

144 FERC ¶ 61,207
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C.	Docket Nos. ER11-2814-000 ER11-2814-001 ER11-2815-000 ER11-2815-001 ER11-2815-002 ER11-2815-004
Midwest Independent Transmission System Operator, Inc.	ER11-3279-000 ER11-3279-001

ORDER REJECTING CONTESTED SETTLEMENTS

(Issued September 19, 2013)

1. On December 21, 2012, American Transmission Systems, Incorporated (ATSI) submitted, on behalf of itself, American Municipal Power, Inc. (AMP), and Buckeye Power, Inc. (Buckeye) (together, the PJM Settling Parties), a settlement agreement (ATSI Settlement)¹ to resolve all pending issues with respect to ATSI's proposal in Docket Nos. ER11-2814 and ER11-2815 to make revisions to the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (PJM Tariff) in connection with its integration into PJM.² On the same date, ATSI submitted, on behalf of itself, the Midwest Independent Transmission System Operator, Inc. (MISO),³ and the MISO

¹ The ATSI Settlement was filed pursuant to Rule 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602 (2013).

² *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,198 (2011) (May 31, 2011 Order).

³ Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

Transmission Owners (MISO TO)⁴ (together, the MISO Settling Parties), a settlement agreement (Schedule 37 Settlement) to resolve all pending issues with respect to MISO's proposal in Docket No. ER11-3219 to add a new Schedule 37 to MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (MISO Tariff) to address the withdrawal of ATSI from MISO.⁵ Both settlements are contested. As discussed below, the Commission rejects both the ATSI Settlement and Schedule 37 Settlement because it has not been shown that the respective proposed tariff changes would be just and reasonable.

I. Background

2. On December 17, 2009, the Commission approved, subject to certain conditions, ATSI's request to withdraw from MISO and join PJM.⁶ On February 1, 2011, in Docket Nos. ER11-2814 and ER11-2815, PJM and ATSI jointly submitted modifications to the PJM Tariff, Operating Agreement, Reliability Assurance Agreement, and Transmission Owners Agreement, in connection with ATSI's integration into PJM, effective June 1, 2011 (February 1, 2011 Filing). PJM proposed revisions to the PJM Tariff to recover

⁴ MISO TOs for purposes of this filing consist of: Ameren Services Company, as agent for Union Electric Company, Ameren Illinois Company and Ameren Transmission Company of Illinois; American Transmission Company LLC; City Water, Light & Power (Springfield, IL); Dairyland Power Cooperative; Duke Energy Corporation 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 Company; International Transmission Company; 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; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

⁵ *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,204 (2011) (Schedule 37 Order).

⁶ *American Transmission Systems, Inc.*, 129 FERC ¶ 61,249 (2009) (December 17, 2009 Order).

from transmission customers in the ATSI zone: (1) the costs incurred by PJM in connection with ATSI's integration and billed to ATSI, (2) ATSI's deferred internal integration costs, (3) MISO exit fees, (4) costs of legacy MISO Transmission Expansion Plan (MTEP) projects, which are transmission projects previously identified in the MTEP and approved by the MISO Board of Directors prior to ATSI's integration into PJM, and (5) costs of any transmission projects approved in PJM's regional transmission expansion planning (RTEP) process. ATSI also proposed revisions to its formula rate protocols and ministerial revisions.

3. In the May 31, 2011 Order, the Commission accepted and suspended ATSI's proposed formula rate tariff provisions, effective June 1, 2011, subject to refund and ATSI making a compliance filing within 30 days of the date of the order removing from its formula rates the PJM incurred costs, ATSI's internal integration costs, and MISO exit fees, including legacy MTEP project costs. The Commission explained that its finding was without prejudice to ATSI submitting a new Federal Power Act (FPA) section 205 filing seeking recovery of the costs.⁷ The Commission stated that, if ATSI makes such a filing, it should specifically identify the benefits of the Regional Transmission Operator (RTO) realignment decision with respect to its wholesale transmission customers and include a cost-benefit analysis showing that the benefits to wholesale transmission customers exceed the costs of the realignment.⁸ The Commission also accepted PJM's proposed ministerial revisions and set ATSI's proposed formula rate protocols for hearing and settlement judge proceedings. On June 30, 2011, ATSI submitted its compliance filing and a request for rehearing of the May 31, 2011 Order.

4. On April 1, 2011, in Docket No. ER11-3279, MISO, MISO TOs, and ATSI (Schedule 37 Applicants) proposed a new Schedule 37 and revisions to Attachment GG to the MISO Tariff⁹ reflecting the treatment of costs of legacy MTEP projects upon the withdrawal of ATSI from MISO, effective June 1, 2011.¹⁰ On May 31, 2011, the

⁷ May 31, 2011 Order, 135 FERC ¶ 61,198 at P 60.

⁸ *Id.*

⁹ Attachment GG sets forth the formula rate for calculating the MISO TOs' revenue requirements for network upgrades subject to regional cost sharing. The Schedule 37 Applicants proposed revisions to this attachment to acknowledge the new provisions of Schedule 37.

¹⁰ The Schedule 37 Applicants explained that the revisions were necessary because after ATSI's integration into PJM, the remaining MISO TOs will continue to be obligated to construct legacy MTEP projects, and wholesale transmission customers serving load in the ATSI zone will continue to be obligated to pay a portion of the cost of these projects.

(continued...)

Commission conditionally accepted MISO's filing subject to removal or modification of tariff language suggesting that ATSI's wholesale transmission customers bear responsibility for any remaining financial obligation for legacy MTEP projects, consistent with the May 31, 2011 Order.¹¹ On June 30, 2011, ATSI submitted its compliance filing and a request for rehearing of the Schedule 37 Order.

5. On July 27, 2011, ATSI submitted a settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure resolving the formula rate protocol matters set for hearing and settlement judge procedures by the Commission in its May 31, 2011 Order (Protocols Settlement).¹² The Commission is issuing an order on the Protocols Settlement concurrently with this order.¹³

6. ATSI states that, in October 2011, the PJM Settling Parties initiated settlement discussions in order to resolve the outstanding issues in the ATSI and MISO proceedings. On December 21, 2012, ATSI submitted the ATSI Settlement and the Schedule 37 Settlement providing, *inter alia*, that PJM will collect legacy MTEP project costs from transmission customers in the ATSI transmission zone and forward the payments to MISO, and ATSI will guaranty PJM's payment obligations.

II. The ATSI Settlement

7. The main provisions of the ATSI Settlement may be summarized as follows:
8. Article I sets forth definitions.
9. Article II provides the procedural background.

In addition, the Schedule 37 Applicants explained that wholesale transmission customers serving load in the remaining MISO zones will continue to be obligated to pay for previously identified legacy MTEP projects that ATSI has constructed or remains obligated to construct.

¹¹ Schedule 37 Order, 135 FERC ¶ 61,204 at P 13.

¹² 18 C.F.R. § 385.206 (2013).

¹³ *PJM Interconnection, L.L.C.*, 144 FERC ¶ 61,206 (2013).

10. Article III sets forth the Settlement Agreement and Offer of Settlement. Section 3.1 provides that ATSI will include the revenue requirements related to the Exit Fee,¹⁴ PJM Costs,¹⁵ and Internal Integration Costs¹⁶ in deriving ATSI zonal transmission rates in the same manner and over the same periods as were proposed by ATSI in the February 1, 2011 Filing. This section also provides that ATSI shall include the long-term firm transmission rights (LTTR) Settlement Costs¹⁷ in its operation and maintenance costs in deriving ATSI zonal transmission rates. In addition, section 3.1 states that ATSI will reimburse or credit AMP and Buckeye for the Exit Fee costs, PJM Costs, Internal Integration Costs, and LTTR Settlement Costs they are assessed as a result of paying transmission rates, and ATSI will not seek to recover the amounts that PJM charges to ATSI to fund these reimbursements or credits. If AMP or Buckeye are directly charged and pay any portion of these costs, the section states that ATSI will promptly request PJM to provide the appropriate credit or reimbursement in the next monthly PJM billing statement.

11. Section 3.2 provides that ATSI shall include the revenue requirements related to legacy MTEP project costs allocated to ATSI's zone in deriving ATSI zonal transmission

¹⁴ "Exit Fee" is defined as "the withdrawal obligation that ATSI is required to pay the Midwest ISO under Article Five, Section II.B of the Midwest ISO transmission owners agreement in connection with ATSI's withdrawal from the Midwest ISO...." ATSI Settlement, section 1.5.

¹⁵ "PJM Costs" are defined as "the costs incurred by PJM, and periodically billed to (but deferred for future recovery by) ATSI, in connection with ATSI's integration related to PJM activities that do not benefit other zones within the PJM footprint." ATSI Settlement, section 1.15.

¹⁶ "Internal Integration Costs" are defined as "the incremental expenses incurred and deferred by ATSI to evaluate its transition to PJM, and the amount recorded by ATSI in Operation & Maintenance accounts in 2010 to implement the transition." ATSI Settlement, section 1.7.

¹⁷ "LTTR Settlement Costs" are defined as "the amounts ATSI has agreed to pay the Midwest ISO pursuant to Section 3.1 of the settlement agreement between ATSI and the Midwest ISO filed on July 25, 2011 in Docket No. ER11-2059, as approved by the Commission's order in that docket dated August 22, 2012. *Midwest Independent Transmission System Operator, Inc.*, 140 FERC ¶ 61,139 (2012)" (LTTR Settlement). In this settlement, ATSI agreed to pay MISO \$1.8 million to address potential adverse effects on the feasibility of LTTRs from the withdrawal of a TO or market participant from MISO. LTTR Settlement, section 3.1.

rates in the same manner as proposed by ATSI in the February 1, 2011 Filing. The section states that, as proposed by ATSI in the February 1, 2011 Filing, PJM will pay the MISO invoices for revenue requirements related to the legacy MTEP costs allocated to ATSI's zone for distribution to the MISO TOs by debiting ATSI's PJM bill, and collection and payment for legacy MTEP projects will commence with transmission service effective June 1, 2011. Section 3.2 also states that ATSI will reimburse or credit AMP and Buckeye for any legacy MTEP project costs that they are assessed as a result of paying transmission rates under the PJM Tariff that include or are based upon ATSI's annual transmission revenue requirement, and ATSI will not seek to recover the amounts that PJM charges to ATSI to fund these reimbursements or credits. If AMP or Buckeye are directly charged and pay any portion of these costs, the section states that ATSI will promptly request PJM to provide the appropriate credit or reimbursement in the next monthly PJM billing statement.

12. Section 3.3 requires AMP and Buckeye to reimburse ATSI for credits received under Schedules 10-D, 16-B, and 17-B of the MISO Tariff¹⁸ for the period June 1, 2011 through December 31, 2011. Section 3.3 describes Schedules 10-D, 16-B, and 17-B as enabling transmission customers and market participants in MISO to receive reductions to the amount they pay for certain administration charges to recognize payments these entities make for the Exit Fee included in ATSI's transmission rates. The section states that the PJM Settling Parties agree that AMP and Buckeye should not have received these credits because the Exit Fee was not included in ATSI's transmission rates.

13. Section 3.4 provides that the ATSI Settlement will be implemented through revisions to the provisions of Attachment II and Attachment H-21 of the PJM Tariff as originally included in the February 1, 2011 Filing, with a proposed effective date of June 1, 2011. This section states that the revised tariff sheets include two changes, a correction of a typographical error and removal of a cancelled project. Section 3.5 provides that the Commission's acceptance of the ATSI Settlement does not prejudice the rights of the PJM Settling Parties with respect to the zone rate design issue pending in Docket No. EL11-54 or Multi Value Project costs as defined in Docket No. ER10-1791. Section 3.6 provides that, upon the satisfaction of all conditions of the ATSI Settlement, the ATSI Settlement and Protocols Settlement shall operate as a full and final settlement of all the disputes related to the issues in this proceeding.

¹⁸ MISO, Open Access Transmission, Energy, and Operating Reserves Markets Tariff, Schedule 10-D, ATSI and Eligible Customer Alternative Schedule 10 Administrative Cost Adder (1.0.0); Schedule 16-B, ATSI and Eligible Customer Alternative Schedule 10 Administrative Cost Adder (1.0.0); Schedule 17-B, ATSI and Eligible Customer Alternative Schedule 10 Administrative Cost Adder (1.0.0).

14. Article IV sets forth the effective date and conditions on acceptance. Section 4.1 provides that the ATSI Settlement shall take effect on the date the ATSI Settlement is accepted by the Commission without condition or modification in a final order, or if the Commission accepts the ATSI Settlement subject to modification or condition, on the date that all the PJM Settling Parties have notified the other PJM Settling Parties that any such condition or modification is acceptable in accordance with section 4.2. Section 4.2 specifies that the ATSI Settlement is expressly conditioned on acceptance of all provisions without modification or condition, and if the Commission fails to accept the ATSI Settlement in its entirety, the ATSI Settlement shall be null and void unless the Commission issues an order accepting the ATSI Settlement subject to modification or condition and each of the PJM Settling Parties notifies all of the other PJM Settling Parties in writing within ten days of the order that it accepts the modifications or conditions. Section 4.3 states that the ATSI Settlement is also expressly conditioned on the Commission's acceptance of the settlement in Docket No. ER11-3279 without change or condition unacceptable to any of the parties thereto.

15. Article V provides that the standard of review for any modification to the ATSI Settlement, whether set forth in a written amendment executed by the PJM Settling Parties or pursuant to the Commission's exercise of its authority of FPA section 206, whether acting *sua sponte* or on a complaint filed by a Settling Party, shall be the just and reasonable standard. The article states that the standard of review for any modifications to the ATSI Settlement unilaterally proposed by a non-Settling Party shall be the public interest standard of review.

16. Article VI contains miscellaneous provisions.

III. The Schedule 37 Settlement

17. The main provisions of the Schedule 37 Settlement may be summarized as follows:

18. Article I sets forth definitions.

19. Article II provides the procedural background.

20. Article III sets forth the Settlement Agreement and Offer of Settlement. Section 3.1 of the Schedule 37 Settlement states that, under Schedule 37, the costs of certain specified legacy MTEP projects constructed or to be constructed by MISO TOs are allocated to transmission customers in the ATSI zone. The section states that these projects are the same projects originally listed by the Schedule 37 Applicants in their original filing, except that this list does not include the G172 Mitchell County Substation project with Project ID 1749.

21. Section 3.2 of the Schedule 37 Settlement notes that section III.C of Schedule 37 provides that MISO will bill PJM, as the designated agent of ATSI, the monthly amount of the annual revenue requirements for each legacy MTEP project the costs of which are allocated to transmission customers in the ATSI zone. Also, under Attachment II of the PJM Tariff, PJM, as designated agent of ATSI, is required to pay these monthly bills by debiting ATSI's PJM monthly bill.

22. Section 3.3 of the Schedule 37 Settlement provides that the MISO Settling Parties agree to modify section III.C of Schedule 37 to provide that ATSI will guaranty PJM's payment obligations described in section 3.2 such that, in the event PJM does not pay a MISO invoice for legacy MTEP project costs allocated to transmission customers in the ATSI zone, MISO may invoice ATSI directly and ATSI will pay such invoice.

23. Under section 3.4 of the Schedule 37 Settlement, the MISO Settling Parties agree to the version of Schedule 37 that was originally filed on April 1, 2011 in Docket No. ER11-3279 with three revisions. First, Schedule 37 is revised to include the ATSI payment guaranty obligation described in section 3.3, with an effective date of June 1, 2011. This is the same effective date for Schedule 37 submitted in the original filing and both the commencement date of the obligation of transmission customers taking transmission service for deliveries in the ATSI Zone set forth in section II of Schedule 37 and of ATSI's obligation under section III.C of Schedule 37. Second, Schedule 37 is revised to remove the G172 Mitchell County Substation project with Project ID 1749 from the list of projects set forth in section V.A of Schedule 37. Third, Schedule 37 is revised to include the revisions filed on December 2, 2011 in Docket No. ER12-517 by MISO and the MISO TOs, with a January 1, 2012 effective date, which is the effective date for the revisions accepted in Docket No. ER12-517.¹⁹

24. Under section 3.5 of the Schedule 37 Settlement, the MISO Settling Parties agree to the version of Attachment GG that was filed on June 30, 2011 by MISO and the MISO TOs in a compliance filing in Docket No. ER11-3279, with the following revisions, effective June 1, 2011. First, section 2(h)(ii), 2(h)(iii) and 2(i)(1) of Attachment G have been modified to include the term "transmission customers taking transmission service for deliveries in the ATSI Zone." Further, the MISO Settling Parties agree to the version of Attachment GG that was accepted by the Commission in Docket No. ER12-334, with the inclusion of any revision to Attachment GG accepted and made effective by the Commission on or after January 1, 2012, and with the modifications to sections 2(h)(ii)

¹⁹ Docket No. ER12-517 proposed clarifying revisions to Schedule 37, in order to coincide with the filing of Schedule 38 which related to recovery of MTEP costs based on the withdrawal of Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc. from MISO. The Commission conditionally accepted the filing on January 31, 2012.

and 2(h)(iii) described above included in sections that subsequently were renumbered 2(h)(2) and 2(h)(3) in Docket No. ER12-334.

25. Section 3.6 of the Schedule 37 Settlement provides that the Schedule 37 Settlement will be implemented through Schedule 37 and Attachment GG of the MISO Tariff, with the revisions specified in sections 3.3, 3.4 and 3.5 of the Schedule 37 Settlement. Tariff sheets implementing the Schedule 37 Settlement are included as Attachment A. Specifically, Attachment A includes (i) a version of Schedule 37 effective June 1, 2011; (ii) a version of Schedule 37 effective January 1, 2012; (iii) an excerpt of the version of Attachment GG effective June 1, 2011 that contains the portions of Attachment GG being revised; and (iv) an excerpt of the version of Attachment GG effective January 1, 2012 that contains the portion of Attachment GG being revised; each reflecting the revisions agreed to in this Settlement in clean and redline format.

26. Under section 3.7 of the Schedule 37 Settlement, upon the satisfaction of all conditions to the effectiveness of the Settlement, the Schedule 37 Settlement shall operate as a full and final settlement, release, discharge, accord and satisfaction of all the disputes, claims, demands, liabilities, rights, and/or obligations related to or arising out of the issues raised by the MISO Settling Parties in this proceeding.

27. Article IV sets forth the effective date and conditions on acceptance. Section 4.1 of the Schedule 37 Settlement states that the Schedule 37 Settlement shall take effect on the date it is accepted by the Commission without condition or modification in a Final Order or, if the Commission accepts this Settlement subject to condition or modification, on the date that all MISO Settling Parties have notified the other MISO Settling Parties that any such condition or modification is acceptable in accordance with section 4.2 of the Schedule 37 Settlement. An order shall be deemed to be a "Final Order" as of the date rehearing is denied by the Commission, or if rehearing is not sought, the date on which the right to seek Commission rehearing expires.

28. Section 4.2 of the Schedule 37 Settlement states that the Schedule 37 Settlement is expressly conditioned upon the acceptance of all provisions hereof by the Commission in accordance with Rule 602, without modification or condition. If the Commission fails to accept the Schedule 37 Settlement in its entirety without modification or condition, the Schedule 37 Settlement shall not become effective and shall be null and void, unless (i) the Commission issues an order accepting the Schedule 37 Settlement subject to modification or condition and it becomes a Final Order; and (ii) each of the MISO Settling Parties notifies all of the other MISO Settling Parties in writing within ten days of such Commission order that it accepts such modifications or conditions.

29. Section 4.3 states that the Schedule 37 Settlement also is conditioned upon the Commission's acceptance of the settlement submitted by ATSI, AMP, and Buckeye in Docket Nos. ER11-2814, *et al.*, (described in section 2.10 of the Schedule 37 Settlement) without change or condition unacceptable to any of the parties thereto.

30. Article V provides that the standard of review for any modification to the Schedule 37 Settlement, whether set forth in a written amendment executed by the MISO Settling Parties or pursuant to the Commission's exercise of its authority of FPA section 206, whether acting *sua sponte* or on a complaint filed by a Settling Party or a non-Settling Party, shall be the just and reasonable standard.

31. Article VI contains miscellaneous provisions.

IV. Comments

32. The Ohio Consumers' Counsel (OCC) filed initial comments opposing the ATSI and Schedule 37 Settlements. The Commission's Trial Staff (Trial Staff) filed initial comments in the ATSI Settlement proceeding taking no position on the substantive provisions of the ATSI Settlement. Reply comments were filed by ATSI and the MISO TOs in both proceedings. AMP and Buckeye filed reply comments in the ATSI Settlement proceeding.

33. On February 6, 2013, OCC filed an answer to ATSI's and Buckeye's reply comments. On February 12, 2013, ATSI filed an answer to OCC's answer.

A. Initial Comments

1. OCC's Initial Comments

34. OCC explains in its comments that it opposes the settlements because, if approved, Ohio consumers would be subjected to higher electricity bills as ATSI would be authorized to modify the PJM and MISO tariffs to include transmission charges specifically prohibited by the Commission in the May 31, 2011 Order and Schedule 37 Order.²⁰ OCC argues that, with respect to the Exit Fee, Internal Integration Costs, PJM Costs, and legacy MTEP project costs, the Commission has expressly prohibited ATSI from imposing them on transmission customers absent a new FPA section 205 filing showing that the benefits to transmission customers exceed the costs of ATSI's voluntary RTO realignment.²¹ Likewise, OCC argues that the Commission addressed the LTTR Settlement Costs in Docket No. ER11-2059-000 and found that the issue of cost recovery

²⁰ OCC Initial Comments at 1-2.

²¹ *Id.* at 3 (citing May 31, 2011 Order, 135 FERC ¶ 61,198 at P 60; Schedule 37 Order, 135 FERC ¶ 61,204 at P 13).

of the exit charges to be paid by ATSI was beyond the scope of the proceeding.²² OCC contends that the support of AMP and Buckeye is of no moment because their customers are absolved under the ATSI Settlement from any responsibility for paying the new transmission charges, while other Ohio customers are not.

35. OCC argues that, given the Commission's prior rulings in these proceedings, the Commission does not need to decide the merits of the contested issues. OCC states that ATSI has not made a new FPA section 205 filing or provided the cost-benefit analysis mandated by the prior Commission orders. OCC contends that severance is not a meaningful option because ATSI filed the settlements for the express purpose of addressing all of the pending rehearing issues and to modify the MISO and PJM tariffs generally.

36. Finally, OCC asserts that ATSI fails to explain why it is just and reasonable, and not unduly discriminatory, for ATSI to credit AMP and Buckeye for any payment of the charges at issue but to impose those charges on ATSI's Ohio distribution affiliates and other potential wholesale transmission customers.

2. Trial Staff's Initial Comments

37. In its initial comments, Trial Staff states that it takes no position on the substantive provisions of the ATSI Settlement, inasmuch as it addresses issues that were explicitly excluded from the hearing ordered by the Commission. Instead, Trial Staff states that the purpose of its comments is to provide background information that may assist the Commission and to ensure that all relevant and affected parties have been provided adequate notice of and opportunity for participation in the settlement discussions. Trial Staff explains that its concern is that "ATSI is apparently resolving its transition cost issues by filing a settlement in this docket rather than through a separate section 205 filing, as previously ordered by the Commission."²³

B. Reply Comments

1. ATSI's Reply Comments

38. In its reply comments, ATSI argues that OCC fails to note that the settlements are consistent with a retail settlement agreement approved by the Public Utilities

²² *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,139 (2012)).

²³ Trial Staff Initial Comments at 4.

Commission of Ohio (Ohio Commission),²⁴ and the only costs that will be passed on to retail customers are those permitted by the Ohio Retail Settlement Order. ATSI also argues that OCC's contention that the ATSI Settlement violates the Commission's requirement that ATSI provide a cost-benefit analysis to support its recovery of RTO transition costs from wholesale customers ignores the fact that the ATSI Settlement does not require AMP and Buckeye to pay any RTO transition costs and that the Ohio retail customers will pay only the RTO transition costs that the Ohio Commission has determined to be reasonable. With respect to legacy MTEP project costs, ATSI states that OCC's position ignores the fact that the settlements, in conjunction with the Ohio Retail Settlement Order, authorize recovery from Ohio retail customers only of the same share of legacy MTEP project costs that those customers would have paid had ATSI remained in MISO.²⁵ ATSI argues that OCC is attempting to use the Commission's settlement process to mount a collateral attack on the Ohio Retail Settlement Order, and OCC fails to recognize that, operating together, the settlements and the Ohio Retail Settlement Order present a balanced resolution in which ATSI and its affiliated retail distribution companies in Ohio will absorb a large portion of the transition costs and Ohio customers will only pay the share of transition costs that the Ohio Commission determined to be reasonable.²⁶

39. ATSI contends that OCC's opposition to the ATSI Settlement and Schedule 37 Settlement does not make them "contested" under the Commission's rules because OCC raises no genuine issue of material fact regarding the reasonableness of the settlements' resolution of the issues and does not present any affidavits to support its opposing

²⁴ ATSI Reply Comments at 2 (citing *In re Application of Ohio Edison Co., et al.*, Opinion and Order, Case No. 10-388-EL-SSO (Ohio Commission Aug. 25, 2010) (Ohio Retail Settlement Order). ATSI states that the Ohio Retail Settlement permits the FirstEnergy retail distribution companies in Ohio to recover legacy MTEP project costs, Internal Integration Costs, and LTTR Settlement Costs from Ohio retail customers. However, ATSI states that the companies agreed not to seek recovery from Ohio retail customers of the Exit Fee or PJM Costs, and the companies agreed to absorb up to \$360 million in legacy RTEP costs, the costs associated with facilities planned and approved through PJM's RTEP process before June 1, 2011 that would otherwise be charged to their retail customers in Ohio under the PJM Tariff).

²⁵ *Id.* at 17.

²⁶ *Id.* at 15-18.

comments, as Rule 602 requires of a party contesting a settlement.²⁷ ATSI argues that, because the settlements are uncontested, they may be approved by the Commission upon a finding that they appear to be fair and reasonable and in the public interest. Even if the Commission determines that OCC's comments render the settlements contested, ATSI argues that the Commission can approve a settlement under the standard for uncontested settlements and decide the matter in a summary fashion if the opposing party fails to raise a genuine issue of material fact.²⁸

40. In addition, ATSI asserts that, since the settlements do not authorize ATSI to recover RTO transition costs from AMP and Buckeye, the unaffiliated wholesale transmission customers participating in this proceeding, no cost-benefit analysis is required.²⁹ Further, ATSI argues that no cost-benefit analysis is required with respect to Legacy MTEP Project costs because, as the record in Docket No. ER11-2814, *et al.* establishes, customers in the ATSI zone would have paid these costs if ATSI had remained in MISO and nothing in the May 31, 2011 Order requires a cost-benefit analysis when the level of charges to customers does not change. ATSI contends that the May 31, 2011 Order requires a cost-benefit analysis in the event ATSI submits a separate FPA section 205 filing subsequent to the termination of these proceedings, but the Commission did not require that ATSI submit a cost-benefit analysis as part of a settlement of these cases. ATSI argues that OCC's objection regarding the cost-benefit analysis is invalid where the Settlements resolve a pending rehearing request seeking to eliminate that very requirement. In addition, ATSI argues that requiring the PJM Settling Parties to submit a cost-benefit analysis would be in conflict with the Commission's settlement policies because it would impose litigation burdens that settlements are designed to avoid.³⁰ ATSI contends that the PJM Settling Parties' failure to include such

²⁷ *Id.* at 13 (citing 18 C.F.R. § 385.602(f)(4)(2013) (“Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the offer of settlement, or items not included in the settlement, that are relevant to support the claim.”)).

²⁸ *Id.* at 14-15 (citing 18 C.F.R. § 385.602(h)(1)(i) (2013); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 115 FERC ¶ 61,271, at P 18 (2006); *New Orleans Pub. Serv., Inc. v. FERC*, 659 F.2d 509, 512 (5th Cir. 1981); *Penn. Gas & Water Co. v. FPC*, 463 F.2d 1242 at 1246 (D.C. Cir. 1972)).

²⁹ *Id.* at 21.

³⁰ *Id.* at 22-23.

an analysis is not contrary to the May 31, 2011 Order or other Commission precedent because the Settlements are specific to these proceedings and approval will not constitute precedent on this or any other issue.³¹

41. ATSI argues that OCC stands alone in opposition to the Settlements, with neither the Ohio Commission nor any other representatives of Ohio retail customers expressing concerns.³² ATSI states that a diverse group of retail parties signed the Ohio Retail Settlement, and OCC participated in all phases of the Ohio Retail Settlement proceedings.

42. In response to Trial Staff's suggestion that ATSI clarify the procedures that led to the ATSI Settlement, ATSI describes the settlement process and states that it reached out to OCC to include it in the settlement negotiations.³³ ATSI represents that the processes used were comprehensive, inclusive, and time consuming and ensured that all relevant and affected parties were provided adequate notice of and opportunity for participation the settlement discussions.

2. Buckeye's Reply Comments

43. In its reply comments, Buckeye argues that Trial Staff's concern regarding whether all relevant parties have had the opportunity to participate in the resolution of the transition cost issue was met by the public notice of ATSI's and PJM's initial filing, which allowed parties to intervene and file protests.³⁴ With respect to OCC's concerns regarding the imposition of transition costs on retail customers served by ATSI's Ohio distribution affiliates, Buckeye argues that ATSI's Ohio distribution affiliates have already submitted voluntarily, via stipulation, to restrictions on their ability to recover transition costs in retail rates, and the Ohio Commission has sanctioned those restrictions.³⁵ Finally, Buckeye argues that the ATSI Settlement is in the public interest because it resolves AMP's and Buckeye's concerns without increasing the impact of

³¹ *Id.* at 23.

³² *Id.* at 18-19.

³³ *Id.* at 24-25.

³⁴ Buckeye Reply Comments at 4-5.

³⁵ *Id.* at 5-6.

transition costs on any other entity and renders unnecessary the expenditure of resources for a separate FPA section 205 proceeding.³⁶

3. AMP's Reply Comments

44. In its reply comments, AMP states that the ATSI Settlement resolves issues related to “pass through” of RTO transition costs by allowing ATSI to include these costs in its revenue requirement but then crediting back to AMP and Buckeye amounts that provide a dollar-for-dollar offset against charges attributable to those costs, thus eliminating the need for additional proceedings to make a new FPA section 205 filing. AMP urges the Commission to accept the ATSI Settlement as the product of extensive arms-length negotiations that were conducted in good faith over several months.

45. In response to Trial Staff's Comments, AMP argues that the May 31, 2011 Order cannot reasonably be read as stating that ATSI is permitted to resolve its transition cost issues only through a section 205 filing, nor to preclude ATSI from resolving those issues through agreements.

4. MISO TOs' Reply Comments

46. In their reply comments, the MISO TOs state that they support the Schedule 37 Settlement because it will provide resolution and certainty with respect to issues that have been long pending and urge the Commission to accept it without modification despite OCC's objections to the terms of the ATSI Settlement.

C. OCC's Response

47. In its response to ATSI's and Buckeye's reply comments, OCC contends that nowhere in the offers of settlement or explanatory materials is there a reference to the Ohio Retail Settlement as having a bearing on the issues in this proceeding. OCC further contends that ATSI previously represented that the Ohio Retail Settlement was not relevant to the proceeding when it filed its proposed tariff revisions in Docket Nos. ER11-2814 and ER11-2815, and it is improper for ATSI and Buckeye to argue its relevance for the first time in their reply comments. In any case, OCC explains that the RTO transition costs would be billed to ATSI's Ohio distribution affiliates only to the extent that the Commission approved them, and therefore the Ohio Retail Settlement is relevant only if Commission approval is obtained. OCC argues that the Ohio Retail Settlement is irrelevant because the Commission expressly prohibited ATSI from imposing on its wholesale customers four of the transmission charges proposed to be

³⁶ *Id.* at 6.

included in the PJM Tariff rates under the settlement offers, and ATSI has never made a proper FPA section 205 filing to recover the fifth charge. Furthermore, OCC argues that the Commission had before it the arguments of Buckeye and AMP that these charges were not just and reasonable in light of the Ohio Retail Settlement, and the Commission did not adopt this reasoning in the May 31, 2011 Order, thereby implicitly finding the settlement immaterial. In addition, OCC argues that there is no basis for ATSI's argument that the Ohio Commission determined that it is in the public interest of for Ohio retail customers to pay RTO transition costs.

48. In response to ATSI's argument that the settlements should be treated as uncontested because OCC has not submitted an affidavit or raised a material issue of fact, OCC argues that it is not raising a factual argument because it has shown as a matter of law that the proposed settlements are contrary to governing Commission orders. OCC responds to ATSI's various arguments as to why it need not submit a cost-benefit analysis by reiterating that the Commission has ruled that ATSI cannot recover charges in the absence of submitting a cost-benefit analysis to prove it should be allowed recovery, and ATSI has not given any sound reason why the Commission should reverse itself. Finally, OCC states that ATSI's suggestion that OCC refused to participate in settlement negotiations is false.

V. Discussion

49. Under the Commission's procedural regulations, the Commission may approve an uncontested settlement upon a finding that the settlement appears to be fair and reasonable and in the public interest.³⁷ However, the Supreme Court has held that where a settlement is contested, the Commission must make an "independent finding supported by substantial evidence on the record as a whole, that the proposal will establish just and reasonable rates."³⁸

50. The ATSI Settlement and the Schedule 37 Settlement are contested because OCC, a party to the proceedings, submitted timely comments opposing their approval. While ATSI contends that these settlements are not contested because OCC failed to submit an affidavit along with its brief and has not shown that there is a genuine issue of material fact, the Commission's regulations do not require all parties to file affidavits or allege genuine issues of material fact in order to properly contest a settlement. Rather,

³⁷ 18 C.F.R. § 385.602(g)(3) (2013).

³⁸ *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974).

they simply require that an affidavit is required only when a party alleges a dispute as to a genuine issue of material fact.³⁹

51. OCC opposes the settlements on policy grounds because they are counter to the Commission's orders in this proceeding, rejecting ATSI's recovery of MISO transition costs. Because OCC does not allege a disputed issue of material fact, the Commission is permitted to decide the issues on the merits.⁴⁰ Rule 602(h)(1)(i) of the Commission's settlement rules provides that the Commission may decide the merits of the contested issues if the record contains substantial evidence upon which to base a reasoned decision or the Commission finds that there is no genuine issue of material fact.⁴¹

52. The Commission is not persuaded that the ATSI Settlement results in just and reasonable rates. The Commission previously determined in the May 31, 2011 Order that ATSI's proposed tariff changes imposing transition costs on wholesale transmission customers had not been shown to be just and reasonable and stated that this finding was without prejudice to ATSI submitting a new section 205 filing showing that the benefits of the RTO realignment decision with respect to wholesale transmission customers outweigh the costs.⁴² The ATSI Settlement would impose the same tariff changes as proposed in ATSI's original filing, but ATSI provides neither additional support for why those tariff changes are just and reasonable nor a cost-benefit analysis showing that the benefits outweigh the costs. ATSI's argument that no cost-benefit analysis is necessary because ATSI is not requiring AMP and Buckeye to pay transition costs is not persuasive because the ATSI Settlement provides that the original proposed tariff changes will go into effect, thereby imposing transition costs on wholesale transmission customers not exempted by the settlement. ATSI has not shown why this result is just and reasonable absent a cost-benefit analysis.

53. The parties to the ATSI Settlement have negotiated special consideration only for the settling parties while submitting tariff provisions that continue to impose the costs of ATSI's RTO transition on other parties. While the settling parties will not have to pay

³⁹ 18 C.F.R. § 385.602(f)(4) (2013).

⁴⁰ 18 C.F.R. § 385.206(h)(1)(i). *See San Diego Gas & Electric Co. v. Sellers of Energy*, 128 FERC ¶ 61,004, at P 16 (2009).

⁴¹ *Duke Energy Trading and Marketing, L.L.C., et al.*, 125 FERC ¶ 61,345, at P 29 (2008) (citing 18 C.F.R. § 385.206(h)(1)(i) (2013)).

⁴² May 31, 2011 Order, 135 FERC ¶ 61,198 at P 60.

these transition costs, all other customers will still be required to absorb these costs. In *HIOS*, the Commission rejected a settlement in which the only active parties supporting an uncontested settlement received special consideration, in the form of a \$3 million payment, not given to any other party.⁴³ The Commission reasoned that “[t]he fact the Indicated Shippers demanded greater benefits than the settlement provides *HIOS*’ other customers undercuts any assumption that the Indicated Shipper’s agreement to the settlement shows that it is in the interest of other affected parties and consumers generally...Upon further reflection, the Commission is increasingly concerned about the unduly discriminatory nature of such arrangements.”⁴⁴ The Court of Appeals for the District of Columbia Circuit affirmed, recognizing the Commission’s argument that the normal presumption for uncontested settlements would not apply due to the three-million-dollar payout from *HIOS* to certain parties to the settlement, which “would, in the circumstances of this case, undermine the usual assumption that a settlement’s active parties will protect the interests of its inactive parties.”⁴⁵ Similarly, the *ATSI Settlement* gives AMP and Buckeye the benefit of being held harmless from the transition costs while imposing them on other customers. *ATSI* has not shown why it is not unduly discriminatory for AMP and Buckeye to be exempted from paying transition costs but not other customers. Accordingly, we find that the *ATSI Settlement* does not meet the burden that must be met for acceptance of a contested settlement.

54. We disagree with *ATSI*’s argument that the Commission should disregard OCC’s arguments because they relate to a retail rate matter that has been resolved in Ohio by the Ohio Commission’s approval of the Ohio Retail Rate Settlement. The costs involved here are subject to Commission jurisdiction, not state jurisdiction, so the state determination made with respect to a retail rate settlement prior to the Commission’s May 31, 2011 Order is not determinative and does not address the justness and reasonableness of the proposed revisions to PJM’s wholesale transmission tariff. In fact, the Ohio Commission recognized in its order approving the settlement that it was yet to be determined whether Ohio retail customers would ultimately be subject to these costs.⁴⁶

⁴³ *High Island Offshore System, L.L.C.*, 110 FERC ¶ 61,043, at P 30 (2005) (*HIOS*).

⁴⁴ *Id.* P 33.

⁴⁵ *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 697 (D.C. Cir. 2007).

⁴⁶ “Although the Commission agrees with [Ohio Consumer and Environmental Advocates’ (OCEA’s)] statement that the likelihood that retail customers in Ohio will be required to pay the legacy RTEP charges is key to determining whether the [Ohio Retail Settlement] benefits ratepayers and the public interest, we cannot accept OCEA’s

(continued...)

While other wholesale customers may not have objected to the settlement, these customers are largely served by ATSI's distribution affiliates. Thus, the lack of objection from these affiliates either to the Settlement or the Ohio Retail Rate Settlement has no bearing on the justness and reasonableness of the wholesale transmission tariff revisions that must be accepted by the Commission in order for the relevant terms of that settlement to apply.

55. ATSI suggests that, because OCC is the only party who opposes the ATSI Settlement, it should be accepted. The fact that a proposal is a settlement or that the settlement has wide support does not establish the justness and reasonableness of its terms.⁴⁷

56. ATSI, AMP, and Buckeye contend that the ATSI Settlement eliminates the need for additional proceedings that would have arisen if ATSI was compelled to make a new section 205 filing to pass through the transition costs. As the court found in *Laclede*, the fact that a settlement allows the parties to avoid protracted litigation is insufficient to support approval of the settlement.⁴⁸

57. We reject the Schedule 37 Settlement for the same reasons as noted above. In the Schedule 37 Order, the Commission required ATSI and MISO to remove or modify tariff language suggesting that ATSI's wholesale transmission customers bear responsibility for any remaining financial obligation for legacy MTEP projects. The Schedule 37 Settlement neither makes these required changes, nor does it provide either additional support for why its tariff changes are just and reasonable or a cost-benefit analysis showing that the benefits outweigh the costs. Accordingly, we find that the Schedule 37 Settlement does not result in just and reasonable rates. Furthermore, the Schedule 37 Settlement relies upon the collection of payments from customers in the ATSI transmission zone under the ATSI Settlement, and section 4.3 of the Schedule 37 Settlement states that it is conditioned upon the Commission's acceptance of the ATSI Settlement. Therefore, our rejection of the ATSI Settlement voids the Schedule 37 Settlement.

assumption that there is a zero probability that retail customers will be required to pay such charges without further clarification from FERC...We also believe that there would be significant litigation regarding this issue at both the state and Federal level..." Ohio Retail Settlement at 32.

⁴⁷ *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990).

⁴⁸ *Laclede Gas Co. v. FERC*, 997 F.2d 936, 945 (D.C. Cir. 1993) (*Laclede*).

The Commission orders:

The ATSI Settlement and Schedule 37 Settlement are hereby rejected, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.