140 FERC ¶ 61,139
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System Operator, Inc. — Docket Nos. ER11-2059-002, ER11-2059-003

ORDER APPROVING SETTLEMENTS

(Issued August 22, 2012)

1. In this order, we approve two settlements in these proceedings, one between Midwest Independent Transmission System Operator, Inc. (MISO) and FirstEnergy Service Company (FirstEnergy) (FirstEnergy Settlement),[1] and the other between MISO and Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc. (together, Duke) (Duke Settlement).

Background

2. In Order No. 681,[2] the Commission stated that issues related to departures of long-term firm transmission right (LTTR) holders from a transmission organization may require additional language in the transmission organization's tariff or its members agreement.[3] On November 9, 2010, MISO filed proposed revisions to its Open Access Transmission, Energy, and Operating Reserve Markets Tariff (Tariff) that would allow

[1] FirstEnergy is acting on behalf of: its electric transmission affiliate American Transmission System, Inc. (ATSI); its power marketing affiliate FirstEnergy Solutions Corp.; and its affiliated utility operating companies: The Cleveland Electric Illuminating Company; Ohio Edison Company; Pennsylvania Power Company; and The Toledo Edison Company).

[2] *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, FERC Stats. & Regs. ¶ 31,226, *reh'g denied*, Order No. 681-A, 117 FERC ¶ 61,201 (2006).

[3] *Id.*, FERC Stats. & Regs. ¶ 31,226 at P 428.

MISO to assess an exit fee applicable to withdrawing transmission owners. This charge is intended to recover the congestion hedge revenues that MISO would lose when the withdrawing members' LTTRs are removed from MISO. The proposed Tariff charge would apply to ATSI and Duke, both of which have received conditional Commission authorization to withdraw from MISO, including the condition that each pay an exit fee to satisfy contractual obligations.[4]

3. In its order issued on January 7, 2011,[5] the Commission concluded that MISO's proposed Tariff revisions raised issues of material fact that the Commission could not resolve on the record before it. Accordingly, the Commission accepted the Tariff revisions, suspended them for a nominal period, and set them for hearing and settlement judge procedures. MISO filed its settlement with FirstEnergy (FirstEnergy Settlement) on July 25, 2011, and its settlement with Duke (Duke Settlement) on July 29, 2011. On September 15, 2011, the Settlement Judge reported to the Commission that the remaining parties to the proceeding (Remaining Stakeholders)[6] were using the MISO stakeholder process as a vehicle for resolving the issues affecting them.

4. On September 19 and 21, 2011, respectively, the Settlement Judge reported the FirstEnergy and Duke Settlements to the Commission. In these reports, the Settlement Judge noted that American Municipal Power, Inc. (AMP) had conditioned its non-opposition to the FirstEnergy and Duke Settlements on its understanding that the Settlements did not prejudice AMP's right to defend against any future attempts by ATSI

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[4] *See Am. Transmission Sys., Inc.*, 129 FERC ¶ 61,249, at P 4 (2009), *order on reh'g*, 130 FERC ¶ 61,171 (2010); *Duke Energy Ohio, Inc.*, 133 FERC ¶ 61,058, at P 14, P 73 (2010), *reh'g denied*, 134 FERC ¶ 61,235 (2011). ATSI and Duke seek to withdraw from MISO to join PJM Interconnection, L.L.C.

[5] *Midwest Indep. Transmission Sys. Operator, Inc.*, 134 FERC ¶ 61,009 (2011).

[6] The Remaining Stakeholders, intervenors in these proceedings, include: Coalition of Midwest Transmission Customers, Detroit Edison Co.; Public Utilities Commission of Ohio; Wisconsin Electric Power Co.; MidAmerican Energy Co.; American Municipal Power, Inc.; Ameren Services Company, which intervened on behalf of Ameren Illinois Company d/b/a Ameren Illinois, Union Electric Company d/b/a Ameren Missouri, Ameren Energy Marketing Company and Ameren Energy Generating Company; Midwest TDUs (comprising Madison Gas & Electric Company, the Midwest Municipal Transmission Group, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Southern Minnesota Municipal Power Agency and WPPI Energy); Consumers Energy Co.; Hoosier Energy Rural Electric Cooperative, Inc.; Office of the Ohio Consumers' Counsel; Xcel Energy Services, Inc.; and ITC Holdings, Inc.

or Duke to recover a Settlement-mandated payment from their transmission customers through their formula rates. The Settlement Judge concluded that the conditional nature of AMP's approval raised a question as to whether the two Settlements were contested or uncontested, a question whose resolution requires a substantive finding, which a Settlement Judge lacks authority to make.[7] Thus, the Settlement Judge reported the two Settlements to the Commission rather than certifying them as uncontested.

5. On April 12, 2012, the Settlement Judge reported to the Commission that the Remaining Stakeholders had reached agreement and that once the Commission approved the FirstEnergy and Duke Settlements, MISO would file the settlement with the Remaining Stakeholders. This, he reported, and as MISO had pointed out, would resolve the proceeding.

<u>The Settlements' Provisions</u>

6. Paragraph 2.1 of each Settlement states that the respective settling parties settle and resolve all issues between them in the matters raised in Docket No. ER11-2059. Paragraph 3.1 of each Settlement states that ATSI and Duke, each, will pay to MISO the same sum, $1.8 million, within fifteen days after the Commission issues an order approving the Settlements, or the Settlements otherwise become fully effective.

7. Paragraph 3.2 of each Settlement states that, within fifteen days after the Commission issues an order approving the Settlements, FirstEnergy and Duke will each move to withdraw all its pleadings and testimony. FirstEnergy specifies that this includes its pending request for rehearing. Paragraph 3.3 of each Settlement states that the Settlement resolves between MISO, and FirstEnergy or Duke, accordingly, all issues involving these companies' compliance with MISO's proposed Tariff revisions.

8. Paragraph 3.4 of each Settlement states that the Settlement does not, and is not intended to, affect any other matters at issue between MISO, the Commission, or any other party in Docket No. ER11-2059-000 proceedings. Paragraph 3.4 also recognizes that MISO may file proposed Tariff provisions modifying those filed in Docket No. ER11-2059-000. The FirstEnergy Settlement states that such proposed Tariff provisions will be inapplicable to FirstEnergy so long as FirstEnergy is not a transmission-owning member of MISO, and shall not affect the Settlement's resolution of all issues between MISO and FirstEnergy. The Duke Settlement states that such proposed Tariff provisions shall be inapplicable to Duke until Duke withdraws from

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[7] The Settlement Judge cited *City of Anaheim v. Cal. Indep. Sys. Operator, Corp.*, 101 FERC ¶ 61,392, at P 12 (2002); *Statement of Admin. Policy on Separation of Functions*, 101 FERC ¶ 61,340, at P 33 (2002); *Amer. Elec. Power Serv. Corp*, 100 FERC ¶ 61,346, at P 41 (2002).

MISO and thereafter as long as Duke remains a non-member of MISO, and that such proposed Tariff provisions shall not affect the Settlement's resolution of all issues between MISO and Duke.

Paragraph 4.9 of each Settlement provides that, unless the settling parties otherwise agree in writing, any modification to the Settlement proposed by one of the settling parties after Commission approval shall be subject to the "public interest" application of the just and reasonable standard set forth in the *Mobile-Sierra* doctrine,[8] as clarified in *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washington*, 554 U.S. 527 (2008) and refined in *NRG Power Marketing. v. Maine Public Utilities Commission*, 130 S.Ct. 693 (2010). Paragraph 4.9 provides further that any modification proposed by the Commission acting *sua sponte* or by a non-settling party shall be subject to the most stringent standard available under applicable law.

<u>Comments and Responses</u>

9. AMP and Trial Staff submitted comments on both Settlements. MISO submitted motions for leave to respond to AMP's comments on both Settlements, and its two responses.

10. In nearly identical comments on the FirstEnergy and Duke Settlements, AMP states that it does not oppose the Settlements based on its understanding that Commission acceptance of the Settlements shall not prejudice any party's position on the issue of whether the charges that ATSI and Duke agreed to pay may be recovered from transmission customers through ATSI's or Duke's formula rate. AMP states that, because these charges arise solely from withdrawal from MISO, they may not be recovered from ATSI's and Duke's wholesale transmission customers absent a cost-benefit analysis showing that the benefits to the customers outweigh the costs of Regional Transmission Organization alignment. AMP continues that it opposes the Settlements should the Commission determine that the Settlements prejudice AMP's position on cost recovery. AMP continues further that it does not foresee its reservation being a hindrance to approval of the Settlements because the issue of cost recovery is beyond the scope of these proceedings.[9]

11. Responding to AMP's comments, MISO confirms that it, and FirstEnergy and Duke, which authorized MISO to speak for them, do not intend to address cost recovery

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[8] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[9] AMP Aug. 15, and Aug. 18, 2011 Comments.

issues in the Settlements. Thus, MISO continues, AMP's comments should not hinder approval of the Settlements.[10]

Discussion

12. We agree with AMP and MISO that the issue of cost recovery of the exit charges to be paid by ATSI and Duke is beyond the scope of these proceedings. Therefore, we conclude that both Settlements are uncontested.

13. We find that the FirstEnergy and Duke Settlements appear to be fair and reasonable and in the public interest, and will, therefore, approve them, terminating Docket Nos. ER11-2059-002 and ER11-2059-003. However, approval of these Settlements does not terminate the Docket No. ER11-2059-000 proceeding, which will remain open pending MISO's Filing of the settlement reached between it and the Remaining Stakeholders.

The Commission orders:

The FirstEnergy Settlement and the Duke Settlement are hereby approved.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[10] MISO, Aug. 16, and Aug. 24, 2011 Responses.