

144 FERC ¶ 61,217
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.,
Duke Energy Ohio, Inc., and
Duke Energy Kentucky, Inc.

Docket No. ER12-91-000
ER12-91-002
ER12-91-005
ER12-92-000
ER12-92-002
ER12-92-005

ORDER REJECTING SETTLEMENT

(Issued September 19, 2013)

1. Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc. (together, the Duke Companies) have submitted a settlement agreement (Settlement) between the Duke Companies and American Municipal Power, Inc. (AMP) and the AMP member companies that resolves all pending issues in the referenced proceedings, including the issues that were set for hearing and those that remain pending on rehearing.¹ In this order, we reject the Settlement, as discussed below.

I. Background

2. On October 14, 2011, pursuant to section 205 of the Federal Power Act,² PJM Interconnection, L.L.C. (PJM), on behalf of the Duke Companies, filed modifications to the PJM Open Access Transmission Tariff (OATT), Operating Agreement, Reliability Assurance Agreement, and Transmission Owners Agreement, in connection with the Duke Companies' move from the Midwest Independent Transmission System Operator,

¹ AMP enters into the Settlement Agreement on behalf of its individual members, the City of Hamilton, Ohio (Hamilton), the City of Lebanon, Ohio (Lebanon), and the City of Williamstown, Kentucky (Williamstown).

² 16 U.S.C. § 824d (2006).

Inc. (MISO)³ to PJM, including a formula transmission rate and formula rate protocols for the purpose of establishing and recovering the Duke Companies' annual transmission revenue requirement. AMP and Indiana Municipal Power Agency (IMPA) filed timely motions to intervene and protest. The protests raised various issues, including the Duke Companies' treatment of the costs related to their transition to PJM, the proposed rate of return on equity (ROE), and certain aspects of the formula rate protocols.

3. On December 27, 2011, the Duke Companies filed a request for deferral of action, requesting that the Commission enable the Duke Companies, PJM, AMP, and IMPA to continue settlement discussions. On April 5, 2012, the Duke Companies filed a settlement agreement with the Commission that resolved all issues in the case between the Duke Companies and IMPA.

4. On April 24, 2012, the Commission issued an order (April 24 Order) that accepted in part and rejected in part the Duke Companies' October 14, 2011 filing, established hearing and settlement judge procedures for the Duke Companies' ROE, and approved the settlement agreement between the Duke Companies and IMPA.⁴ While the Duke Companies had submitted testimony in support of the recovery of the Legacy MISO Transmission Expansion Plan (MTEP) costs⁵ and PJM transition costs,⁶ the Commission found the supporting testimony insufficient. Accordingly, the April 24 Order also directed the Duke Companies to remove the Legacy MTEP and Transition costs from

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

⁴ *PJM Interconnection, LLC*, 139 FERC ¶ 61,068 (2012) (April 24 Order), *reh'g pending*.

⁵ Legacy MTEP costs are defined as all costs arising from obligations of the Duke Companies to pay any portion of costs for transmission expansion projects included in any MISO transmission expansion plan that was approved prior to the date the Duke Companies integrated into PJM, including any such costs that arise from Multi-Value Projects approved by the MISO Board of Directors prior to the date of the Duke Companies integration into PJM.

⁶ Transition costs include PJM transition costs for the Duke Companies to join PJM, the Duke Companies' Internal Integration Costs, the exit fee to be paid by the Duke Companies to the MISO, and the \$1.8 million settlement payable by the Duke Companies to resolve a dispute with the MISO over long term transmission rights.

their proposed rates.⁷ This requirement was without prejudice to the submission of a separate section 205 filing seeking recovery of these costs.⁸

5. On May 24, 2012, the Duke Companies filed a request for rehearing concerning the Commission's denial of its proposed recovery of the Legacy MTEP and Transition costs and its establishment of hearing and settlement procedures for the Duke Companies' proposed ROE.

6. On February 4, 2013, pursuant to Rule 602 of the Rules of Practice and Procedure,⁹ the Duke Companies submitted the Settlement with an explanatory statement.

II. Settlement

7. The Settlement includes tariff records which reinstate the recovery of Legacy MTEP and PJM transition costs. The Duke Companies state that the Settlement resolves all pending issues in the proceeding, including the issues that were set for hearing and those that remain pending on rehearing, and does not provide for the recovery of any transition costs or Legacy MTEP costs that were not included in the Duke Companies' original filing in this docket. The main provisions of the Settlement may be summarized as follows:

8. Article I provides the background and procedural history of the proceeding.

9. Article II defines certain terms contained in the Settlement.

10. Article III contains the substantive terms of the Settlement. Section 3.1 of the Settlement stipulates that the Duke Companies will reimburse AMP for 100 percent of the PJM transition costs included in the charges for transmission service that PJM provides.¹⁰ Section 3.2 provides that the Duke Companies will reimburse AMP for 75 percent of the Legacy MTEP costs included in the cost of transmission service that PJM provides to AMP in the Duke Companies' zone for the retail electrical load served by Hamilton, Lebanon, and Williamstown.¹¹ In exchange for these payments, Section 3.9

⁷ April 24 Order, 139 FERC ¶ 61,068 at P 76.

⁸ *Id.*

⁹ 18 C.F.R. § 385.602 (2013).

¹⁰ Settlement, Article 3.1.

¹¹ Settlement, Article 3.2(a)-(c).

provides that AMP agrees that the Duke Companies are fully discharged from any obligation to make payments to AMP and its members according to Article V, Section 2 of the MISO Transmission Owners Agreement in connection with the Duke Companies' move from MISO to PJM.¹²

11. Section 3.3 stipulates that the tariff records included as Exhibit A to the Settlement shall replace and supersede the tariff records included in PJM OATT Attachments H-22 and JJ that were filed in this proceeding on October 14, 2011 and May 24, 2012. The tariff records include a reduction in the Duke Companies ROE from 12.38 percent to 10.88 percent plus 50 basis points for membership in a regional transmission organization (RTO).

12. Section 3.4 provides that AMP shall not initiate a proceeding prior to January 1, 2016, seeking a reduction in the Duke Companies ROE in its PJM formula rate, and shall not support a reduction in the Duke Companies ROE in a proceeding initiated by others in which the reduction would become effective prior to January 1, 2016.

13. Section 3.10 stipulates that the Duke Companies will withdraw their May 24, 2012 request for rehearing of the Commission's April 24 Order within twenty days of Commission's acceptance of the Settlement.

14. Article IV addresses a series of miscellaneous provisions, including, but not limited to, the scope of the agreement, the effective date of the Settlement, the absence of precedential effect, and waiver. This article also addresses the standard of review for any modifications to the Settlement and provides that modifications sought by parties to the Settlement shall be governed by the *Mobile-Sierra* doctrine's "public interest" application of the just and reasonable standard,¹³ while modifications proposed by the Commission acting *sua sponte* or by a non-settling party shall be subject to the lower "just and reasonable" standard. The settling parties ask the Commission to approve the Settlement without condition or modification.

¹² See Transmission Owners Agreement, Article V, Section 2, Effect Of Withdrawal By An Owner On Contractual Obligations, subsection B, Existing Obligations.
<https://www.misoenergy.org/Library/Repository/Tariff/Rate%20Schedules/Rate%20Schedule%2001%20-%20Transmission%20Owners%20Agreement.pdf>

¹³ See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Washington*, 554 U.S. 527, 545 (2008).

III. Comments

15. The Commission's Trial Staff filed initial comments. Trial Staff takes no position on the substantive provisions of the Settlement. Trial Staff states that its primary purpose in this proceeding is to ensure that all relevant and affected parties have been provided adequate notice of and opportunity for participation in the settlement discussions concerning issues which may affect them. Trial Staff notes, however, that the Settlement attempts to resolve the Legacy MTEP and Transition cost issues, which the Commission excluded from this proceeding.

16. No other party filed comments on or in opposition to the Settlement. On March 21, 2013, the Settlement Judge certified the Settlement as uncontested.

IV. Commission Determination

A. Legacy MTEP and Transition Costs

17. As discussed below, we find that the Settlement has not been shown to be fair and reasonable and in the public interest, and we reject the proposed Settlement.

18. As previously noted, the Settlement provides for recovery of Legacy MTEP and Transition costs from AMP and then reimbursing AMP for 75 percent of the Legacy MTEP costs and 100 percent of the transition costs. The Settlement also allows the Duke Companies to recover Legacy MTEP and Transition costs from any non-settling customer without reimbursement.¹⁴ The Duke Companies' position is that the Settlement does not raise issues that were not included in the original filing, and that other customers had notice and opportunity to participate in discussions.

19. First, we find it unclear, as noted by Trial Staff, that all customers were on notice that these issues would be resolved. The hearing established by the Commission was limited to the ROE portion of the Duke Companies' filing. The Commission rejected the recovery of Legacy MTEP and Transition costs,¹⁵ and did not include those issues for hearing.

20. Second, in any event, we reject this portion of the Settlement, because the parties here negotiated special consideration only for the settling parties while submitting tariff provisions that continue to impose the Legacy MTEP and Transition Costs on other parties. While the settling parties will not have to pay the full Legacy MTEP and

¹⁴ See Explanatory Statement at 6-8.

¹⁵ April 24 Order, 139 FERC ¶ 61,068 at P 76.

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.¹⁶ 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.”¹⁷ The Court of Appeals for the District of Columbia Circuit affirmed this determination, 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.”¹⁸ Similarly, the Settlement gives AMP the benefit of being held harmless from the Transition costs and all but 25 percent of the Legacy MTEP costs while imposing these costs on other customers. The Duke Companies have not shown why it is not unduly discriminatory for AMP, but not other customers, to be exempted from paying such costs.

21. Given our earlier finding that recovering Legacy MTEP and Transition costs is not just and reasonable, we cannot find that the Settlement, which proposes recovering a portion of these costs from AMP and all of these costs from non-settling parties, is fair and reasonable and in the public interest. Moreover, the fact that the Settlement provides greater benefits to AMP than the Duke Companies’ other customers is inconsistent with the assumption that AMP’s interests also represent the interests of other customers. Accordingly, we find that the Settlement has not been shown to be fair and reasonable and in the public interest.

22. The Duke Companies contend that the Settlement should be accepted because it contains provisions that are comparable to those in the approved IMPA settlement. We disagree, finding these situations to be distinguishable. The parties entered into the IMPA settlement before the Commission had acted on the Duke Companies’ filing. Therefore, the IMPA settlement affected only the rates paid by IMPA and had no effect on the rates paid by other customers. Indeed, in the same order that approved the IMPA

¹⁶ *High Island Offshore System, L.L.C.*, 110 FERC ¶ 61,043, at P 30 (2005) (*HIOS*).

¹⁷ *Id.* P 33.

¹⁸ *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 697 (D.C. Cir. 2007).

settlement, the Commission rejected inclusion of PJM Transition costs and Legacy MTEP costs in the tariff provisions for other customers. The Commission explained that the recovery of these costs had not been shown to be just and reasonable because the Duke Companies had not sufficiently shown that wholesale transmission customers would realize net benefits from the RTO realignment. Here, the Duke Companies have included tariff provisions for recovery of these costs from other customers. Absent a section 205 filing sufficiently demonstrating a net benefit, the April 24 Order clarified that the Duke Companies shall not recover Legacy MTEP and Transition costs from their wholesale transmission customers.

B. ROE

23. In the April 24 Order, the Commission established hearing and settlement judge procedures to investigate the Duke Companies' ROE. The Settlement reduces the Duke Companies' ROE from 12.38 percent to 10.88 percent plus 50 basis points for RTO membership as applicable to all parties. The Settlement also imposes a moratorium on AMP's ability to initiate any proceeding challenging the Duke Companies' ROE until January 1, 2016 and forbids AMP from supporting any reduction of the ROE with an effective date before January 1, 2016 in any other proceeding. The Settlement includes a non-severability provision. Although the ROE provisions of the proposed Settlement appear fair and reasonable, the non-severability provisions preclude our acceptance. Accordingly, consistent with the April 24 Order, we remand the proceeding for further hearing and settlement judge procedures.¹⁹

The Commission orders:

The proposed Settlement between the Duke Companies and AMP is hereby rejected, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁹ See March 25, 2013 Order of Chief Judge terminating settlement judge procedures that was subject to final action by the Commission.