137 FERC ¶ 61,198
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. ER12-33-000
Duke Energy Ohio, Inc.
Duke Energy Kentucky, Inc.

ORDER CONDITIONALLY ACCEPTING EXIT FEE AGREEMENT AND PROPOSED RATE SCHEDULES

(Issued December 15, 2011)

1. On October 5, 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) notified the Commission that they had successfully negotiated the exit fees required of Duke Ohio and Duke Kentucky upon their withdrawal from MISO, as directed by the Commission.[2] Applicants submitted an executed Exit Fee Agreement and three associated schedules, Schedules 10-G, 16-C, and 17-C (collectively, alternative administrative cost schedules) to MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (MISO Tariff) (October 5 Filing). In this order, we conditionally accept the Exit Fee Agreement and the alternative administrative cost schedules, effective December 31, 2011, the planned date of Duke Ohio's and Duke Kentucky's withdrawal from MISO, as discussed below.

I. **Background**

2. In the Duke Realignment Order, the Commission approved Duke Ohio's and Duke Kentucky's withdrawal from MISO and integration into PJM Interconnection, L.L.C.

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[1] 16 U.S.C. § 824d (2006).

[2] *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).

(PJM). The order conditioned its approval on, among other things, the submission of a separate filing to address Duke Ohio's and Duke Kentucky's remaining financial obligations required under Article Five, Section II.B of the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc. (MISO TO Agreement).[3]

II. The October 5 Filing

3. The Exit Fee Agreement determines and resolves Duke Ohio's and Duke Kentucky's obligations to pay Schedules 10, 16, and 17 exit fees under the MISO Tariff.[4] Applicants state that the Exit Fee Agreement is the product of arms'-length bargaining and includes no special discounts to Duke Ohio or Duke Kentucky.

4. The Exit Fee Agreement provides that on December 1, 2011, MISO will provide Duke Ohio and Duke Kentucky with a good-faith estimate of the applicable exit fee for each entity.[5] The good-faith estimates of the exit fees will be subject to a true-up fee[6]

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[3] *Id.* P 73. Article Five, Section II.B of the MISO TO Agreement states: "[a]ll financial obligations incurred and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by [MISO] and the withdrawing [transmission owner]." This financial obligation consists of multiple components, one of which is at issue in this proceeding: Duke Ohio and Duke Kentucky's payment of MISO Schedule 10, 16, and 17-related financial obligations incurred and payments applicable to time periods prior to the effective date of its withdrawal.

[4] Schedule 10 (ISO Cost Recovery Adder) provides for the recovery of the costs associated with operating MISO, exclusive of those costs recovered under Schedules 16 and 17. Schedule 16 (Financial Transmission Rights (FTR) Administrative Service Cost Recovery Adder) provides for the recovery of the costs associated with administering MISO's FTR market. Schedule 17 (Energy Market Support Administrative Service Cost Recovery Adder) provides for the recovery of the costs associated with administering MISO's energy markets.

[5] The exit fees will be calculated based on the financial obligations of MISO's balance sheet as of December 31, 2011, according to a methodology set forth in the Exit Fee Agreement, using the most recent twelve months of billing determinants prior to Duke Ohio's and Duke Kentucky's withdrawal. *See* Exit Fee Agreement, Att. A at p. A-1.

[6] The true-up fee is defined in section 3.1(c) of the Exit Fee Agreement as "a written statement of the Exit Fee true-up calculated in accordance with the provisions of the Exit Fee Methodology to account for the substitution of actual data in lieu of

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ninety days after Duke Ohio's and Duke Kentucky's withdrawal from MISO. Upon payment of the exit fees, Duke Ohio and Duke Kentucky will gain the right to receive and pay for post-withdrawal transmission services provided by MISO under alternative administrative cost schedules that reflect the payment of an amount equal to the exit fee, as adjusted by the true-up fee. Therefore, Duke Ohio and Duke Kentucky will earn a credit against future Schedule 10, 16, or 17 charges incurred under the MISO Tariff to reflect having prepaid certain MISO administrative costs through the exit fees. Thus, to the extent that Duke Ohio or Duke Kentucky uses MISO transmission service in the future, the costs of that service will be offset by the amount each party paid in exit fees, respectively, until the earlier of either December 31, 2026, or until the prepayment amounts recouped under the respective alternative administrative cost schedule is equal to the portion of the exit fee allocated to that schedule. Applicants propose that any prepayment amount shall be allocated to the alternative administrative cost schedules on a schedule-by-schedule basis based on the amount of the exit fees.

5. The Exit Fee Agreement also provides that to the extent that Duke Ohio or Duke Kentucky recovers any portion of the exit fees through their respective network integration transmission service (NITS) or point-to-point transmission (PTP) rates, as applicable, Duke Ohio or Duke Kentucky will allocate to persons that pay NITS or PTP rates a portion of the prepayment amount and the associated right to use the alternative administrative cost schedules on a monthly basis up to the amount of the exit fees recovered from such customers through Duke Ohio's or Duke Kentucky's NITS or PTP rates. Such persons may also assign or transfer any unutilized portion of the prepayment amount and the associated right to use the alternative administrative cost schedules to that person's existing and future affiliates and members that also are Eligible Customers.[7]

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estimated data[.]" The true-up fee is calculated using actual billing determinants from the 12 moths prior to the date of Duke Ohio's and Duke Kentucky's withdrawal. Exit Fee Agreement, Att. A.

[7] Section 3.3(c) of the Exit Fee Agreement provides, among other things, that "Eligible Customers" include: (i) Duke Ohio and Duke Kentucky, and existing and future affiliates of Duke Ohio or Duke Kentucky, provided that an affiliate or assign of DEO or DEK that is an existing or future transmission-owning member of MISO (including but not limited to Duke Energy Indiana, Inc.) shall not be an eligible customer; and (ii) persons in the zone to be established for Duke Ohio and Duke Kentucky under the PJM Tariff responsible for paying for NITS or PTP on or after Duke Ohio's and Duke Kentucky's withdrawal date, including existing and future affiliates and members of such persons, provided that an existing or future affiliate or assignee of such persons that is a MISO transmission owner shall not be an Eligible Customer. An Eligible Customer may

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6. To the extent that Duke Ohio or Duke Kentucky does not recover all of the exit fees through its NITS or PTP rates, they may assign or otherwise transfer the payment amount and the associated right to use the alternative administrative cost schedules to other Eligible Customers.[8]

7. Applicants contend that the methodology for calculating the exit fees is consistent with the Commission's decision in *LG&E*, which allowed Louisville Gas and Electric Company and Kentucky Utilities Company (collectively, LG&E/KU), upon their withdrawal from MISO, to receive credits under Schedules 10, 16, and 17 for the lump-sum exit fee they paid to MISO.[9] Applicants note that the Exit Fee Agreement submitted here restricts the transfer of Duke Ohio's and Duke Kentucky's eligibility rights by strictly defining the identities of entities entitled to use the alternative administrative costs schedules.

8. Applicants request an effective date of December 31, 2011. Applicants explain that the Exit Fee Agreement requires that MISO present Duke Ohio and Duke Kentucky with a good-faith estimate of the exit fee on December 1, 2011, and that Duke Ohio and Duke Kentucky must pay that exit fee no later than 30 calendar days after withdrawal. Thus, Applicants assert that an effective date of no later than December 31, 2011 will ensure an accurate calculation of the exit fee and will help ensure an orderly transition.

III. Notice of Filing and Responsive Pleadings

9. Notice of the filing was published in the *Federal Register*, 76 Fed. Reg. 64,340 (2011), with interventions and protests due on or before October 26, 2011. Timely motions to intervene were filed by Consumers Energy Company and Wisconsin Electric Power Company. Timely motions to intervene and comments were filed by American Municipal Power, Inc. (American Municipal Power) and MISO TOs (MISO TOs).[10] Duke Ohio and Duke Kentucky filed an answer.

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not assign or otherwise transfer any unutilized eligibility amount and associated eligibility rights to a person that is not an Eligible Customer.

[8] Section 3.3(c) of the Exit Fee Agreement.

[9] *Louisville Gas and Electric Co.*, 114 FERC ¶ 61,282, *order on reh'g*, 116 FERC ¶ 61,020 (2006) (*LG&E*).

[10] MISO TOs for the purpose of this filing consist of: Ameren Services Company, as agent for Union Electric Company d/b/a Ameren Missouri, Ameren Illinois Company d/b/a Ameren Illinois and Ameren Transmission Company of Illinois; American

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A. Comments

10. MISO TOs state that they do not oppose the proposed Exit Fee Agreement or tariff provisions. They ask the Commission to clarify, however, that the Exit Fee Agreement covers only those costs associated with the tariff schedules specifically addressed in the filing and does not resolve any other amounts Duke Ohio or Duke Kentucky may owe related to their exit from MISO. MISO TOs contend that Commission precedent makes it clear that a departing transmission owner's obligation under Article Five, Section II.B of the MISO TO Agreement to pay "all financial obligations" not only includes amounts due under Tariff Schedules 10, 16, and 17, but also an allocated share of costs of certain projects approved pursuant to the MISO Transmission Expansion Plan.[11] According to MISO TOs, the Exit Fee Agreement states it is only addressing the amounts associated with Schedules 10, 16, and 17, and does not address any other amounts Duke Ohio and Duke Kentucky owe; thus, the requested clarification can avoid confusion and potential litigation in the future about the scope of the Exit Fee Agreement and of any ruling on the proposed agreement.

11. American Municipal Power states that it does not oppose the Exit Fee Agreement but notes that the Commission's ruling on the validity of Duke Ohio's and Duke Kentucky's attempt to pass through their MISO exit fees to load in their respective zones

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Transmission Company LLC; Big Rivers Electric Corporation; Central Minnesota Municipal Power Agency; City Water, Light & Power (Springfield, IL); Dairyland Power Cooperative; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company d/b/a ITC Transmission; ITC Midwest LLC; Michigan Electric Transmission Company, LLC; Michigan Public Power Agency; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin Corporation, subsidiaries of Xcel Energy, Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

[11] MISO TOs Comments at 6 (citing Duke Realignment Order, 133 FERC ¶ 61,058 at P 74 (stating "[t]he Commission has interpreted this provision [MISO TO Agreement Article V, Section II.B] to include transmission cost allocations made under Attachment FF")).

should be left to a separate proceeding in which Duke Ohio and Duke Kentucky specifically propose the rate to be implemented after the transition to PJM.

12. In addition, American Municipal Power requests that the City of Lebanon, Ohio (Lebanon) be added to the list of eligible customers included in Schedule 10-G. American Municipal Power explains that Lebanon does not directly take transmission service under the MISO Tariff because its power suppliers take transmission service on behalf of the city. American Municipal Power asserts that MISO listed those transmission customers that are included in the Duke Ohio and Duke Kentucky zones, thus excluding Lebanon from this group.[12]

B. Answer

13. Duke Ohio and Duke Kentucky state that they do not object to the clarification requested by the MISO TOs but request that the clarification be limited to stating that the Exit Fee Agreement and accompanying schedules do not address whether any other actual costs or charges can be allocated to Duke Ohio and Duke Kentucky as a result of their withdrawal from MISO.

14. In addition, Duke Ohio and Duke Kentucky state that they do not object to American Municipal Power's request to add Lebanon to the list of eligible customers included in Schedule 10-G and propose to do so in a compliance filing.

IV. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[13] the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Duke Ohio's and Duke Kentucky's answers because they have provided information that has assisted us in our decision-making process.

[12] American Municipal Power Protest at 5.

[13] 18 C.F.R. § 385.214 (2011).

B. Substantive Matters

16. In *LG&E*, the Commission conditionally approved LG&E/KU's withdrawal from MISO and accepted a proposed methodology to determine LG&E/KU's exit fees, which is the same methodology used to calculate Duke Ohio's and Duke Kentucky's exit fees.[14] The proposed alternative administrative cost schedules are expressly modeled on Schedules 10-C, 16-A, and 17-A to the MISO Tariff, which the Commission found to be just and reasonable in *LG&E*.[15] Thus, we find that the Exit Fee Agreement and alternative administrative cost schedules are consistent with the Commission's decision in *LG&E* and are similarly just and reasonable.[16] Accordingly, we will accept the proposed Exit Fee Agreement and alternative administrative cost schedules, to become effective on December 31, 2011,[17] subject to a compliance filing, as discussed below.

17. We also grant MISO TOs' request for clarification that the Exit Fee Agreement covers only those costs associated with the MISO Tariff schedules specifically addressed in the October 5 Filing, i.e., Schedules 10, 16, and 17, and does not resolve any other amounts Duke Ohio or Duke Kentucky may owe or any other costs or charges that can be allocated to Duke Ohio and Duke Kentucky as a result of their withdrawal from MISO.[18] We note that Duke Ohio and Duke Kentucky do not object to this limited clarification. Likewise, we note that the issue of whether Duke Ohio or Duke Kentucky may pass through the MISO exit fee to load in their respective zones is pending before the Commission in a separate proceeding.[19] Furthermore, we note that language in the Exit

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[14] *LG&E*, 114 FERC ¶ 61,282 at P 57-59.

[15] *Id.*

[16] *LG&E*, 114 FERC ¶ 61,282 at P 57-59.

[17] We find that Applicants have shown good cause to grant waiver of the 60-day prior notice requirement to permit an effective date of May 31, 2011. *See Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, *order on reh'g*, 61 FERC ¶ 61,089 (1992).

[18] *See* Exit Fee Agreement, section 3.1(a): "The Exit Fees, as estimated separately for [Duke Ohio] and [Duke Kentucky], will each allocate specific amounts relating to MISO Schedules 10, 16, and 17. Any remaining obligations of [Duke Ohio] and [Duke Kentucky] under Article Five, Section II.B of the MISO Agreement will be determined and billed separately and apart from the Exit Fee calculation."

[19] Duke Kentucky and Duke Ohio, Application, Docket Nos. ER12-91-000 & ER12-92-000 (filed Oct. 14, 2011).

Fee Agreement and the alternative administrative cost schedules reflects that this issue has not yet been determined, and does not purport to resolve it.[20]

18. With regard to American Municipal Power's request to add Lebanon to the list of eligible customers, we note that in their answer, Duke Ohio and Duke Kentucky state that they do not object to the request.[21] Therefore, we direct Duke Ohio and Duke Kentucky to submit a compliance filing within 30 days of the date this order to include Lebanon as an eligible customer in Schedule 10-G.

19. Finally, consistent with the Commission's directives in *LG&E*,[22] we direct Applicants to submit: (1) the calculation of their final exit fee to the Commission, and (2) revised alternative administrative cost schedules that reflect the actual portion of the exit fee allocated to each schedule, in a compliance filing within 30 days of MISO providing a calculation of the true-up fee to Duke Ohio and Duke Kentucky. In that compliance filing, Applicants should provide the documentation that MISO provides to Duke Ohio and Duke Kentucky to demonstrate that the proposed exit fee was calculated pursuant to the methodology accepted here.

<u>The Commission orders</u>:

(A) Applicants' filing is hereby conditionally accepted for filing, to become effective on December 31, 2011, subject to compliance filings, as discussed in the body of this order.

(B) Applicants are hereby directed to submit a compliance filing within 30 days of the date this order is issued to add Lebanon, Ohio to the list of eligible customers in Schedule 10-G.

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[20] *See* Exit Fee Agreement, section 3.3(b): "The Parties recognize that [Duke Ohio] and [Duke Kentucky] may separately seek recovery of the applicable Exit Fee, as adjusted by the True-Up Fee, if any, by adding such amount to its NITS and PTP. To the extent [Duke Ohio] or [Duke Kentucky] actually recovers such amounts in its NITS or PTP rates, ..." *See also id*., section 3.3(c) ("To the extent [Duke Ohio] or [Duke Kentucky] does not recover all of the Exit Fee through its NITS or PTP rates, ...").

[21] Duke Ohio and Duke Kentucky Answer at 2.

[22] *See LG&E*, 114 FERC ¶ 61,282 at P 60.

(C) Applicants are hereby directed to submit a compliance filing within 30 days of MISO providing a calculation of the true up fee to Duke Kentucky and Duke Ohio, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.