

137 FERC ¶ 61,254
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission
System Operator, Inc.

Docket No. ER12-334-000

ORDER ACCEPTING TARIFF REVISIONS

(Issued December 30, 2011)

1. On November 2, 2011, pursuant to section 205 of the Federal Power Act (FPA),¹ Midwest Independent Transmission System Operator, Inc. (MISO), Duke Energy Ohio, Inc. (Duke Ohio), and Duke Energy Kentucky, Inc. (Duke Kentucky) (jointly, Applicants) proposed new Schedule 38 (MISO Transmission Expansion Plan (MTEP) Project Cost Recovery For Duke Ohio and Duke Kentucky) and proposed revisions to Attachment GG (Network Upgrade Charge) to MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) (November 2 Filing). The proposed revisions reflect the treatment of costs of certain MTEP Projects² upon the withdrawal of Duke Ohio and Duke Kentucky from MISO. In this order, we accept new Schedule 38 and revised Attachment GG, and grant waiver of the prior notice requirement, to make them effective January 1, 2012, as requested.

I. Background

2. On October 21, 2010, the Commission conditionally approved Duke Ohio's and Duke Kentucky's request to withdraw from MISO and join PJM Interconnection, L.L.C. (PJM).³ In the Duke Realignment Order, the Commission conditioned its approval on,

¹ 16 U.S.C. § 824d (2006).

² Proposed Schedule 38 defines an MTEP Project as "a transmission project approved by the MISO Board of Directors prior to Duke Ohio's and Duke Kentucky's January 1, 2012 exit from MISO." See Proposed Schedule 38, section I.M. Further, MTEP Projects do not and will not include Multi-Value Projects (MVPs). *Id.*

³ *Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc.*, 133 FERC ¶ 61,058, at P 73 (2010), *order on reh'g*, 134 FERC ¶ 61,235 (2011) (Duke Realignment Order).

among other things, the submission of separate filings addressing Duke Ohio's and Duke Kentucky's remaining financial obligations as well as their obligation to construct new facilities under Article Five, sections II.B and C of the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc. (MISO TO Agreement).⁴

II. Description of the Instant Filing

3. In order to satisfy the condition in the October 21 Order, Applicants jointly submitted the November 2 Filing to propose a new Schedule 38 to the MISO Tariff. Schedule 38 provides a mechanism to collect and distribute revenues related to the MTEP Projects associated with the Duke Zone.⁵ Applicants state that the instant filing is necessary because, after Duke Ohio's and Duke Kentucky's integration into PJM, the remaining MISO Transmission Owners⁶ and American Transmission Systems, Incorporated (ATSI) (pursuant to Schedule 37 of the MISO Tariff)⁷ will continue to be obligated to construct certain projects and Duke Ohio and Duke Kentucky will continue to be obligated to pay a portion of those costs. Applicants note that ATSI has pending a

⁴ *Id.* P 73, 76. Article Five, section II.B of the MISO TO Agreement states that “[a]ll financial obligations incurred and payments applicable to time periods prior to the effective date of [the withdrawing Owner’s] withdrawal shall be honored by the Midwest ISO and the withdrawing Owner.” Article Five, section II.C. of the MISO TO Agreement states that “[o]bligations relating to the construction of new facilities pursuant to an approved plan of [MISO] shall be renegotiated as between [MISO] and the withdrawing owner.”

⁵ The MISO Board of Directors was scheduled to approve additional MTEP Projects during their December 8, 2011 meeting, in which case Schedule 38 provides that a filing may be made with the Commission to seek authorization to add the additional projects to the list of projects subject to Schedule 38. *See* November 2 Filing at 2.

⁶ Proposed Schedule 38 defines a MISO Transmission Owner as “any Transmission Owner or ITC in MISO as of January 1, 2012 and responsible for the construction of MTEP Projects under the MISO Tariff, including [Duke Energy Indiana, Inc. (Duke Indiana)], but not including, [Duke Ohio], [Duke Kentucky], or ATSI.” *See* Proposed Schedule 38, section I.J.

⁷ ATSI withdrew from MISO effective June 1, 2011, at which time Duke Ohio and Duke Kentucky were MISO Transmission Owners. Thus, Schedule 37 of the MISO Tariff allocates costs to ATSI for certain MTEP Projects, much like Schedule 38 proposes to do for Duke Ohio and Duke Kentucky.

variety of challenges to its Schedule 37 in the MISO-ATSI Proceeding.⁸ Applicants assert that their Schedule 38 filing is intentionally designed to avoid any need for the Applicants and ATSI to litigate in this proceeding the issues in the MISO-ATSI Proceeding. Specifically, Applicants state to ensure that the November 2 Filing does not change the relationship between MISO and ATSI, the cost allocations to ATSI, or the revenue distributions to ATSI pursuant to Schedule 37, Schedule 38 references cost allocations or revenue distributions to or from ATSI with the parenthetical reference “pursuant to Schedule 37.”⁹

4. In addition, pursuant to proposed Schedule 38, transmission customers serving load in the MISO Transmission Pricing Zones¹⁰ and ATSI will continue to be obligated to pay for a portion of the costs of previously identified MTEP Projects that Duke Ohio or Duke Kentucky has constructed or remains obligated to construct.

5. Specifically, Schedule 38 establishes: (1) the method by which transmission customers taking transmission service from MISO, and ATSI, are charged for a portion of the MTEP Projects constructed by Duke Ohio and Duke Kentucky; (2) the method by which MISO will transmit the revenues received from transmission customers and ATSI to Duke Ohio and Duke Kentucky; (3) the method by which Duke Ohio and Duke Kentucky will be charged for a portion of the MTEP Projects of the MISO Transmission Owners and ATSI; (4) the method by which MISO will transmit the revenues received from Duke Ohio and Duke Kentucky for the MTEP Projects of the MISO Transmission Owners and ATSI; and (5) the manner in which the annual revenue requirements will be derived for purposes of determining the relevant charges. Applicants maintain that the costs recovered under proposed Schedule 38 represent the costs that customers taking transmission service in MISO, ATSI, Duke Ohio, and Duke Kentucky would have paid if Duke Ohio and Duke Kentucky had remained in MISO, and that Schedule 38 provides a mechanism to ensure MTEP Project costs are recovered and distributed properly.

6. Applicants state that Appendix 1 to Schedule 38 recognizes that Duke Ohio and Duke Kentucky have sought Commission authorization to allocate MTEP Project costs and revenues to Commission-jurisdictional transmission customers in Duke Ohio’s and

⁸ See November 2 Filing at 5 (citing *Midwest Independent Transmission System Operator, Inc.*, 135 FERC ¶ 61,204 (2011), *reh’g pending* (MISO-ATSI Proceeding)).

⁹ See November 2 Filing at 4-5. For the purposes of this order, all cost allocation references to ATSI also are intended as references “pursuant to Schedule 37.”

¹⁰ Proposed Schedule 38 defines MISO Transmission Pricing Zones as “the Transmission Pricing Zones MISO uses to develop transmission rates and allocate revenues.” See Proposed Schedule 38, section I.K.

Duke Kentucky's proposed zone in PJM (Duke Zone).¹¹ Thus, Applicants explain that Appendix 1 provides that, solely to the extent authorized by the Commission in a separate proceeding, the allocation of costs and distribution of revenues to Duke Ohio and Duke Kentucky under Appendix 1 and Schedule 38 shall instead be treated as allocations to Commission-jurisdictional transmission customers taking service in the Duke Zone, without the need to amend or modify Schedule 38.

7. Applicants also propose revisions to Attachment GG, which sets forth the formula rate for calculating the MISO Transmission Owners' revenue requirements for network upgrades subject to regional cost sharing, to acknowledge the new provisions of Schedule 38.¹²

8. Applicants request waiver of the 60-day prior notice requirement¹³ and that the Commission make the filing effective January 1, 2012, to coincide with Duke Ohio's and Duke Kentucky's withdrawal from MISO and integration into PJM.

III. Notice of Filing and Responsive Pleadings

9. Notice of Applicants' filing was published in the *Federal Register*, 76 Fed. Reg. 70,435 (2011), with interventions and protests due on or before November 23, 2011. Wabash Valley Power Association, Inc., Consumers Energy Company, and Hoosier Energy Rural Electric Cooperative, Inc. filed timely motions to intervene. American Municipal Power, Inc. (American Municipal Power) filed a timely motion to intervene and comment and ATSI filed a timely motion to intervene, comments, and conditional protest.

¹¹ PJM, Application, Docket Nos. ER12-91-000 and ER12-92-000 (filed Oct. 14, 2011) (PJM-Duke Filing). On October 14, 2011, in Docket Nos. ER12-91-000 and ER12-92-000, PJM, Duke Ohio, and Duke Kentucky jointly submitted proposed modifications to PJM's Open Access Transmission Tariff (PJM OATT) related to, among other things, Duke Ohio's and Duke Kentucky's transmission revenue requirements, including formula rate protocols to recover MTEP Project costs from transmission customers in Duke Ohio's and Duke Kentucky's proposed zone in PJM (Duke Zone). The Commission will address the PJM-Duke Filing in a future order.

¹² Annual revenue requirements for MTEP Projects are calculated pursuant to the formula set forth in Attachment GG of the MISO Tariff and recovered in a charge calculated and assessed under Schedule 26 of the MISO Tariff.

¹³ 18 C.F.R § 35.3(a) (2011).

IV. Discussion

A. Procedural Issues

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁴ the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Comments and Protests

11. American Municipal Power states that it does not oppose either the proposed Schedule 38 or the related changes to Attachment GG of the MISO Tariff to the extent that, as indicated by the Applicants in the November 2 Filing, the Commission's acceptance of Schedule 38 does not constitute approval of the pass-through of MTEP Project costs to Duke Ohio's and Duke Kentucky's transmission customers. According to American Municipal Power, Applicants state that Appendix 1 to Schedule 38 expressly states that recovery from transmission customers is permitted "solely to the extent authorized by FERC," and that "the Commission's acceptance of Schedule 38 will not authorize any such recovery from customers."¹⁵ Accordingly, American Municipal Power asserts that the Commission should not rule on the validity of Duke Ohio's and Duke Kentucky's plan to charge transmission customers for the costs of MTEP Projects in the instant docket.

12. In addition, American Municipal Power contends that the Commission must ensure that any costs that it determines Duke Ohio and Duke Kentucky may recover from customers under Schedule 38 and Attachment GG are not also recovered through Duke Ohio's and Duke Kentucky's zonal rates under the PJM OATT. American Municipal Power contends the Commission must ensure that Schedule 38 does not result in any double recovery of costs that might create a windfall to Duke Ohio and Duke Kentucky.

13. ATSI contends that Applicants claim that their proposal in Schedule 38 is consistent with Schedule 37 of the MISO Tariff by providing for the allocation to ATSI of a portion of the costs of certain MTEP Projects constructed by Duke Ohio and Duke Kentucky. ATSI asserts that as Applicants acknowledge, ATSI, MISO and certain MISO transmission owners are currently litigating a number of issues regarding Schedule 37 in the MISO-ATSI Proceeding.¹⁶ ATSI asserts that an issue pending before the Commission in the MISO-ATSI Proceeding is relevant in the instant proceeding; namely,

¹⁴ 16 U.S.C. § 824d(d) (2006); 18 C.F.R. § 35.3(a) (2011).

¹⁵ American Municipal Power Comments at 5 (citing November 2 Filing at 4).

¹⁶ ATSI Comments at 3 (citing MISO-ATSI Proceeding, 135 FERC ¶ 61,204).

whether MISO is authorized by the MISO Tariff or the MISO TO Agreement to charge costs associated with MTEP Projects to ATSI as distinct from the transmission customers in the ATSI zone who paid those costs before ATSI's withdrawal.¹⁷

14. According to ATSI, Applicants presume in both their transmittal letter and the proposed Schedule 38 that ATSI is required to pay costs associated with MTEP Projects.¹⁸ ATSI claims that Applicants provide no support for this position. ATSI contends that the Commission recently confirmed that a transmission owner that withdraws from MISO remains obligated to fulfill financial obligations for MTEP upgrades that it incurred prior to its withdrawal, but incurs no new financial obligations for such upgrades.¹⁹ ATSI asserts that the Commission also stated that a transmission owner is only obligated to pay for MTEP upgrades after it withdraws if the MISO Tariff charged it for those costs before its withdrawal.²⁰ However, ATSI argues that throughout the period that it was a MISO member, it was never a MISO transmission customer. Instead, ATSI asserts that it was a transmission owner, and that it did not use MISO transmission service to serve load or to sell or distribute electricity to customers in the ATSI zone or elsewhere. ATSI states that all load in the ATSI pricing zone was and is served by other entities that took MISO transmission service over ATSI's facilities.²¹ Thus, according to ATSI, no provision of the MISO Tariff required ATSI to pay costs for MTEP Projects prior to its withdrawal from MISO, and therefore, ATSI has no such obligation to do so after its withdrawal from MISO.

15. ATSI claims that for this reason, the Commission should make any order it issues accepting Schedule 38 subject to the outcome of the MISO-ATSI Proceeding. ATSI states that if the Commission declines to do so, it should direct Applicants to remove from Schedule 38 any provision allocating to ATSI any portion of the costs of Duke Ohio's and Duke Kentucky's MTEP projects.

¹⁷ *Id.*

¹⁸ *Id.* at 4 (citing Proposed Schedule 38, Section II.A: "Transmission Customers taking transmission service in MISO, as well as ATSI (pursuant to Schedule 37), shall pay for a portion of the MTEP Projects of [Duke Ohio] and [Duke Kentucky]...").

¹⁹ *Id.* (citing *Midwest Indep. Trans. Sys. Operator, Inc.*, 133 FERC ¶ 61,221 (2010), *order on reh'g*, 137 FERC ¶ 61,074, at P 322-323 (2011), *petitions for review pending* (MVP Rehearing Order)).

²⁰ *Id.* (citing MVP Rehearing Order, 137 FERC ¶ 61,074 at P 323).

²¹ *Id.* at 5, n.10.

C. Commission Determination

16. The Commission accepts proposed Schedule 38 and the revised Attachment GG to collect and distribute revenues related to the MTEP Projects set forth in Schedule 38 to become effective January 1, 2012. We deny ATSI's request to condition this order on the outcome of the MISO-ATSI Proceeding. As Applicants point out, proposed Schedule 38 was designed to avoid the need to litigate in this proceeding the issues in the MISO-ATSI proceeding, expressly providing that, among other things, the costs of certain MTEP projects constructed by Duke Ohio and Duke Kentucky will be allocated to ATSI "pursuant to Schedule 37."²² Therefore, Schedule 38 is drafted to take into account whether ATSI may be allocated MTEP costs pursuant to Schedule 37, an issue that is pending in the MISO-ATSI Proceeding, and it is unnecessary to condition the acceptance of Schedule 38 as ATSI requests.

17. In addition, as requested by American Municipal Power, we clarify that the Commission's acceptance of Schedule 38 and Attachment GG in this proceeding does not constitute approval of the pass-through of MTEP costs to transmission customers in the Duke Zone. Instead, this issue is appropriately addressed in the PJM-Duke Filing. Furthermore, we note that the language in Appendix 1 to Schedule 38 expressly states that Duke Ohio and Duke Kentucky "shall themselves be responsible, at the wholesale level, for paying for the costs identified in [Appendix 1 and Schedule 38] in accordance with the methodology established in Schedule 38," unless the Commission authorizes Duke Ohio and Duke Kentucky to allocate costs and revenues of MTEP Projects to Commission-jurisdictional transmission customers taking service in the Duke Zone.²³

18. American Municipal Power asserts that the Commission must ensure that any costs it determines Duke Ohio and Duke Kentucky may recover from customers under Schedule 38 and Attachment GG also are not recovered through Duke Ohio's and Duke Kentucky's zonal rates under the PJM OATT. Schedule 38 provides the method by which transmission customers taking service from MISO, and ATSI, are charged to recover costs for MTEP Projects constructed by Duke Ohio and Duke Kentucky, which we find just and reasonable. As noted, the PJM-Duke Proceeding includes Duke Ohio's and Duke Kentucky's proposed transmission revenue requirements for recovery from transmission customers in the Duke Zone in PJM. While it is not perfectly clear that American Municipal Power is concerned that Duke Ohio and Duke Kentucky may recover the same costs through their zonal rates under the PJM OATT that are recovered under Schedule 38, to the extent that this is correct, the issue should be raised in the PJM-Duke Proceeding.

²² See Proposed Schedule 38, Sections II.A, II.B, III.B, and IV.C.

²³ See Proposed Schedule 38, Appendix 1.I.

The Commission orders:

(A) Applicants' filing is hereby accepted for filing, as discussed in the body of this order.

(B) Waiver of the prior notice requirement is hereby granted in order to make the proposed Schedule 38 and the proposed revisions to Attachment GG effective on January 1, 2012.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.