

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

American Municipal Power-Ohio, Inc.

Docket No. EL03-56-000

v.

Dayton Power and Light Company and
PJM Interconnection, LLC

ORDER ESTABLISHING SETTLEMENT JUDGE PROCEDURES

(Issued July 10, 2003)

1. The Commission here establishes settlement judge procedures for a complaint filed by American Municipal Power-Ohio (AMPO) against Dayton Power and Light Company (DP&L) and PJM Interconnection, LLC (PJM) regarding the interpretation of AMPO members' long-term transmission service contracts with DP&L. This order benefits customers because the assistance of a settlement judge may be helpful in discerning the rights and obligations of the parties and, thereby, may prove useful in ultimately reducing the time and expense involved in resolving this dispute.¹

BACKGROUND

2. Thirteen municipal power systems in Ohio (the Municipals)² have long-term transmission contracts with DP&L under which DP&L provides all of their transmission service at fixed rates. These contracts will expire in 2014 (with the possibility of additional extensions), except for DP&L's contract with the city of Celina, which will

¹Southern Minnesota Municipal Power Agency, 99 FERC ¶ 61,322 at 62,373 (2002).

²The thirteen Ohio municipalities are Arcanum, Celina, Eldorado, Jackson Center, Lakeview, Mendon, Minster, New Bremen, Piqua, Tipp City, Versailles, Waynesfield and Yellow Springs.

expire in 2004 (also, with the possibility of additional extensions.) AMPO is a service organization for Ohio municipals that is bringing this complaint on behalf of the thirteen Municipals named above.

3. DP&L is in the process of preparing to place its transmission facilities under PJM's operational control, as a part of DP&L's joining PJM. As we noted in American Electric Power Service Corporation, et al.,³ in an order issued on July 31, 2002,⁴ the Commission accepted, and suspended subject to refund and the outcome of a hearing, filings made by several Midwestern utilities setting forth a plan by which they would sequentially place their transmission facilities under PJM's control. DP&L initially contemplated placing its transmission facilities under PJM's operational control by May 1, 2003.

4. AMPO filed the instant complaint on March 10, 2003, on behalf of the thirteen Municipals, regarding the status of the Municipals' transmission contracts once DP&L's transmission system is operated by PJM. AMPO states that it is seeking to ensure that the Municipals' contracts are honored under the new arrangement, and that the Municipals are not required to pay pancaked rates once DP&L fully joins PJM.⁵ AMPO also states that it is necessary to address the implications of the seam between MISO and PJM, both before and after that matter is resolved in another docket.⁶ AMPO asserts that the Municipals have been negotiating as to this question with DP&L, but have been unable to resolve the parties' differences; further, according to AMPO, the parties' existing contracts "could be read, and may well be read by DP&L, as permitting the very type of rate pancaking that the creation of [Regional Transmission Organizations] RTOs was designed to eliminate."⁷ Thus, AMPO states, the Municipals require the Commission to decide this case now, so that the Municipals can know what their transmission charges will be as they make power supply decisions. AMPO also asks the Commission to establish a refund effective date,

³103 FERC ¶ 61,008 (2003) (New PJM Companies)

⁴ Alliance Companies, 100 FERC ¶ 61,137 (2002) (July 31 Order).

⁵AMPO cites a Midwest Independent System Operator (MISO) case in which the Commission stated that "grandfathered transmission agreements must be amended to ensure that no customer pays pancaked rates that would exceed the rate that would be charged under the Midwest ISO tariff," Midwest Independent Transmission System Operator, et al., 84 FERC ¶ 61,231 at 62,170 (1998).

⁶Docket No. EL02-111-000.

⁷Complaint at 10.

as to which AMPO proposes the later of either 60 days after the filing of this complaint, or the date on which DP&L places its transmission facilities under PJM's control.⁸

Notice, Answers, and Motions to Intervene

5. Notice of the Complainants' filing was published in the Federal Register,⁹ with answers, protests, comments, or motions to intervene due on March 31, 2003. Reliant Resources, Inc. (Reliant) filed a timely motion to intervene. DP&L and PJM filed timely answers. AMPO filed a motion for leave to file a response and a response to DP&L's answer. DP&L then filed a motion for leave to file a response and a response to AMPO's response.

6. PJM states in its answer that it is willing to facilitate discussions among the parties to determine the best manner in which the Municipals' contracts can be implemented within the PJM framework. PJM also states that, because the integration of DP&L into PJM is still several months away, the Commission should assign this case to a settlement judge or some other alternative dispute resolution process to allow the parties to resolve the issues in the complaint.

7. DP&L, in its answer, states that the Municipals have breached provisions in their contracts which require that disputes must be mediated with an agreed mediator or a mediator appointed by the American Arbitration Association before a party may file a complaint with the Commission. DP&L states that neither AMPO nor any of the Municipals have initiated this dispute resolution procedure, and urges the Commission to reject AMPO's complaint on that basis.

8. DP&L also responds to the Municipals' substantive allegations. DP&L states that the contracts provide that no party may unilaterally seek a change in the terms of the contract under Section 205 or 206 of the Federal Power Act (FPA)¹⁰ without the consent of all parties. According to DP&L, the Municipals' complaint constitutes an attempt to change the terms of the parties' contracts under Section 206, because the Municipals' proposal (and the Commission's approval of it) would "expand significantly their rights to

⁸On March 20, 2003, AMPO filed an erratum to its complaint, adding an omitted footnote to a citation in its complaint.

⁹68 Fed. Reg. 12,691 (2003).

¹⁰16 U.S.C. §§ 824d and 824e (2000).

use transmission, without any additional compensation."¹¹ DP&L asserts that, for transmission within the DP&L system:

After DP&L joins the PJM RTO, the Municipals will pay the rates provided for in the [contracts], supplemented by an ancillary services surcharge made necessary by the entry of DP&L into the PJM RTO.¹²

9. For transmission commencing outside of DP&L's system, DP&L states that the Municipals will pay "the applicable RTO rates required to transmit power to the DP&L system" and will then, in addition, pay DP&L the contract rate associated with transmission on the DP&L system.¹³ DP&L states that, by suggesting any other payment provisions, the Municipals are asking the Commission to act under Section 206 to modify the provisions of their contracts, without making any showing under the Mobile-Sierra¹⁴ test that the public interest requires such modification.

10. AMPO, in its response to DP&L's answer, stated that DP&L has waived the provisions for mandatory mediation through its conduct in continuing to negotiate with AMPO even after AMPO indicated that it would be filing a complaint with the Commission. AMPO also stated that DP&L waived the mediation precondition through its failure to dispute the statement in a February 19, 2003 letter from AMPO's counsel to DP&L's counsel that the parties agreed that the settlement negotiations in which they were engaged "will be deemed to comply with the dispute resolution protocols of the various power service and interconnection agreements."¹⁵ AMPO states that its complaint is not a violation of Mobile-Sierra, as claimed by DP&L, and in any case, the public interest would support AMPO's interpretation rather than that of DP&L's. AMPO states that the Commission should set the case for hearing and direct the parties to mediate under the auspices of the Commission's Dispute Resolution Service (DRS) or to negotiate a settlement with the aid of a settlement judge.

¹¹DP&L answer to complaint at 7.

¹²Id. at 10.

¹³Id. at 12.

¹⁴See United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

¹⁵AMPO's response to DP&L's answer at 6, citing Exhibit A to AMPO's response to DP&L's answer.

11. DP&L, in its response to AMPO's response, does not address AMPO's contention that DP&L waived the mediation precondition. It states, however, that if AMPO is offering to withdraw its complaint in order to initiate mediation, if DP&L gives AMPO prior notice before integrating with PJM, then DP&L accepts that offer. DP&L states that mediation of this complaint is appropriate, and asks the Commission to dismiss the complaint so that the parties can mediate their dispute under the supervision of a Commission-appointed mediator agreed to by all parties.

DISCUSSION

Procedural matters

12. Reliant's timely, unopposed motion to intervene serves to make it a party to this proceeding, see Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003). Under Rule 213(a)(2), 18 C.F.R. § 385.213(a)(2)(2003), a party may not file an answer to an answer unless the decisional authority so orders. We will accept the responses filed by AMPO and DP&L on the basis that they have assisted us with our resolution of this case.

Analysis

13. As noted above, while DP&L initially contemplated transferring control of its facilities to PJM on May 1, 2003, it is now clear that this will not occur. DP&L has not yet made a filing with the Commission to transfer operational control of its facilities to PJM, and in a compliance filing made by PJM in Docket No. ER03-262-004 on May 1, 2003, PJM stated that "the most reasonable projection is that DP&L will come under the PJM OATT and, concurrently, be integrated into the PJM market . . . during the Spring or Fall of 2004."¹⁶

14. Under the Commission's complaint regulations (18 C.F.R. § 385.206(b)(9) (2003)), complainants must state whether dispute resolution procedures were used, and whether the complainant believes that alternative dispute resolution (ADR) under the Commission's supervision could successfully resolve the complaint. AMPO states in its complaint that settlement discussions have not been productive so far, and it therefore sought relief due to the immediate pendency of the integration of DP&L into PJM

¹⁶PJM compliance filing in Docket No. ER03-262-004, filed May 1, 2003, transmittal letter at 4.

(complaint at 1).¹⁷ PJM states that it too is willing to work with the parties to determine the best manner in which to integrate the Municipals' contracts into the PJM framework and suggests that the use of settlement judge or alternative dispute resolution procedures would foster a resolution of this issue.

15. Now that the effective date of DP&L's participation in PJM is farther in the future than was the case previously, the time constraint which prompted AMPO's filing of this complaint no longer exists, and it appears that the issues are susceptible to resolution through settlement proceedings. Accordingly, we are establishing settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁸ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Administrative Law Judge will select a judge for this purpose.¹⁹ The settlement judge shall issue a report to the Chief Judge and the Commission within 120 days of the date of this order concerning the results of settlement discussions. At that time, the Commission will take appropriate action, including, if appropriate, ordering the Chief Judge to provide the parties with additional time to continue their settlement discussions.²⁰

16. In the event that the parties' dispute is not resolved through settlement judge proceedings or other Commission action prior to the entry of DP&L into PJM, we will set a refund effective date of the earlier of (1) five months subsequent to the expiration of the 60-day period following the filing of AMPO's complaint, or (2) the date on which DP&L's transmission facilities are placed under PJM's control.

The Commission orders:

¹⁷DP&L also has indicated that is willing to continue negotiating with AMPO once this complaint is no longer pending. DP&L Response to AMPO's response at 1.

¹⁸18 C.F.R. § 385.603 (2003).

¹⁹If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a listing of the Commission's judges and a summary of their background and experience (www.ferc.gov - Click on Offices under Commission Matters).

²⁰The Commission anticipates that it will issue a further order within 90 days of the settlement judge's report.

(A) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2003), the Chief Administrative Law Judge is hereby authorized to appoint a settlement judge. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge.

(B) Within 120 days of the date of this order, the settlement judge shall file a report with the Chief Judge and the Commission on the results of the settlement discussions.

(C) The refund effective date is the earlier of (1) five months subsequent to the expiration of the 60-day period following the filing of AMPO's complaint, or (2) the date on which DP&L's transmission facilities are placed under PJM's control.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.