that is just and reasonable and in the public interest. Both Midwest ISO and Midwest ISO TOs recognize the benefit of mitigating the annual impact of the resolution by stretching the \$10 million payment to ComEd to December 15, 2018, as opposed to the potential of bearing the cost of the \$20 million in transmission credits over the shorter period ending December 15, 2013, if ComEd prevailed in litigation. Commission Trial Staff also states that the Proposed Settlement and underlying issues do not raise any major policy implications, will not affect any pending cases, raise no issues of first impression, and involve no previous reversals of the issues.

36. With regard to the recovery of the costs associated with the Proposed Settlement, Midwest ISO clarifies that the \$10 million payment to ComEd "will be treated as a cost of operations and will be recovered under Midwest ISO's Schedule 10."³⁴ Midwest ISO maintains that this cost recovery method is appropriate. Midwest ISO contends that, if ComEd prevailed in litigation, Midwest ISO's collection of Schedule 10 revenues would be reduced by the value of the assigned Section 4.8 Credits. Midwest ISO argues that recovering the cost of the \$10 million payment to ComEd under the Proposed Settlement through Schedule 10 would have "the same effect, but of a lesser magnitude."³⁵

37. ComEd and Ameren and Midwest ISO TOs contend that Midwest ISO's method of recovering the costs related to the Proposed Settlement is irrelevant to determining whether the Proposed Settlement is just and reasonable. ComEd and Ameren argue that the Proposed Settlement does not address how the Midwest ISO will recover the associated costs. Midwest ISO TOs maintain that there is no requirement that the Proposed Settlement address cost recovery and that the Settling Parties rightly left this issue for the Midwest ISO to resolve with its customers in a future proceeding. Midwest

³⁴ Midwest ISO Reply Comments at 4.

³⁵ *Id.*

ISO TOs argue that any Midwest ISO transmission customer can object when Midwest ISO seeks to recover the costs associated with the Proposed Settlement.

38. ComEd and Ameren argue that the Proposed Settlement should be approved under the first approach for approval outlined in *Trailblazer* because the Commission can assess and reject the arguments of contesting parties. In particular, ComEd and Ameren contend that the arguments raised about the impact of the Proposed Settlement on Midwest ISO rates are beyond the scope and properly subject of another proceeding if, or when, Midwest ISO seeks to recover or alter recovery of its costs.³⁶

39. Similarly, Midwest ISO TOs contend that Consumers and FirstEnergy raise no genuine issue of material fact. They claim that the calculations offered in FirstEnergy's affidavit are speculative and irrelevant because Midwest ISO's method of recovering the costs associated with the Proposed Settlement and the amount of FirstEnergy's future withdrawal fee are not yet known and are not in dispute in this proceeding. Midwest ISO TOs also note that only FirstEnergy submitted the affidavit required by the Commission to contest an offer of settlement.³⁷

40. ComEd and Ameren argue that the Commission can determine that the Proposed Settlement, as a whole, is just and reasonable, consistent with the second approach in *Trailblazer*. In support, they cite to section 6 of the Proposed Settlement and recent Supreme Court precedent for the proposition that the Commission must presume that the rate set out in a freely-negotiated contract meets the just and reasonable requirement imposed by law.³⁸ ComEd and Ameren assert that the presumption may only be overcome if the Commission concludes that the contract seriously harms the public interest. They also argue that the public interest standard applies to the Commission and non-contracting third parties.³⁹

41. Midwest ISO TOs argue that Consumers and FirstEnergy would be in no worse position as a result of the Proposed Settlement than of continued litigation. Midwest ISO TOs contend that, as there are only two potential outcomes to litigation in this

³⁶ ComEd and Ameren Joint Comments at 9-10, n.25 (citing *Yankee Atomic Elec. Co.*, 60 FERC ¶ 61,316, at 62,096 (1992)).

³⁷ Midwest ISO TOs Reply Comments at 3 (citing 18 C.F.R. § 385.602(f)(4)).

³⁸ ComEd and Ameren Joint Comments at 10 (citing *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2749 (2008)).

³⁹ *Id.* at 11 (citing *NRG Pwr Mrkt'g v. Maine Pub. Util. Comm'n*, 130 S. Ct. 693, 696-97 (2010)).

proceeding, it is reasonable to conclude that either outcome of litigation is equally likely. They claim that, under these circumstances, it is reasonable to test the benefits of the Proposed Settlement against the consequences of the worst-case outcome of litigation. Under the worst-case outcome in this proceeding, Midwest ISO TOs maintain that ComEd could assign its Section 4.8 Credits to Ameren, thereby costing Midwest ISO \$20 million and possibly as much as \$30 million.⁴⁰ Midwest ISO TOs assert that, in contrast, the Proposed Settlement requires Midwest ISO to incur costs of only \$10 million.

42. Midwest ISO argues that only the Commission can determine whether the Proposed Settlement is worse for FirstEnergy than if the matter had been fully litigated. Midwest ISO contends that, since the December 30 Order suggests that the Commission “was in equipoise over the arguments *pro* and *con*,” the Proposed Settlement essentially splits the difference and, therefore, is no worse than a risk-weighted litigated outcome and is far better than an adverse decision.⁴¹

43. ComEd and Ameren argue that the Commission can approve the Proposed Settlement pursuant to the third approach in *Trailblazer* because the benefits of the Proposed Settlement outweigh the nature of the objections, and the contesting parties’ interests are too attenuated. They contend that the Proposed Settlement provides real benefits by providing certainty for Midwest ISO by reducing substantially the expected amounts owed as credits compared to a likely litigated solution. ComEd and Ameren argue that contesting parties’ arguments are merely speculative and would not be resolved in these proceedings even if they went to litigation.

44. Midwest ISO TOs and ComEd and Ameren disagree with FirstEnergy’s argument that the Proposed Settlement infringes upon FirstEnergy’s right to a determination on the merits. ComEd and Ameren contend that FirstEnergy supports its position by making speculative and unsupported arguments regarding the potential impact of the Proposed Settlement on its future withdrawal fee to Midwest ISO. Midwest ISO TOs argue that FirstEnergy’s claim that it has a right to a determination on the merits is rendered moot if the Commission accepts the Proposed Settlement.⁴² They add that the Commission has

⁴⁰ Midwest ISO TOs contend that the \$20 million to \$30 million in costs under the worst-case outcome could be reduced by 50 percent to reflect the uncertainty of the likely outcome of continued litigation, yielding a risk-adjusted assessment of \$10 million to \$15 million in costs under the worst-case outcome of litigation. *Id.* at 9.

⁴¹ Midwest ISO Reply Comments at 5.

⁴² Midwest ISO TOs Reply Comments at 9-10 (citing *e.g.*, *Trailblazer*, 87 FERC at 61,440).

long recognized the binding nature of administrative settlement agreements on all parties participating in a proceeding.⁴³

45. Midwest ISO TOs also disagree with FirstEnergy's other legal and procedural objections to the Proposed Settlement. Midwest ISO TOs maintain that, given that there is disagreement with respect to what the terms of the Withdrawal Settlement Agreement provide, there is no basis to claim that the Proposed Settlement modifies those terms. They contend that the Proposed Settlement resolves a disagreement over the interpretation and implementation of the Withdrawal Settlement Agreement and does not retroactively modify the agreement. Further, Midwest ISO TOs claim that FirstEnergy's plans to withdraw from Midwest ISO and join PJM are irrelevant to the Proposed Settlement. They assert that FirstEnergy can object to any element of its withdrawal fee when FirstEnergy seeks to finalize the terms of its withdrawal from Midwest ISO.

46. In addition, ComEd and Ameren argue that the Commission should reject Consumers' comments because it slept on its rights.⁴⁴ ComEd and Ameren state that Consumers intervened in Docket No. ER10-640-000, Consumers was provided with a copy of the draft Proposed Settlement, and ComEd solicited comments from Consumers, to which Consumers did not respond. ComEd and Ameren state that Commission precedent provides that a party that forgoes participation in a settlement discussion waives its rights.⁴⁵ ComEd and Ameren argue that, since Consumers has not raised any material issues of fact, its non-participation in the settlement process is an additional ground for rejecting its opposition.

D. Commission Determination

47. Pursuant to Rule 602(h),⁴⁶ we find that the Proposed Settlement is contested and that the Contesting Parties have raised genuine issues of material fact with respect to the

⁴³ *Id.* at 10 (citing *National Fuel Gas Supply Corp.*, 27 FERC ¶ 61,111, at 61,211 (1984)).

⁴⁴ ComEd and Ameren Joint Comments at 13-14 (citing *S. Cal. Edison Co.*, 113 FERC ¶ 61,018, at P 10 (2005); *cf. El Paso Natural Gas Co.*, 75 FERC ¶ 63,001, at 65,032 (1996)).

⁴⁵ *Id.* at 14 (citing *Exelon Corp.*, 103 FERC ¶ 61,164 (2003); *Tennessee Gas Pipeline*, 74 FERC ¶ 61,174 (1996); *El Paso Natural Gas Co.*, 75 FERC ¶ 63,011 (1996)).

⁴⁶ 18 C.F.R. § 385.602 (2010).

likely rate impact of the Proposed Settlement on the Contesting Parties relative to the likely outcome of litigation.

48. The Supreme Court has held that where a settlement is contested, the Commission must make an “independent finding supported by ‘substantial evidence on the record as a whole’ that the proposal will establish ‘just and reasonable’ rates.”⁴⁷ Consistent with this requirement, Rule 602(h)(1)(I) of the Commission’s regulations provides that the Commission may decide the merits of a contested settlement only if “the record contains substantial evidence upon which to base a reasoned decision or the Commission determines that there is no genuine issue of material fact.”⁴⁸

49. In *Trailblazer*, the Commission explained four approaches it has taken for approving a contested settlement despite the objections of the contesting party. Under the first approach, if there is an adequate record, the Commission can address each of the contested issues on the merits, approving the settlement if the Commission finds that each of the contesting party’s contentions lacks merit. Under the second approach, even if some individual aspects of a settlement may not be just and reasonable standing alone, the Commission may approve the settlement as a package if the overall result of the settlement is just and reasonable and the contesting party would be in no worse position under the settlement than if the case were litigated.⁴⁹ Under the third approach, if a settlement is not found to satisfy the just and reasonable standard, the Commission may approve the settlement where the benefits of the settlement outweigh the nature of the objections, and the contesting parties’ interest is too attenuated so that the settlement may be approved under the fair and equitable standard applicable to uncontested settlements. Under the fourth approach, the Commission may sever the contesting party, permitting that party to obtain a litigated result and approving the settlement as to the consenting parties.

50. Despite the benefits of the Proposed Settlement, we cannot approve the Proposed Settlement as just and reasonable in view of the Contesting Parties’ objections. Contrary to arguments made by the Settling Parties, none of the approaches outlined in *Trailblazer* provide an effective means of approving the Proposed Settlement. Taken in turn, we cannot approve the Proposed Settlement under the first or second approaches outlined in *Trailblazer* because there remains an issue of material fact as to whether the Withdrawal Settlement Agreement permits ComEd to assign its Section 4.8 Credits to unaffiliated third parties. Specifically, we cannot address all of the Contesting Parties’ arguments on

⁴⁷ *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974).

⁴⁸ 18 C.F.R. § 385.602 (2010).

⁴⁹ *Trailblazer*, 85 FERC at 62,342; *order on reh’g*, 87 FERC at 61,440.

the merits,⁵⁰ nor can we determine the likely outcome of litigation,⁵¹ because the record is insufficient to make a finding on the assignment issue.

51. Likewise, the third and fourth approaches outlined in *Trailblazer* do not offer reasonable bases to approve the Proposed Settlement. With respect to the third approach, we find that Contesting Parties' interests are not too attenuated. With respect to the fourth approach, no party argues that the Proposed Settlement could or should be approved as to only the Settling Parties, with the Contesting Parties severed, nor do we find that the nature of the Proposed Settlement, involving rights and obligations under the Withdrawal Settlement Agreement, lends itself to severability with respect to individual Midwest ISO customers.

52. Therefore, based on the foregoing and given the unique facts and circumstances of this case, we will reject the Proposed Settlement and direct the Chief Judge to commence hearing procedures or further settlement judge procedures, as appropriate, on the issues set for hearing in the December 30 Order. We also direct the Chief Administrative Law Judge, or his designee, to appoint a presiding judge, or a settlement judge, as appropriate, to convene a conference no later than fifteen days from the date of this order for the purpose of establishing a procedural schedule or settlement procedures, as appropriate.

The Commission orders:

(A) FirstEnergy's request for rehearing is hereby denied, as discussed in the body of this order.

(B) The Proposed Settlement is hereby rejected, as discussed in the body of this order.

(C) The Chief Administrative Law Judge is directed to commence hearing or further settlement judge proceedings, as appropriate, in this case and assign a presiding judge or settlement judge, as appropriate, to oversee those proceedings, as discussed in this order and the December 30 Order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁰ *Trailblazer*, 85 FERC 61,345 at 62,342.

⁵¹ *Id.*; *Trailblazer*, order on reh'g, 87 FERC at 61,440.