

135 FERC ¶ 61,051
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
		ER10-209-002
		EL10-12-000
		EL10-12-001
		EL10-12-002
		ER11-2931-000

Midwest Independent Transmission System Operator, Inc.	Docket Nos.	ER10-640-000
		ER10-640-001

ORDER ACCEPTING NOTICE OF TERMINATION OF RATE SCHEDULE,
GRANTING MOTION TO WITHDRAW PLEADINGS, AND
DENYING MOTION TO VACATE

(Issued April 21, 2011)

1. On February 22, 2011 in Docket No. ER11-2931-000, pursuant to Rules 212 and 216 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, .216 (2010), and Part 35 of the Commission's regulations, 18 C.F.R. Part 35 (2010), Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc. (collectively, ComEd) submitted a notice of termination of the rate schedule effectuating assignment of transmission credits to the Ameren Companies (collectively, Ameren)¹ that was accepted in part, rejected in part, and made effective subject to refund by the

¹ The Ameren Companies are Ameren Services Co., acting as agent, and its principals Union Electric Co., Ameren Illinois Co. (as successor to Central Illinois Public Service Co., Central Illinois Light Co., and Illinois Power Co., as a result of the merger of those companies approved in Docket No. EC10-52, *et al.*), and Ameren Energy Marketing Co.

Commission's December 30, 2009 order.² In addition, ComEd, jointly with Ameren, moved to withdraw all filings, applications and other submissions (collectively, pleadings) in Docket Nos. ER10-209-000 & -001, EL10-12-000 & -001, and ER10-640-000. ComEd and Ameren also jointly moved to vacate the Initial Decision issued on January 20, 2011.³

2. In this order, we accept the notice of termination, to be effective February 22, 2011, as requested. We also accept the withdrawal of the pleadings but deny the motion to vacate the Initial Decision.

I. Background

3. A detailed history of these proceedings is included in the December 30 Order⁴ and March 26, 2010 order⁵ addressing Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) filing in Docket No. ER10-640-000. Rather than repeat that detailed history here, we will briefly recount certain key points of prior proceedings and the present case.

4. On November 3, 2009 in Docket No. ER10-209-000, ComEd submitted the proposed Assignment Rate Schedule to its tariff in order to effect ComEd's proposed assignment to Ameren of certain credits (Section 4.8 Credits) under the 2001 "Settlement Agreement Involving the [Midwest ISO], Certain Transmission Owners in the Midwest ISO, the Alliance Companies and Other Parties" (Withdrawal Settlement Agreement). Also on November 3, 2009 in Docket No. EL10-12-000, ComEd filed a Petition for Declaratory Order seeking a Commission order requiring Midwest ISO to recognize the assignment of Section 4.8 Credits and allow Ameren to take service under Schedule 10-A of the Midwest ISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff).⁶

5. In the December 30 Order,⁷ the Commission accepted in part, rejected in part, and suspended the Assignment Rate Schedule, made it effective subject to refund,

² *Commonwealth Edison Co.*, 129 FERC ¶ 61,298 (2009) (December 30 Order).

³ *Commonwealth Edison Co.*, 134 FERC ¶ 63,004 (2010) (Initial Decision).

⁴ *See* December 30 Order, 129 FERC ¶ 61,298 at P 3-9.

⁵ *Midwest Indep. Transmission Sys. Operator, Inc.*, 130 FERC ¶ 61,243, at P 3-8 (2010) (March 26 Order).

⁶ Midwest ISO, FERC Electric Tariff, Fourth Revised Vol. No. 1.

⁷ *See supra* note 2.

consolidated the proceedings in Docket Nos. ER10-209-000 and EL10-12-000, and set both proceedings for hearing and settlement judge procedures, finding that the filings raised issues of material fact that could not be resolved based on the record.

6. On January 25, 2010 in Docket No. ER10-640-000, Midwest ISO submitted proposed Tariff revisions to modify Attachment I (Index of Transmission Customers Eligible for Schedule 10-A) to remove Ameren and its affiliates from the list of entities that are eligible to use Schedule 10-A of the Midwest ISO Tariff. In its March 26 Order, the Commission accepted in part, rejected in part, and suspended the proposed Tariff revisions, made them effective March 27, 2010 subject to refund, and established hearing and settlement judge procedures. The Commission also consolidated Midwest ISO's filing with the proceedings in Docket Nos. ER10-209-000 and EL10-12-000 for hearing, settlement, and decision.

7. On January 20, 2011, Deputy Chief Administrative Law Judge Bobbie J. McCartney issued an Initial Decision finding that the Withdrawal Settlement Agreement does not permit ComEd to assign its Section 4.8 Credits to unaffiliated third parties. No briefs on exceptions to the Initial Decision were filed.

8. On February 22, 2011 in Docket No. ER11-2931-000, ComEd submitted a notice of termination of the Assignment Rate Schedule. In addition, ComEd, jointly with Ameren, move to withdraw all pleadings in Docket Nos. ER10-209-000 & -001, EL10-12-000 & -001, and ER10-640-000. ComEd and Ameren also jointly moved to vacate the Initial Decision issued on January 20, 2011.

9. On March 4, 2011, the Commission issued an order staying the effectiveness of the Initial Decision pending the end of the comment period on the notice of termination of rate schedule and withdrawal of pleadings that is now before us, and to provide the Commission the opportunity to review the Initial Decision under Rule 712 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.712 (2010), in light of the notice of termination and withdrawal of pleadings.⁸

II. Notice of Filing and Responsive Pleadings

10. Notice of ComEd's filing in Docket No. ER11-2931-000 was published in the *Federal Register*, 76 Fed. Reg. 12,100 (2011), with interventions and protests due on or

⁸ *Commonwealth Edison Co.*, 134 FERC ¶ 61,166 (2011).

before March 15, 2011. FirstEnergy Companies (FirstEnergy)⁹ filed a motion to intervene and comments.

11. Answers to ComEd's motion to vacate were filed by Midwest ISO-Midwest ISO TOs,¹⁰ FirstEnergy, and Trial Staff. ComEd and Ameren filed a joint motion for leave to respond and response to the answers filed by Midwest ISO-Midwest ISO TOs, FirstEnergy, and Trial Staff.

III. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motion to intervene of FirstEnergy serves to make it a party to the proceeding in Docket No. ER11-2931-000.

13. 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 an answer unless otherwise ordered by the decisional authority. We will accept the answer filed by ComEd and Ameren in Docket No. ER10-209, *et al.* because it has provided information that assisted us in our decision-making process.

⁹ The FirstEnergy Companies are Cleveland Electric Illuminating Co., Ohio Edison Co., Pennsylvania Power Co., Toledo Edison Co., and FirstEnergy Solutions Corp.

¹⁰ Midwest ISO's answer was filed jointly with certain Midwest ISO Transmission Owners (Midwest ISO TOs). For the purposes of this pleading, Midwest ISO TOs are: 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 corp., and Northern States Power Co., a Wisconsin corp.; Northwestern Wisconsin Electric Co.; Otter Tail Power Co.; Southern Illinois Power Cooperative; Southern Indiana Gas and Electric Co.; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

B. Commission Determination**1. Termination of Rate Schedule**

14. ComEd states that the Assignment Rate Schedule effectuates the assignment of credits in accordance with, and subject to the terms and conditions of, an agreement between ComEd and Ameren (Assignment Agreement).¹¹ ComEd states that the parties have now mutually agreed to terminate the Assignment Agreement, and as such, the Assignment Rate Schedule has terminated in accordance with its terms. ComEd adds that it has not provided service under the Assignment Rate Schedule, and no other entities are affected by its notice of termination.

15. FirstEnergy contends that the notice of termination proposes to both terminate and withdraw the Assignment Rate Schedule, which are mutually exclusive actions. FirstEnergy states that, under the Commission's regulations, a rate schedule may be withdrawn prior to its effective date or terminated once it is on file.¹² FirstEnergy claims that the Assignment Rate Schedule has been effective for over a year, and as such, FirstEnergy does not oppose its termination, but maintains that it cannot be withdrawn.¹³

16. Midwest ISO-Midwest ISO TOs do not oppose "the withdrawal of rate schedule or withdrawal of pleadings noticed by ComEd and Ameren," on the condition that such withdrawal is with prejudice to any future argument that Section 4.8 Credits are assignable to unaffiliated third parties.¹⁴

17. We accept without prejudice ComEd's notice of termination of the Assignment Rate Schedule, to become effective February 22, 2011, as requested.¹⁵

¹¹ ComEd November 3, 2009 Filing, Docket No. ER10-209-000, at App. E, Assignment Agreement (Nov. 3, 2009).

¹² FirstEnergy March 9, 2011 Answer at 8-9 (citing *New England Power Pool*, 70 FERC ¶ 61,155, at 61,465 (1995) (citing *Canal Elec. Co.*, 29 FERC ¶ 61,330, at 61,685 (1984))); FirstEnergy March 15, 2011 Comments at 3 (citing, *e.g.*, 18 C.F.R. §§ 35.15, 35.17)).

¹³ FirstEnergy March 9, 2011 Answer at 9 (citing *Detroit Edison Co.*, 93 FERC ¶ 61,234 (2000)); FirstEnergy March 15, 2011 Comments at 3-4.

¹⁴ Midwest ISO-Midwest ISO TOs March 4, 2011 Answer at 2.

¹⁵ While the notice of termination of the Assignment Rate Schedule is accepted without prejudice, the Commission relies on ComEd's representation that it will not

(continued)

2. Withdrawal of Pleadings

18. Pursuant to Rule 216 of the Commission's Rules of Practice and Procedure,¹⁶ ComEd and Ameren move to withdraw their pleadings in Docket Nos. ER10-209-000, -001; EL10-12-000, -001; and ER10-640-000. They state that section 8.2 of the Assignment Agreement provides that, upon termination of the Assignment Agreement, "all filings, applications, and other submissions made pursuant to this [Assignment] Agreement, to the extent practicable, shall be withdrawn from the agency or other [p]erson to which they were made."¹⁷ In light of this provision, ComEd and Ameren state that they withdraw all pleadings in the relevant dockets.

19. FirstEnergy argues that the Commission should deny ComEd and Ameren's motion to withdraw because such withdrawal is neither permitted by the Commission's regulations nor have they shown good cause for such extraordinary relief.¹⁸ FirstEnergy maintains that Rule 216 does not apply to the withdrawal of tariff or rate filings.¹⁹ FirstEnergy also claims that ComEd and Ameren have identified no legitimate purpose that might be served by withdrawing all of the pleadings at this late stage in these proceedings. FirstEnergy argues that the only explanation given – that the termination of the Assignment Agreement requires the withdrawal of all filings – lacks any basis in the Commission's rules or any meaningful showing of cause for the requested relief. If the Commission grants the motion to withdraw, however, FirstEnergy requests that withdrawal be with prejudice to preclude the possibility of relitigation.²⁰

20. Midwest ISO-Midwest ISO TOs do not oppose "the withdrawal of rate schedule or withdrawal of pleadings noticed by ComEd and Ameren," on the condition that such

seek to assign its Section 4.8 Credits to an entity that is not an affiliate or a successor entity. *See infra* note 24 and accompanying text, and P 26.

¹⁶ ComEd February 22, 2011 Notice of Termination of Rate Schedule and Joint Motion to Withdraw Pleadings and Vacate Initial Decision at 1, 3 (citing 18 C.F.R. § 385.216).

¹⁷ *Id.* at 3 (citing Assignment Agreement § 8.2).

¹⁸ FirstEnergy March 9, 2011 Answer at 10.

¹⁹ FirstEnergy's other arguments in its March 9, 2011 Answer objecting to the motion of withdrawal in relation to the Assignment Rate Schedule are summarized above.

²⁰ FirstEnergy March 9, 2011 Answer at 14.

withdrawal is with prejudice to any future argument that Section 4.8 Credits are assignable to unaffiliated third parties.²¹

21. Rule 216(a) provides that any participant may seek withdrawal of a pleading by filing a notice of withdrawal. Rule 216(b) states that “if a timely motion in opposition to a notice of withdrawal is filed ... the withdrawal is not effective until the decisional authority issues an order accepting the withdrawal” and any disallowance must be for “good cause.” Contrary to FirstEnergy’s assertions, therefore, Rule 216 does not require the party seeking withdrawal of a pleading to show good cause, but rather requires good cause for disallowing the withdrawal.²² We see no good cause to disallow the withdrawal of ComEd and Ameren’s pleadings submitted in Docket Nos. ER10-209-000 & -001, EL10-12-000 & -001, ER10-640-000 and therefore will allow their withdrawal.²³ We also deny FirstEnergy’s request that the withdrawal should be granted with prejudice. In the unlikely event that ComEd seeks to assign its Section 4.8 Credits to an unaffiliated third party in the future,²⁴ FirstEnergy and Midwest ISO-Midwest ISO TOs can raise their concerns – including any concerns as to relitigation – at that time.

3. Initial Decision

22. ComEd and Ameren move to vacate the Initial Decision as moot. They argue that the Commission should vacate the Initial Decision because ComEd is the only entity that holds Section 4.8 Credits, all the claims and issues addressed in the Initial Decision are mooted by the termination of the Assignment Rate Schedule, and the issues addressed in the Initial Decision are not issues of broad applicability.²⁵ ComEd and Ameren also state that no party has submitted a brief on exceptions, and vacating the Initial Decision will

²¹ See *supra* note 14.

²² See *Axia Energy, LP*, 96 FERC ¶ 61,039 (2001) (Letter Order).

²³ We note that, as defined by the Commission’s regulations, a pleading does not include a tariff or rate filing. 18 C.F.R. §§ 385.202, 205 (2010). We shall treat ComEd and Ameren’s motion to withdraw Pleadings as all pleadings ComEd and Ameren submitted in the referenced dockets other than the Assignment Rate Schedule, which we find was properly terminated pursuant to 18 C.F.R. § 35.15 (2010).

²⁴ See *infra* P 26. In its answer, ComEd committed that it will not seek to assign its Section 4.8 Credits to an entity that is not an affiliate or a successor entity.

²⁵ ComEd February 22, 2011 Notice of Termination of Rate Schedule and Joint Motion to Withdraw Pleadings and Vacate Initial Decision at 4 (citing *Enron Power Mktg.*, 123 FERC ¶ 61,149 (2008)).

not prejudice any party. Therefore, they state, an order discussing the findings of the Initial Decision will serve no useful purpose.²⁶

23. Midwest ISO-Midwest ISO TOs oppose the motion to vacate. They argue that ComEd's election to terminate the Assignment Rate Schedule does not render the Initial Decision moot because the Initial Decision remains relevant to whether Midwest ISO's proposed revisions to Attachment I of its Tariff in Docket No. ER10-640-000 are just and reasonable. They also claim that the Initial Decision provides valuable precedent regarding whether ComEd's Section 4.8 Credits may be assigned to unaffiliated third parties until the credits expire in December 2013. Midwest ISO-Midwest ISO TOs maintain that substantial prejudice will result if the Initial Decision is vacated, because the legal and factual determinations made regarding the revisions to Attachment I would need to be litigated anew, and if ComEd seeks to assign or transfer and monetize its Section 4.8 Credits in the future, the same issues resolved by the Initial Decision would need to be relitigated.²⁷ For this reason, they argue that the Commission and federal courts disfavor vacatur and have emphasized the public interest in the preservation of precedents.²⁸ Finally, Midwest ISO-Midwest ISO TOs assert that an order adopting the Initial Decision would establish that the proposed revisions to Attachment I are just and reasonable, clarify ComEd's rights to assign its Section 4.8 Credits, and provide certainty regarding this issue. Accordingly, Midwest ISO-Midwest ISO TOs request that the Commission deny the motion to vacate, find that the proposed revisions to Attachment I are just and reasonable, and adopt the Initial Decision without modification.

24. Trial Staff also opposes the motion to vacate and recommends that the Commission deny the motion. Trial Staff claims that ComEd and Ameren provide no legitimate reason to vacate the Initial Decision and that their argument that the termination of the Assignment Rate Schedule moots the Initial Decision is without merit. Trial Staff states that ComEd has not pledged to refrain from attempting to assign its Section 4.8 Credits to a third party, and if ComEd were to propose to assign its Section 4.8 Credits to a third party, the vacatur of the Initial Decision would require restarting the proceeding, wasting resources for parties and the Commission. Trial Staff maintains that allowing the Initial Decision to stand "provides benefits in terms of certainty, efficiency

²⁶ *Id.* (citing *United Gas Pipeline Co.*, 56 FERC ¶ 61,211, at 61845 (1991)).

²⁷ In contrast, if the Initial Decision remains in full force and effect, Midwest ISO-Midwest ISO TOs claim that ComEd would not be prejudiced unless it attempts to assign or transfer its Section 4.8 Credits. *Id.* at 6-7.

²⁸ *Id.* at 7 (citing *Panhandle Eastern Pipe Line Co.*, 83 FERC ¶ 61,008, at 61,030 (1998) (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 512 U.S. 18 (1994) (*U.S. Bancorp Mortgage*))).

and the advantage of having at hand an analysis and decision on the issues to which the parties and others could refer and build upon.”²⁹ Trial Staff also argues that Commission policy militates against vacatur except upon a showing of exceptional circumstances,³⁰ which Trial Staff argues ComEd and Ameren have not alleged. Trial Staff states that the Commission has noted that vacating orders simply due to mootness would be a disruptive and an inappropriate use of resources.³¹ Trial Staff contends that the Supreme Court found that a principal consideration when determining if an order should be vacated is whether the party seeking relief caused, by voluntary action, the circumstances which render the order moot.³² Here, Trial Staff claims that mootness would arise from ComEd’s voluntary action to terminate the Assignment Rate Schedule and ComEd and Ameren’s voluntary withdrawal of Pleadings. Trial Staff adds that the Commission has rejected vacating Initial Decisions for mootness.³³ Finally, Trial Staff claims that the cases cited by ComEd and Ameren do not support their claim. Trial Staff argues that, in *Enron Power Marketing*, the Commission vacated an Initial Decision where parties had resolved all issues, and in *United Gas Pipeline*, the Commission vacated an Initial Decision that addressed rates that had been replaced twice since the Initial Decision’s issuance.

25. FirstEnergy contends that the Commission should deny ComEd and Ameren’s motion to vacate or, if it grants the motion, it should be with prejudice to preclude the possibility of relitigation. FirstEnergy claims that the Initial Decision is not mooted by the termination of the Assignment Rate Schedule because the Initial Decision also addresses the justness and reasonableness of Midwest ISO’s proposed revisions to Attachment I of its Tariff,³⁴ which is not being withdrawn. FirstEnergy maintains that any such mootness would also have been occasioned only by the actions of the parties seeking vacatur, which renders vacatur contrary to Commission policy.³⁵ It also

²⁹ Trial Staff March 9, 2011 Answer at 6.

³⁰ *Id.* at 7 (citing *East Kentucky Power Cooperative, Inc.*, 121 FERC ¶ 61,255, at P 10 (2007)).

³¹ *Id.* (citing *Town of Neligh, NE v. Kinder Morgan Interstate Gas Transmission*, 94 FERC ¶ 61,075 (2001) (*Town of Neligh*)).

³² *Id.* (citing *U.S. Bancorp Mortgage*, 512 U.S. at 26).

³³ *Id.* at 7-8 (citing *KeySpan Energy Development Corp. v. New York ISO*, 108 FERC ¶ 61,201, at P 4 (2004) (*KeySpan Energy Development*)).

³⁴ FirstEnergy March 9, 2011 Answer at 10-11.

³⁵ *Id.* at 12 (citing, *e.g.*, *Town of Neligh*, 94 FERC ¶ 61,075 at 61,348).

contends that the Initial Decision provides valuable precedent relevant to any future attempt by ComEd to assign its Section 4.8 Credits and prevent the possibility of needless, repetitive litigation. FirstEnergy claims that the Commission and parties have invested significant resources in these proceedings, and it would not be in the public interest to vacate the product of those efforts because the Initial Decision “causes one of the parties discomfort.”³⁶ FirstEnergy argues that ComEd and Ameren have not described any extraordinary circumstances that would warrant vacatur, and there is no basis to conclude that vacatur is in the public interest, promotes administrative efficiency, or benefits any party other than ComEd and Ameren.

26. In their answer, ComEd and Ameren reiterate their previous arguments that, given the termination of the Assignment Rate Schedule, the issues in this proceeding are moot, and it is appropriate to vacate the Initial Decision. They argue that the motion to withdraw applies to their protest to Midwest ISO’s proposed revisions to Attachment I, and since no other party protested the filing and the Commission accepted the Tariff revisions subject to refund, there are no remaining controversial issues in that proceeding. In response to arguments that ComEd may seek to assign its Section 4.8 Credits in the future, “ComEd commits that it will not seek to assign the Section 4.8 [C]redits to an entity that is not an affiliate or a successor entity.”³⁷ ComEd and Ameren conclude that all issues of controversy in these proceedings have been eliminated, and as a result, the Initial Decision will not prejudice any party, and an order on the Initial Decision will serve no useful purpose.

27. We deny the motion to vacate the Initial Decision. The notice of termination and withdrawal of pleadings, discussed above, resolves the instant litigation, and thus there is no need to address the merits of the Initial Decision now before us. However, an initial decision is not a final Commission decision, but is a recommendation by a presiding judge,³⁸ and thus there is no need to vacate an initial decision in a case such as this where the parties have withdrawn the underlying filing and pleadings and the Initial Decision is not being addressed on the merits.

³⁶ *Id.* at 11-12 (citing *KeySpan Energy Development*, 108 FERC ¶ 61,201 at P 4).

³⁷ ComEd and Ameren March 15, 2011 Answer at 3.

³⁸ *See, e.g., Texas New Mexico Power Co. v. El Paso Electric Co.*, 110 FERC ¶ 61,258, at P 10 (2005); *KeySpan Energy Development*, 108 FERC ¶ 61,201 at P 4. The Initial Decision does not have any res judicata or collateral estoppel effect, since it is not a final Commission decision. *See Questar Pipeline Company*, 57 FERC ¶ 61,287 (1991). We note, however, that ComEd has represented that it will not seek to assign its Section 4.8 Credits to an entity that is not an affiliate. *See supra* P 26.

The Commission orders:

(A) ComEd's notice of termination of the rate schedule is hereby accepted, to become effective February 22, 2011, as requested.

(B) ComEd and Ameren's withdrawal of pleadings is accepted, effective as of the date of issuance of this order.

(C) ComEd and Ameren's motion to vacate the Initial Decision is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.