

135 FERC ¶ 61,237
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.

Duquesne Light Company	Docket Nos. ER08-194-000 ER08-194-001 ER08-194-002 ER08-194-003 ER08-194-004
Midwest Independent Transmission System Operator, Inc. and Duquesne Light Company	Docket Nos. ER08-1235-000 ER08-1235-001
Midwest Independent Transmission System Operator, Inc. and Duquesne Light Company	Docket No. ER08-1309-000
PJM Interconnection, L.L.C.	Docket Nos. ER08-1339-000 ER08-1339-001 ER08-1339-002
PJM Interconnection, L.L.C.	Docket Nos. ER08-1345-000 ER08-1345-001 ER08-1345-002
Midwest Independent Transmission System Operator, Inc. and Duquesne Light Company	Docket No. ER08-1370-000

ORDER ESTABLISHING BRIEFING PROCEDURES

(Issued June 16, 2011)

1. On October 12, 2010, Midwest Independent Transmission System Operator, Inc. (MISO) submitted a motion requesting that the Commission establish procedures to permit the Commission to respond to a request for guidance from the United States District Court for the Southern District of Indiana (the District Court). In this order, we grant MISO's motion and establish briefing procedures to develop a record that may enable the Commission to respond to the District Court's questions.

I. Background

2. On November 8, 2007, Duquesne Light Company (Duquesne) filed with the Commission a petition requesting approval to withdraw from PJM Interconnection, L.L.C. (PJM). Duquesne conditioned its proposed withdrawal on the Commission's approval of its joining MISO, MISO's implementation of a centralized energy balancing program by a date certain and MISO's submission to the Commission of an integration filing. The Commission approved Duquesne's conditional petition to withdraw from PJM on January 17, 2008, but conditioned its approval on certain requirements of Duquesne. One of those requirements was that Duquesne satisfy any contractual requirements for withdrawal that it had with PJM and that such satisfaction be found just and reasonable by the Commission.¹

3. On July 3, 2008, Duquesne and MISO filed an integration plan that would govern the orderly transition of Duquesne's transmission assets from PJM to MISO. The Commission accepted the integration plan on September 3, 2008.² One month later, Duquesne submitted to MISO its signed application for membership along with a tender of the \$15,000 membership fee and several other documents necessary for Duquesne to become a transmission-owning member of MISO, including a signed MISO Transmission Owners Agreement.

4. On August 21, 2008, the Board Directors of MISO voted to approve Duquesne's application for membership in MISO. Subsequent meetings were held to begin the process of integrating Duquesne into MISO. However, on November 4, 2008, MISO received a copy of a draft settlement agreement between Duquesne and PJM wherein Duquesne agreed to remain a member of PJM for an additional five years. That settlement was finalized in December 2008 and submitted for approval to the Commission. In the settlement agreement, Duquesne sought to withdraw from Commission consideration its prior request to withdraw from PJM and establish membership in MISO. On December 10, 2008, Duquesne, PJM and fifteen other parties filed the settlement agreement with the Commission seeking approval of the settlement.

5. MISO objected to the settlement because: (1) it did not address Duquesne's contractual commitment to remain a MISO member for five years; and (2) assuming premature withdrawal, the settlement did not address Duquesne's financial commitment

¹ *Duquesne Light Co.*, 122 FERC ¶ 61,039 (2008).

² *Duquesne Light Co.*, 124 FERC ¶ 61,219 (2008) (September 3 Order).

to MISO, either with respect to the direct cost incurred to achieve integration or the contractual obligation to pay a withdrawal fee.³

6. On January 29, 2009, the Commission accepted the settlement agreement. As to MISO's objections, the Commission held:

We . . . find that the terms pursuant to which Duquesne will be permitted to terminate its obligations to [MISO], including Duquesne's obligation to pay financial obligations incurred prior to the effective date of its withdrawal from the [MISO] Transmission Owners Agreement, raise issues that cannot be resolved summarily in this proceeding. These issues are not addressed by the Settlement Agreement. Accordingly, [MISO] or other affected parties may make a separate filing in a new proceeding raising these issues, or they may pursue these issues in an appropriate judicial forum.⁴

7. Nine months later, MISO filed an action in the District Court, alleging breach of contract and promissory estoppel and demanding a jury trial. Duquesne filed a motion to stay, and requested that the District Court refer the breach of contract action to the Commission. Duquesne argued that MISO's claim required interpretation of the Commission's prior orders and the MISO Transmission Owners Agreement, and thereby warranted referral to the Commission under the primary jurisdiction doctrine. Duquesne also noted that should it be determined that Duquesne had an obligation to pay a withdrawal fee, the Commission would have exclusive jurisdiction to assess what amount would be just and reasonable.

8. On July 12, 2010, the District Court granted Duquesne's motion to stay. In the order granting the motion to stay, the District Court found that:

[The Commission's] superior knowledge, both substantive and historical with respect to the factual circumstances, its expertise in interpretation of [Transmission Owners] Agreements and exit fee prerequisites, along with the public policy interest in consistency and uniformity in the regulation of this industry, requires us to withhold our review of these matters until the [Commission] can weigh in on what it deems appropriate under these

³ MISO estimated the exit fee to be \$7.1 million based upon the *Louisville Gas and Electric Co.* formula. See *Louisville Gas & Elec. Co.*, 114 FERC ¶ 61,282, order on reh'g sub nom. *E.ON U.S. LLC*, 116 FERC ¶ 61,020 (2006).

⁴ *Duquesne Light Co.*, 126 FERC ¶ 61,074, at P 33 (January 29 Order), reh'g denied, 127 FERC ¶ 61,186 (2009).

circumstances with which it is entirely familiar. This is truly a case where the expertise and experience of the [Commission] is too great for a court to waive-off and attempt to duplicate on its own.⁵

9. On August 13, 2010, the District Court entered an order directing MISO to seek the Commission's opinion on the following issues regarding the breach of contract claim:

A. In light of the circumstances presented in this case, did Duquesne's execution of the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation create a binding commitment to [MISO]?

If the answer is "no," then the Commission need not proceed further.

B. If the answer to the above question is yes, is Duquesne obligated to pay the withdrawal fee specified in Article V of the [MISO] TO Agreement upon its withdrawal?

If the answer is "no," then the Commission need not proceed further.

C. If the answer to the above question is yes, what is a just and reasonable exit fee under the circumstances of this case?⁶

II. Discussion

A. MISO's Motion

10. In its motion, MISO requests that the Commission establish proceedings before an administrative law judge for the purpose of developing a record responsive to the order of the District Court. MISO states that it would expect to enjoy all procedural options provided under the Administrative Procedure Act and the Commission's Rules of

⁵ *Midwest Indep. Transmission Sys. Operator, Inc. v. Duquesne Light Co.*, No. 1:09-cv-1289-TWP-DML at 8 (S.D. Ind. July 12, 2010).

⁶ *Midwest Indep. Transmission Sys. Operator, Inc. v. Duquesne Light Co.*, No. 1:09-cv-1289-TWP-DML at 1-2 (S.D. Ind. Aug. 13, 2010).

Practice and Procedure, including the right of discovery as to all participants in the proceedings, the right to a full hearing, and the specified review process.⁷

B. Answers

11. On October 27, 2010, Duquesne filed an answer to MISO's motion, arguing that MISO has not shown good cause for a hearing and broad discovery. Duquesne states that MISO failed to follow the Commission's instructions in its January 29 Order by choosing to file a motion in the dormant ER08-194 *et al.* consolidated docket rather than initiate a new proceeding. Duquesne states that MISO's filing of its motion in the earlier consolidated docket might make some sense if it were asking the Commission to rule based on the record developed in that docket. However, Duquesne asserts that MISO is not asking the Commission to rule on that record but seeks the appointment of an administrative law judge. Duquesne claims that there is no need to develop such a record, as the Commission has sufficient information to answer the first question posed by the District Court. Duquesne maintains that the Commission can find that there was no binding commitment by Duquesne to join MISO, as MISO stipulated in the joint July and August 2008 submissions to the Commission and the Commission itself recognized in the September 3 Order. Moreover, Duquesne asserts that the September 3 Order identified a large number of hurdles that remained before the Commission could approve Duquesne switching Regional Transmission Operators. Therefore, Duquesne maintains that the existing record supports an answer of "no" to the District Court's first question, which will dispose of MISO's breach of contract claim and obviate the need to answer the other two questions.⁸

12. On the other hand, Duquesne has no objection if the Commission believes that a more detailed consideration of the record is required to answer the District Court's questions and that an administrative law judge is best equipped to undertake this examination. However, Duquesne asks the Commission to limit the scope of the hearing to consideration of the questions posed by the District Court if the Commission appoints a presiding judge. Duquesne states that the presiding judge need not delve into the reasonableness of MISO's reliance on Duquesne's alleged promises or the expenses that MISO claims it incurred in reliance on those promises because the District Court will later adjudicate MISO's promissory estoppel claim.⁹

⁷ MISO Motion at 5.

⁸ Duquesne Answer at 9-10.

⁹ *Id.* at 10.

13. Based on MISO's motion and its decision to file the motion in the dormant consolidated docket, Duquesne claims that it appears MISO will demand discovery not just from Duquesne, but also from all of the parties who intervened in the docket. Duquesne asserts that MISO has offered no justification for extending the scope of discovery to third parties, none of whom possesses relevant information or has a stake in this dispute. Accordingly, Duquesne requests that the Commission limit discovery to a discrete time frame and the specific questions posed by the District Court and that neither party be permitted to seek discovery from third parties without the prior approval of the presiding judge. In the alternative, Duquesne requests that the Commission direct MISO to refile under a new docket.¹⁰

14. On October 27, 2010, PJM filed an answer to MISO's motion, stating that it takes no position on the merits of MISO's claims for damages from Duquesne, but wants to address certain characterizations MISO made in its motion concerning the bilateral negotiations between Duquesne and certain suppliers for capacity. PJM asserts that the negotiations were undertaken under the auspices of the Commission's Dispute Resolution Office and such a claim by MISO to the nature of the bilateral negotiations was specifically rejected by the Commission in the January 29 Order. PJM maintains that bilateral negotiations were required to ensure there were no antitrust law challenges and to maximize Duquesne's options in its negotiations with individual suppliers. PJM asserts that it was not a party to these bilateral negotiations.¹¹

C. Commission Determination

15. We deny Duquesne's alternative requests for the Commission to direct MISO to refile its motion in a new docket rather than the ER08-194 *et al.* consolidated docket, or for the Commission to find in Duquesne's favor based on the existing record of that proceeding. Furthermore, MISO has not made specific allegations that there is a dispute as to a material fact and, therefore, we also deny MISO's request for a trial-type evidentiary hearing.¹² We find, as detailed below, that with supplementation the existing

¹⁰ *Id.* at 11.

¹¹ PJM Answer at 3-5.

¹² *BP W. Coast Prods. LLC v. SFPP, L.P.*, 121 FERC ¶ 61,239, at P 35 (2007) ("The Commission is not required to hold a hearing when issues of material fact are not in dispute."); *see also Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1119 (D.C. Cir. 2002) (holding that the Commission "may properly deny an evidentiary hearing if the issues, even disputed issues, may be adequately resolved on the written record, at least where there is no issue of motive, intent, or credibility.").

docket may provide a sufficient basis for the Commission to respond to the District Court's questions.¹³

16. The record of the consolidated proceeding is extensive, and it is not clear to us that further discovery and submission of evidence will be necessary for us to answer the District Court's questions. We are mindful, however, that the record was not developed with the District Court's specific questions in mind, and so we find that it is appropriate to afford the parties an opportunity to submit legal arguments that will help the Commission respond to the District Court's questions.

17. Because we are not setting this matter for a trial-type evidentiary hearing at this time, we will not rule on Duquesne's arguments concerning discovery. If the Commission determines that further discovery and trial-type hearing are necessary to resolve the District Court's questions, Duquesne may raise issues concerning the scope of discovery.

18. Finally, we acknowledge PJM's response to MISO's characterizations concerning the bilateral negotiations between Duquesne and PJM's capacity suppliers. However, we decline to make any specific findings on these contested remarks at this time. As PJM notes in its answer, MISO's remarks are not germane to the purpose of MISO's motion. If PJM so chooses, it may raise this issue later in these proceedings.

D. Briefing Procedures

19. In order to supplement the record of the combined proceeding, the Commission will afford the parties an opportunity to make additional written submissions to the Commission concerning the District Court's questions delineated above. Initial briefs may be filed by interested parties no later than 30 days after the date of this order. Parties also may file reply briefs in response to parties' initial briefs, due within 50 days of the date of this order.

20. All parties' briefs should separately state the facts and arguments advanced by that party and include any exhibits upon which that party relies. The statement of material facts must include citations to the supporting exhibits, affidavits and/or prepared testimony. All materials must be verified and subscribed as set forth in Rule 2005 of the

¹³ See *Amador Stage Line, Inc. v. United States*, 685 F.2d 333, 335 (9th Cir. 1982) ("The Commission in its discretion may deny an oral hearing even where material facts are disputed so long as the disputes may be adequately resolved by the written submissions."); *City of Batavia v. FERC*, 672 F.2d 64, 91 (D.C. Cir. 1982).

Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2005 (2011), and should be served on all parties to this proceeding.

21. The Commission will then examine the filing fully briefed by the parties on the specific questions posed by the District Court. At that time, the Commission will determine whether further proceedings are necessary, including a trial-type evidentiary hearing before an administrative law judge as MISO requested.

The Commission orders:

(A) Initial briefs may be filed no later than 30 days after the date of this order, as discussed in the body of this order.

(B) Reply briefs shall be due within 50 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.