

122 FERC ¶ 61,039
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Duquesne Light Company

Docket No. ER08-194-000

ORDER ADDRESSING CONDITIONAL
RTO WITHDRAWAL REQUEST

(Issued January 17, 2008)

Table of Contents

	<u>Paragraph</u>
I. Introduction and Summary of Findings	1
II. Background	7
A. Duquesne’s Operational Status and Existing RTO Commitments	7
B. Reasons for Leaving PJM.....	10
C. Discussions with PJM Regarding Withdrawal and Alternative Options	16
D. Discussions with the Midwest ISO	21
E. Requests for Relief	25
III. Notice of Filing and Responsive Pleadings.....	26
IV. Discussion	27
A. Procedural Matters	27
B. Standard of Review	28
C. Whether (and Subject to What Requirements) Duquesne’s Withdrawal Is Permitted Under the Transmission Owners Agreement	31
1. Duquesne’s Position	31
2. Responsive Pleadings	36
3. Duquesne’s Answer	43
4. Additional Answers	46
5. Commission Findings	48
D. Whether (and Subject to What Requirements) Duquesne is Entitled to Withdraw from the Reliability Assurance Agreement.....	55

1. Duquesne's Position	55
2. Responsive Pleadings	63
3. Duquesne's Answer	74
4. Additional Answers	80
5. Commission Findings	81
a. Duquesne's Obligation to Pay for Capacity Acquired On its Behalf	81
b. Determination of Payment Levels	98
E. Whether Duquesne's Withdrawal from PJM is Just, Reasonable and Not Unduly Discriminatory	100
1. Duquesne's Position	101
2. Responsive Pleadings	109
3. Duquesne's Answer	117
4. Additional Answers	125
5. Commission Findings	127
F. Whether Duquesne Should Be Relieved of its Obligations Regarding PJM's January and May 2008 RPM Auctions	135
1. Duquesne's Position	135
2. Responsive Pleadings	136
3. Duquesne's Answer	138
4. Commission Findings	139

I. Introduction and Summary of Findings

1. On November 8, 2007, Duquesne Light Company (Duquesne) submitted for filing, pursuant to section 205 of the Federal Power Act (FPA),¹ a petition requesting that the Commission approve a conditional request to withdraw from PJM Interconnection, L.L.C. (PJM), effective May 31, 2008.² Subject to the conditions identified below, Duquesne requests that the Commission approve its withdrawal as a transmission owner under the PJM Consolidated Transmission Owners Agreement (TO Agreement) and as a load serving entity (LSE) under the Reliability Assurance Agreement Among Load Serving Entities in the PJM Region (RA Agreement).³

2. Duquesne states that it intends to withdraw from PJM if: (i) it is able to join the Midwest Independent Transmission System Operator, Inc. (Midwest ISO); and (ii) the Commission considers and resolves to Duquesne's satisfaction, herein, Duquesne's liability to PJM and its remaining members for costs associated with Duquesne's capacity commitments under PJM's Reliability Pricing Model (RPM).⁴ Duquesne requests a finding that Duquesne's liability for RPM capacity charges is limited to committed RPM supplies delivered by PJM in the applicable delivery year. Specifically, Duquesne requests that it not be held liable for two of the three RPM auctions held to date, covering capacity commitments through 2010. Instead, Duquesne asserts that its RPM liability should be limited to the capacity commitments attributable to PJM's first RPM auction covering deliveries that will end on May 31, 2008 (the date of Duquesne's proposed

¹16 U.S.C. § 824d (2000).

² Duquesne's withdrawal request is also the subject of a declaratory petition filed by Reliant Energy, Inc. (Reliant) before the Pennsylvania Public Utility Commission (Pennsylvania Commission) on November 9, 2007. *See Petition of Reliant Energy, Inc. for a Declaratory Order Regarding the Pennsylvania Public Utility Commission's Jurisdiction Over Duquesne Light Company's Withdrawal from PJM Interconnection, L.L.C.*, Docket No. P00072338 (filed Nov. 9, 2007).

³ Duquesne states that all other PJM agreements and tariffs to which it is subject, including the PJM Operating Agreement and the PJM Open Access Transmission Tariff (PJM OATT), are based on Duquesne's membership in PJM as either a transmission owner or an LSE.

⁴ *See* RA Agreement at article 7 (reserve requirements and obligations); PJM OATT, Attachment DD (RPM procedures). *See also* Duquesne filing at 17, n.34 ("Duquesne reserves the right ... to remain in PJM and not to join the Midwest ISO in the event the Commission's order in this proceeding on the issue of RPM liability is not to its satisfaction or imposes unacceptable conditions.").

withdrawal).⁵ Duquesne also requests that the Commission relieve Duquesne from its obligations to participate in two RPM auctions scheduled to be held prior to Duquesne's proposed withdrawal, i.e., in January and May 2008.

3. Duquesne commits that it will not effectuate its withdrawal from PJM and its transition to the Midwest ISO unless and until two additional conditions are satisfied. First, Duquesne states that its request to withdraw from PJM, on May 31, 2008, is conditioned on the Midwest ISO's implementation of centralized balancing by June 1, 2008.⁶ Duquesne states that if the Midwest ISO has not implemented centralized balancing as of this date, Duquesne reserves the right to delay its withdrawal from PJM. Alternatively, Duquesne states that it may choose to propose, in a future filing, a North American Electric Reliability Corporation (NERC)-approved balancing authority for the Duquesne zone utilizing the services of another (as yet unidentified) Midwest ISO member capable of performing these services.

4. Second, Duquesne states that its request to withdraw from PJM is conditioned on an integration filing to be made by the Midwest ISO, incorporating Duquesne's transmission facilities into the Midwest ISO regional transmission organization (RTO). Duquesne states that upon its integration into the Midwest ISO, the Duquesne zone, as it now exists within the PJM RTO, will become a separate zone within the Midwest ISO. Duquesne states that it is now completing negotiations with the Midwest ISO to finalize the timeline, terms and conditions applicable to this integration.

⁵ On September 13, 2007, Duquesne filed a complaint requesting that the Commission order PJM to exclude the Duquesne zone load from the October 2007 RPM auction (PJM's third RPM auction). The Commission denied Duquesne's request, finding that it was based, in part, on an RTO withdrawal request that had not been made. *See Duquesne Light Co.*, 120 FERC ¶ 61,295, at P 19 (2007).

⁶ Unlike PJM, the Midwest ISO's balancing functions are currently provided by the transmission owners for their own control areas. However, on September 14, 2007, as amended on September 19, 2007, in Docket No. ER07-1372-000, the Midwest ISO submitted a centralized balancing proposal in conjunction with its proposed implementation of day-ahead and real-time energy and ancillary services markets. In its filing, the Midwest ISO states that its June 1, 2008 proposed implementation date is subject to its continuing evaluation regarding the readiness of all equipment, systems, and personnel. On November 19, 2007, the Commission issued an order directing Staff to convene a technical conference to consider the Midwest ISO's proposal, stating that, in a future order following the technical conference, it would address the Midwest ISO's proposal on the merits. *See Midwest Independent Transmission System Operator, Inc.*, 121 FERC ¶ 61,190 (2007). The technical conference was held December 6, 2007.

5. For the reasons discussed below, we find that Duquesne will satisfy the withdrawal requirements of the TO Agreement, subject to conditions. Among other things, Duquesne's withdrawal from the TO Agreement will require our review and approval of Duquesne's proposed replacement arrangements (a submittal not before us here).⁷ We also find that Duquesne has not sufficiently addressed certain of the issues raised by the instant filing, namely the full extent of its remaining transmission function obligations, including the transmission project allocations for which it may be responsible under PJM's regional transmission expansion plan (RTEP) procedures. We require Duquesne to address these obligations in a filing to be made within 45 days of the date of this order.

6. We also find that Duquesne will satisfy the withdrawal requirements of the RA Agreement, subject to its completion of its RA Agreement obligations. We find that these obligations include, among other things, Duquesne's payment of RPM charges attributable to all RPM auctions in which its load forecasts are included, including PJM's forthcoming January 2008 auction. We also grant Duquesne's request to withdraw from the May 2008 auction, provided that it file with PJM and the Commission, by February 1, 2008, a written notice confirming its commitment to withdraw from PJM prior to the delivery year applicable to the May 2008 auction. Finally, we clarify that Duquesne's withdrawal from PJM will have the effect of removing the Duquesne zone in its entirety from PJM, such that all other LSEs in the Duquesne zone will also be removed from the May 2008 auction should Duquesne elect to withdraw.

II. Background

A. Duquesne's Operational Status and Existing RTO Commitments

7. Duquesne states that since 2000, following Pennsylvania's implementation of retail restructuring,⁸ it has been a "wires only" company engaged in the purchase, transmission and distribution of electric energy within the vicinity of Pittsburgh, Pennsylvania. Duquesne states that currently, retail customers within its service area are allowed to take service from third party competitive suppliers, or if they choose, or are unable to take service from another supplier, can rely on Duquesne as the provider of last

⁷ See TO Agreement at section 3.2(ii).

⁸ 66 PaC.S. § 2801, *et seq.*

resort (POLR).⁹ Duquesne states that under this competitive environment, it currently serves approximately 41 percent of all retail load in its service area.¹⁰

8. Duquesne states that the generation assets located within its service area are owned by three entities, namely, FirstEnergy Service Company (First Energy), AES Corporation (AES), and Reliant. Reliant's predecessor in interest, Orion Power Midwest, Inc., is the entity to whom Duquesne sold its generation assets in 1998.

9. Duquesne states that on January 1, 2005, it integrated its transmission facilities into PJM.¹¹ Duquesne states that these facilities, which currently comprise the Duquesne zone along the border of PJM and the Midwest ISO, represent a *de minimis* share of the PJM transmission system (approximately 2 percent in terms of total PJM load and 2.64 percent of the PJM RTO's total transmission revenue requirement).¹² Duquesne states that it is a party to the TO Agreement, as a transmission owner, and the RA Agreement, as an LSE.

⁹ See *Pennsylvania Pub. Util. Commission v. Duquesne Light Co.; Petition for Approval of Plan for Post-Transition Period POLR Service*, Docket No. R-00974104 (PaPuc Nov. 29, 2000).

¹⁰ On April 27, 2007, Duquesne entered into, and filed with the Pennsylvania Public Utility Commission (Pennsylvania Commission), an agreement addressing its POLR obligations from 2008 through 2010. The agreement: (i) permits Duquesne to contract with its power marketer affiliate, Duquesne Power LLC (Duquesne Power) to supply the electric energy needed by Duquesne to provide POLR service; and (ii) provides for fixed-price generation service for residential customers as well as small commercial and industrial customers. Duquesne states that these prices are set based on the results of the January 2006 simulation of the RPM reported by PJM. In response to a question about what it would do if the actual RPM capacity prices turned out to be higher than the assumed prices, Duquesne also stated that it has a fixed price agreement with Duquesne Power; therefore, it would not make any changes to the proposed retail rates, and Duquesne Power "assumes the risks associated with the actual price for capacity resulting from the RPM auctions." (See *Duquesne Light Co., Default Service Plan, PAPUC Docket No. P-00072247, Direct Energy Interrogatories Set I*).

¹¹ See *PJM Interconnection, L.L.C. and Duquesne Light Co.*, 109 FERC ¶ 61,299 (2004).

¹² These facilities consist of 69 kV, 138 kV and 345 kV transmission lines. Duquesne's peak load is approximately 2,837 MW.

B. Reasons for Leaving PJM

10. Duquesne states that its request to withdraw from PJM is based, principally, on the adverse cost impact attributable to PJM's implementation of its new RPM procedures, as approved by the Commission, subject to conditions, in an order on settlement issued December 22, 2006.¹³ The RPM Settlement addressed the finding made by the Commission in an earlier order that PJM's then-existing capacity obligation rules were unjust and unreasonable and must be revised because they failed to address PJM's needs for resource adequacy and reliability.¹⁴ Under the revised tariff provisions implemented pursuant to the RPM Settlement, LSEs are required to contract with suppliers three years in advance of each delivery year with prices set through an auction market. In the auction, capacity sellers submit bids for their existing and planned capacity resources. PJM then uses these bids to derive a supply curve.¹⁵

11. To date, PJM has conducted three RPM auctions: (i) in April 2007 (for the June 2007 through May 2008 delivery year); in July 2007 (for the June 2008 through May 2009 delivery year); and October 2007 (for the June 2009 through May 2010 delivery year). In addition, there will be two auctions held prior to Duquesne's requested withdrawal date: one commencing January 2008 (for the June 2010 through May 2011 delivery year) and the other in May 2008 (for the June 2011 through May 2012 delivery year).

12. Duquesne states that in its filing herein, it is not challenging the Commission's findings in the *RPM Settlement Order*, nor do its requests herein require the Commission to reject or otherwise revise PJM's new capacity procurement rules. Nonetheless, Duquesne asserts that the effects of these rules, on Duquesne, has been disastrous. Specifically, Duquesne states that while its existing retail rates are lower today than they were fifteen years ago and will continue to be lower through 2010 (because of the retail

¹³ See *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006) (*RPM Settlement Order*), *order on reh'g and clarification*, 119 FERC ¶ 61,318, *order on reh'g*, 121 FERC ¶ 61,173 (2007). In Appendix B of the *RPM Settlement Order*, Duquesne is identified as a non-opposing party.

¹⁴ See *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079, at P 29 (2006) (*Initial RPM Order*).

¹⁵ PJM identifies the market clearing price at the intersection of the supply curve and the variable resource requirement (VRR) curve. The VRR curve is based on a number of variables including a measure of capacity demand in the PJM region. See PJM OATT at Attachment DD, section 5.10(a).

rate freeze approved by the Pennsylvania Commission, as noted above), RPM prices threaten to wipe out all of the savings attributable to these multi-year rate plans.

13. For example, Duquesne states that the implementation of RPM has increased capacity costs for Duquesne from approximately \$1 to \$5/MW/day to over \$100 MW/day, an increase which equates to a net annual capacity spike of approximately \$100 million. Duquesne notes that PJM's first RPM capacity auction (for delivery year 2007-08) produced a clearing price of \$40.80/MW/day – an eight fold increase. The second RPM auction (for delivery year 2008-09) resulted in prices of \$111.92/MW/day – almost triple the first auction price and more than 2000 percent above Duquesne's pre-RPM capacity costs. The third auction resulted in similar pricing of \$102.04/MW/day.

14. Duquesne adds that its RPM charges for the portion of the current RPM delivery year (from January 1, 2007 through May 31, 2007) are approximately \$12.7 million. Charges for the next delivery year (2008-09) are approximately \$83.1 million, while charges for the following delivery year (2009-10) are \$72.5 million. Duquesne states that these costs significantly exceed PJM's simulated projections (as made in December 2006), which produced results of \$16.14 per MW/day for the 2007-08 delivery year, \$12.62 per MW/day for the 2008-09 delivery year, and \$8.31 per MW/day for the 2009-10 delivery year.

15. In addition to its high RPM costs, Duquesne cites two additional bases supporting its determination to withdraw from PJM. First, Duquesne asserts that the Midwest ISO's governance model is more receptive to independent comments and criticisms. Second, Duquesne argues that the Midwest ISO's market monitoring procedures are better equipped to ensure a proper operation of its energy markets.¹⁶

C. Discussions with PJM Regarding Withdrawal and Alternative Options

16. Duquesne states that it met with PJM in August 2007 to discuss its concerns regarding its rising RPM cost liability and to explore the possibility of its withdrawal from PJM for the purpose of avoiding the establishment of any further liability. Duquesne states that it also sought guidance from PJM regarding any alternative options it might have to avoid these costs.

17. Duquesne states that it was informed by PJM that the only capacity procurement alternative available to Duquesne would be the development of a Fixed Resource

¹⁶ See Duquesne filing at 12, n.23. Duquesne offers no further elaboration on either assertion.

Requirement (FRR) plan.¹⁷ However, Duquesne states that this option would do nothing to address Duquesne's liability over the initial three RPM delivery years. In addition, Duquesne states that the FRR alternative does not provide a workable solution for the cost issues faced by Duquesne because an alternative of this sort is viable only for an entity that: (i) owns its own generation; and (ii) operates in a service area in which there is no retail choice.

18. Duquesne states that on September 12, 2007, it gave written notice to PJM of its intent to withdraw from PJM and, on September 13, 2007, gave written notice to its fellow transmission owners.¹⁸ In addition, Duquesne states that it has met and discussed its plans with stakeholders in the Duquesne zone, major LSEs in the zone, customer and consumer advocates in Pennsylvania, and both PJM and the Midwest ISO.

19. Duquesne states that on October 15, 2007, PJM responded in writing to Duquesne's withdrawal notice.¹⁹ PJM's letter stated, among other things, that the development of a Fixed Resource Requirement capacity plan to cover delivery year 2010-11 and beyond, as opposed to continued reliance on RPM commitments, could provide the flexibility and long-term price stability Duquesne was seeking. PJM stated, however, that should Duquesne continue to pursue its withdrawal option, its plan (at a minimum) would be required to address: (i) satisfaction of its financial obligations to PJM and its members (including Duquesne's RPM obligations covering all of the auctions for which its load was included); (ii) resolution of certain operational issues;²⁰ and (iii) an ability to

¹⁷ See RA Agreement at Schedule 8.1. The FRR alternative is an alternative method for an LSE to satisfy its capacity procurement obligations, in lieu of having its load profile included in PJM's RPM auctions. It requires the LSE, among other things, to satisfy its unforced capacity obligations for all load in its load zone for a minimum five-year period.

¹⁸ Duquesne's written notice specified a withdrawal date of January 1, 2008 (a date subsequently revised and delayed by five months by Duquesne's filing herein).

¹⁹ See Duquesne filing at Ex. G.

²⁰ PJM identified six operational issues: (i) establishment of a control area (balancing authority) for Duquesne or provision for the merger of its system into an existing one; (ii) delineation between Duquesne and PJM, and possibly others, of new borders and associated tie lines; (iii) resolution of any other border issues; (iv) establishment of flowgates for coordination with the Midwest ISO for the management of transmission and market interfaces; (v) development of a Duquesne OATT and OASIS node and accommodations for any grandfathered agreements; and (vi) assumption by
(continued...)

comply with the resource adequacy requirements imposed by *ReliabilityFirst*, NERC, the Commonwealth of Pennsylvania and, if applicable, the Midwest ISO.²¹

20. PJM further stated that while its tariff does not currently provide for the use of capacity procured through RPM in a context extraneous to the PJM RTO, it was willing to cooperate with Duquesne and any regulatory authorities to enable the RPM capacity procured on Duquesne's behalf to afford an appropriate credit to Duquesne for meeting any resource adequacy requirement to which it might be subject in the future.

D. Discussions with the Midwest ISO

21. Duquesne states that it is now in negotiations with the Midwest ISO to discuss its integration into the Midwest ISO RTO. Duquesne states that it has been informed by the Midwest ISO that Duquesne can be integrated safely and efficiently, the optimum time being the second quarter of 2008. Duquesne characterizes the integration filing that will need to be made by the Midwest ISO as ministerial.²²

22. Duquesne states that the Midwest ISO is a fully functioning Commission-approved RTO that, given its location, offers Duquesne the possibility of a smooth transition. Duquesne states that, operationally, it has discovered no issues that would prevent the move or prevent an orderly transition. Duquesne notes that with its migration, approximately 3000 MW of load will be moving to the Midwest ISO and that an equal amount of capacity resources would also be transferred. Duquesne asserts that, as such, the rest of PJM should not be significantly affected by its withdrawal.

Duquesne from PJM of the responsibility to meet the *ReliabilityFirst* standards for all function and entity definitions and satisfaction of *ReliabilityFirst*/NERC readiness audits.

²¹ PJM stated that it did not foresee significant difficulties in unwinding Duquesne's participation in PJM's FTR/ARR markets, assuming Duquesne's withdrawal occurred at the end of an FTR/ARR planning period and provided that notice was given no later than March 1st of the year applicable to that planning period. PJM noted that the matter would become considerably more complicated were Duquesne to request authorization to withdraw in the middle of a planning period (in which case, the issue of how to handle the outstanding FTR positions for all participants who hold ARR or FTRs that source and/or sink in the Duquesne zone would be necessary).

²² Duquesne notes that it has reviewed the application for transmission owner membership posted on the Midwest ISO website and the relevant provisions of the core documents. Duquesne states that it meets the requirement for "owner" status. Duquesne further states that transmission owner status under the Midwest ISO transmission owners' agreement does not require a vote by any Midwest ISO stakeholder body.

23. Duquesne states that it chose May 31, 2008 as its requested withdrawal date, consistent with the Midwest ISO's recommended timeline and based on other operational and administrative needs. Duquesne notes, for example, that this withdrawal date coincides with the end of the 2007-08 RPM delivery year and other PJM yearly obligations, including the financial transmission rights (FTR) and auction revenue rights (ARR) allocation dates.²³

24. Duquesne states that on June 1, 2008, the Midwest ISO intends to implement revised day-ahead and real-time energy and ancillary services markets.²⁴ Duquesne states that its request to withdraw from PJM is contingent on this occurrence. Duquesne states that if the Midwest ISO has not implemented centralized balancing as of this date, Duquesne reserves the right to delay its withdrawal from PJM. Alternatively, Duquesne states that it may choose to propose, in a future filing, a NERC-approved balancing authority for the Duquesne zone utilizing the services of another (as yet unidentified) Midwest ISO member capable of performing these services.

E. Requests for Relief

25. Duquesne requests that the Commission: (i) approve its conditional withdrawal from PJM as a transmission owner under the TO Agreement;²⁵ (ii) approve its conditional withdrawal as an LSE under the RA Agreement; (iii) address Duquesne's RPM liability by finding that Duquesne is liable for capacity charges for deliveries that occur only while Duquesne is a member of PJM; and (iv) relieve Duquesne from its obligations to participate in the January 2008 and May 2008 auctions.

²³ Duquesne adds that its requested withdrawal date will also benefit retail customers in the Duquesne zone as well as their suppliers because many of the retail contracts to which they are subject are based on a June 1st planning year.

²⁴ See *supra* note 6.

²⁵ See *supra* PP 2-4. As noted above, there are three conditions that attach to Duquesne's intended withdrawal from PJM on the date it is proposing (May 31, 2008). First, the Commission must consider and resolve, to Duquesne's satisfaction, Duquesne's liability for its RPM capacity commitments. Second, Duquesne's withdrawal is conditioned on the Midwest ISO's implementation of centralized balancing by June 1, 2008. And, third, Duquesne's withdrawal is conditioned on an integration filing to be made by Midwest ISO incorporating Duquesne's transmission facilities into the Midwest ISO RTO.

III. Notice of Filing and Responsive Pleadings

26. Notice of Duquesne's filing was published in the *Federal Register*²⁶ with interventions and protests due on or before December 4, 2007. Motions to intervene, comments and protests were timely filed by the entities noted in the Appendix to this order.²⁷ On December 5, 2007, a motion to intervene out-of-time was filed by American Electric Power Service Corporation (AEP). On December 19, 2007, Duquesne filed an answer to protests. On January 3, answers to Duquesne's answer were filed by Reliant and FirstEnergy.

IV. Discussion

A. Procedural Matters

27. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,²⁸ the timely, unopposed motions to intervene submitted by the entities listed in the Appendix to this order serve to make them parties to this proceeding. In addition, given its interests, the early stage of this proceeding, and the absence of undue prejudice or delay, we will grant the unopposed late-filed interventions submitted by AEP. Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2007), prohibits an answer to a protest or an answer to an answer unless otherwise permitted by the decisional authority. We will accept the answers submitted by Duquesne, Reliant and FirstEnergy because they have provided information that assisted us in our decision-making process.

B. Standard of Review

28. The parties to this proceeding do not dispute the standard of review applicable to an RTO withdrawal request, as set forth by the Commission in *Louisville Gas & Electric Co.*²⁹ In the *LG&E Withdrawal Order*, the Commission found that three requirements

²⁶ 72 Fed. Reg. 65,320 (2007).

²⁷ All abbreviations used to identify Intervenors throughout this order are identified in the Appendix.

²⁸ 18 C.F.R. § 385.214 (2007).

²⁹ *LG&E Withdrawal Order*, 114 FERC ¶ 61,282 at P 12, *order on reh'g*, 116 FERC ¶ 61,020 (2006). *See* Duquesne filing at 15 (noting that in the *LG&E Withdrawal Order*, the Commission set forth three general requirements that withdrawing entities must meet in order for the Commission to approve their withdrawal). *See also*

(continued...)

must be met in order for a RTO withdrawal request to be approved (in addition to any applicable merger conditions). First, the withdrawal proposal must satisfy the terms of the applicant's contractual obligations as they relate to RTO withdrawal. Second, applicant's proposed replacement arrangements must comply with Order No. 888³⁰ (and now Order No. 890³¹) and the standard of review under those orders for proposed tariff provisions that differ from the *pro forma* OATT, i.e., proposed deviations must be shown to be "consistent with or superior to" the *pro forma* OATT. Third, the applicant's replacement arrangements must be just, reasonable and not unduly discriminatory.

29. Duquesne's filing does not include its proposed replacement arrangements, e.g., the integration filing that it states will be made by the Midwest ISO prior to Duquesne's planned May 31, 2008 withdrawal date from PJM. As such, our review of Duquesne's filing is based chiefly on the first consideration identified in the *LG&E Withdrawal Order* (i.e., on Duquesne's contractual rights and obligations under the TO Agreement). We clarify, however, that Duquesne's requested approvals as they relate to these asserted contractual entitlements, were submitted by Duquesne under FPA section 205. As such, these approvals are also subject to review under our just and reasonable standard. This point is beyond dispute here, moreover, given the express requirement under the TO Agreement, at section 3.2(iii), requiring a section 205 filing as a condition of withdrawal.³²

30. We acknowledge that there are a number of steps involved in proceeding with an orderly withdrawal from an RTO and accept that Duquesne must stage its activities to

PJM protest at 1-2; Reliant protest 19-20; AMP-Ohio protest at 7, n.3; FirstEnergy protest at 10-11; Constellation protest at 5; PSEG protest at 8; and RESA protest at 5.

³⁰ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and rev'd in part sub nom., Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom., New York v. FERC*, 535 U.S. 1 (2002).

³¹ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (March 15, 2007), FERC Stats & Regs., ¶ 31,241 (2007).

³² This same requirement is included as a condition of withdrawal from the RA Agreement (at section 5.1.4).

ensure that it makes decisions consistent with the interests of its ratepayers and shareholders. As a result, today we make a number of preliminary findings, subject to further filings and proceedings. A number of the issues raised by the intervenors therefore are not resolved in this order, but are reserved for resolution in future orders when sufficient information is presented and a firm departure date is established. In that respect, we note that Duquesne states that Commission resolution of its RPM obligation arguments must occur before it will withdraw from PJM. We provide in this order necessary guidance for Duquesne to decide its future plans.

C. Whether (and Subject to What Requirements) Duquesne's Withdrawal Is Permitted Under the TO Agreement

1. Duquesne's Position

31. Duquesne states that it is entitled to withdraw from PJM, as a transmission owner, pursuant to the terms of the TO Agreement. Specifically, Duquesne asserts that its withdrawal is governed by article III of the TO Agreement, which addresses, at section 3.2, "Withdrawal from this Agreement,"³³ and, at section 3.4, "Obligations after Withdrawal."³⁴

³³ Section 3.2 provides in relevant part:

Any [TO Agreement] Party may withdraw from this Agreement upon ninety (90) days advance written notice to PJM and the other [TOA] Parties; provided that such withdrawal shall not be effective until the withdrawing Party has: (i) if its Transmission Facilities do not comprise an entire Control Area, satisfied all applicable standards of NERC and the Applicable Regional Reliability Council for operating a Control Area or being included within an existing Control Area; (ii) put in place alternative arrangements for satisfaction of the FERC's requirements with respect to comparable transmission services; and (iii) made a filing with the FERC under [FPA] section 205 ... to withdraw from this Agreement and such filing has been approved, accepted without suspension, or if suspended, the suspension period has expired before the FERC has issued an order on the merits of the filing.

³⁴ Section 3.4 provides in relevant part:

Any [TO Agreement] Party that withdraws from, transfers, or assigns this Agreement in accordance with Sections 3.2 and 3.3 hereof, shall remain liable for any and all obligations under this Agreement that such Party incurred, that were incurred on behalf of such Party, or that arose hereunder

(continued...)

32. With respect to section 3.2, Duquesne states that 90 days advance written notice of its intent to withdraw is required to be provided to PJM and to the other parties to the TO Agreement. Duquesne states that it has complied with this requirement.³⁵

33. Duquesne states that section 3.2 also specifies, at subsection (ii), that a withdrawal request shall not become effective until the withdrawing party has “put in place alternative arrangements for satisfaction of the [Commission’s] requirements with respect to comparable transmission services.” Duquesne asserts that it will satisfy this requirement because its withdrawal request is directly tied to Duquesne’s decision to join the Midwest ISO as a transmission owner. Duquesne states that it intends to join the Midwest ISO on June 1, 2008, subject to the following conditions: (i) Commission approval of the Midwest ISO tariff sheets incorporating Duquesne into the Midwest ISO; (ii) the Midwest ISO’s implementation of centralized balancing as of that date; and (iii) the Commission’s favorable ruling, herein, regarding Duquesne’s asserted rights regarding its RPM obligations.

34. Duquesne states that its withdrawal application is also subject, at section 3.2(iii) of the TO Agreement, to a section 205 filing. Duquesne states that to satisfy this requirement, its filing must be approved by the Commission, accepted without suspension, or if suspended, have a suspension period that has expired before the Commission has issued an order on the merits of the filing. Duquesne states that its filing is an essential and contemplated part of this contractual requirement. In addition, Duquesne acknowledges that under FPA section 205, all filings seeking Commission approval must be just, reasonable and not unduly discriminatory. Duquesne states that its proposed withdrawal from PJM meets these qualifications.³⁶

35. Finally, with respect to section 3.4 of the TO Agreement, Duquesne states it is liable for all obligations it has incurred prior to the effective date of its withdrawal. Duquesne states that it is committed to meeting its obligations under section 3.4.³⁷

prior to the date upon which such Party’s withdrawal, transfer, or assignment became effective.

³⁵ Duquesne’s September 12, 2007 notice to PJM (and September 13, 2007 notice to PJM’s transmission owners) specified a withdrawal date of January 1, 2008, a date subsequently revised by Duquesne in the instant filing.

³⁶ Duquesne’s assertions are discussed, below, in section IV.E.

³⁷ Duquesne notes that, up to its date of withdrawal, PJM will assess administrative charges on Duquesne pursuant to Schedule 9 of the PJM OATT based on actual deliveries to Duquesne. Duquesne states that retail load reconciliations will also be necessary. In addition, Duquesne states that PJM will return collateral to Duquesne

(continued...)

Duquesne commits to satisfy these obligations at the levels ultimately established, either by mutual agreement or otherwise.

2. Responsive Pleadings

36. Intervenors argue that Duquesne's asserted compliance with the withdrawal requirements of the TO Agreement is deficient.³⁸ EPSA argues that the Commission should require Duquesne to submit a revised proposal with additional details. Reliant argues that Duquesne's filing is, in effect, a request for a declaratory order. AMP-Ohio agrees, stating that Duquesne has left itself far too many "outs" and "exit ramps" for the Commission to treat its filing as ready for adjudication.³⁹

37. FirstEnergy argues that Duquesne's filing fails to address its obligations under section 3.2(i) of the TO Agreement, i.e., the requirement that Duquesne, as a condition of its withdrawal, establish or be included in a NERC-recognized control area. FirstEnergy asserts that this requirement cannot be met simply by reference to the Midwest ISO's pending application in Docket No. ER07-1372-000.⁴⁰ FirstEnergy argues that the Midwest ISO's proposed implementation date for these revisions could be delayed. FirstEnergy further argues that if Duquesne is required to make an alternative arrangement with the Midwest ISO and function as its own balancing authority, there is no evidence presented by Duquesne in its filing that it would be able to do so. Finally, FirstEnergy argues that Duquesne's statement that it may decide to delay its withdrawal if it cannot make the necessary balancing authority arrangements, nullifies Duquesne's notice of withdrawal because the notice of intent, in this instance, cannot be relied upon. FirstEnergy argues that market participants require and deserve greater certainty.

38. With respect to Duquesne's obligations under section 3.2(ii) of the TO Agreement, intervenors argue that Duquesne's filing fails to include its proposed replacement arrangements. FirstEnergy notes that Duquesne has not executed the Midwest ISO transmission owners' agreement. Constellation argues that Duquesne fails to address interconnection procedures, reservation of firm transmission service, calculations

associated with its participation in the TO Agreement and RA Agreement (discussed below).

³⁸ See, e.g., Exelon comments at 15 (urging the Commission to reject the filing without prejudice); see also Reliant protest at 20; RESA protest at 6.

³⁹ See also EPSA protest at 7 ("The missing elements of Duquesne's filing are not minor and cannot be thrown under the rug.").

⁴⁰ See *supra* note 6.

regarding available transmission service, construction of new facilities, ancillary services, and other operational and functional issues that may differ between the RTO Duquesne seeks to leave and the RTO it seeks to join. Exelon argues that Duquesne treats its section 3.2(ii) obligations as if they relate solely to Duquesne's replacement service on the Midwest ISO, while ignoring the necessary transition plan applicable to PJM's remaining members.

39. Allegheny seeks clarification regarding the AES Beaver Valley generation station in Monaca, Pennsylvania (AES Beaver Valley), a 125 MW plant in the Duquesne zone in which Allegheny's affiliated entity, the West Penn Power Company (West Penn), has a contract to purchase electricity and capacity.⁴¹ Allegheny seeks clarification that neither AES Beaver Valley nor West Penn, as the purchaser of electricity and capacity from AES Beaver Valley, will be adversely affected by Duquesne's withdrawal. Specifically, Allegheny seeks clarification that in light of AES Beaver Valley's continued firm transmission service to West Penn and the guarantee of deliverability given to AES Beaver Valley at the time of Duquesne's integration in PJM: (i) AES Beaver Valley's output will be considered fully deliverable to PJM after Duquesne's withdrawal (without any further studies or actions by any party); (ii) AES Beaver Valley meets the deliverability requirements set forth in Schedule 10 of the RA Agreement; and (iii) Duquesne's withdrawal will not affect West Penn's rights to obtain FTRs and ARRs.

40. With respect to Duquesne's obligations under section 3.2(iii) of the TO Agreement, intervenors dispute Duquesne's assertion that its withdrawal from PJM is just and reasonable.⁴²

41. With respect to Duquesne's obligations under section 3.4 of the TO Agreement, intervenors argue that Duquesne's filing is silent regarding transmission function obligations incurred by Duquesne, incurred on its behalf, or that arose (or will arise) prior to its planned withdrawal. PJM notes Duquesne's failure to address the status of four transmission projects for which it has responsibility that are not scheduled for completion

⁴¹ Allegheny notes that AES Beaver Valley was considered a PJM generation resource even prior to Duquesne's decision to join PJM because it had firm transmission service to West Penn. Allegheny states that upon Duquesne's integration into PJM, AES Beaver Valley retained its firm transmission service and was guaranteed that its output would be considered fully deliverable in PJM.

⁴² See section IV.E below.

until after May 31, 2008.⁴³ PSEG argues that, among other things, Duquesne has been assigned cost responsibility for reliability upgrades of 500 kV and above, as approved under PJM's RTEP.⁴⁴

42. PSEG argues that this cost responsibility should continue even beyond Duquesne's withdrawal because otherwise, the existing cost allocations will need to be reset.⁴⁵ Reliant asserts that Duquesne's proposed June 1, 2008 integration raises unanswered questions relating to ARR and FTRs for LSEs in the Duquesne zone. Reliant notes that PJM will make ARR allocations February 2008 and hold its FTR auction in April 2008. Exelon argues that Duquesne should also be held liable, under section 3.4, for its portion of PJM's new control center. Exelon point outs that these costs are an existing obligation incurred prior to Duquesne's notice of withdrawal.⁴⁶

3. Duquesne's Answer

43. In response to intervenors' assertions that Duquesne's filing is deficient, Duquesne argues that while its filing does not include its proposed replacement arrangements, it is actively working with the Midwest ISO to assure an efficient and reliable transition.

⁴³ According to filed documentation submitted by PJM, Duquesne is responsible for all costs attributable to eight upgrades, each of which has a projected in-service date of June 1, 2009. These projects include conversion of existing substations from 69 kV to 138 kV, reconductoring, and the replacement of a transformer. *See PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,033 (2007) (order on cost allocation report, establishing hearing procedures, and holding proceedings in abeyance)..

⁴⁴ Duquesne is allocated 2.08 percent of these costs.

⁴⁵ Exelon adds that these costs represent existing obligations, even if the withdrawing transmission owner will no longer receive the benefits of the transmission. *See Exelon protest at 14, citing Midwest Independent System Transmission Operator, Inc.*, 120 FERC ¶ 61,080, at P 83 and P 85 (2007).

⁴⁶ Exelon argues that this liability is analogous to the requirement imposed by the Commission in *Illinois Power Co.*, 95 FERC ¶ 61,183 (*Illinois Power*), *reh'g denied*, 96 FERC ¶ 61,026 (2001). Exelon notes that in *Illinois Power*, the Commission required Commonwealth Edison and other Midwest ISO transmission-owning members to pay for equipment that the Midwest ISO had committed to build but had not yet placed into service prior to the withdrawal of these companies from the Midwest ISO. *Id.* P 6.

Duquesne adds that, given the pending nature of the Midwest ISO's proposals in Docket No. ER07-1372-000,⁴⁷ a final transition plan is not possible at this time.

44. Duquesne also responds to intervenors' arguments regarding Duquesne's liability for transmission additions identified through the PJM RTEP process, where the charges at issue will not become payable until after Duquesne's withdrawal. Duquesne argues that these costs are allocated to all load under the PJM OATT and that if it is not a customer at the time that these costs become payable, it cannot be held liable. Duquesne adds that the small share of these costs for which it is currently liable will simply be reallocated among PJM's remaining members. Duquesne adds that given the Commission's finding, in *Opinion No. 494*, that there is no direct relationship between any actual project benefits and the postage stamp cost allocation applicable to these projects, there could be no basis for allocating any remaining costs to Duquesne after it leaves PJM.

45. Finally, Duquesne also addresses PJM's question as to whether Duquesne will be required to complete the Duquesne zone transmission enhancements identified in PJM's RTEP. Duquesne commits to complete all reliability-based transmission enhancement projects identified to date.⁴⁸

4. Additional Answers

46. FirstEnergy responds to Duquesne's argument that PJM's RTEP costs are analogous to its RPM costs, i.e., that these costs cannot be recovered from the Duquesne zone once Duquesne departs. FirstEnergy argues that under Duquesne's proposal, third parties would be required to bear the costs of facilities that would otherwise be allocated to Duquesne. FirstEnergy argues that such a result would not only be unfair but also inconsistent with Duquesne's obligations under PJM's operating agreements.⁴⁹

⁴⁷ See *supra* note 6.

⁴⁸ Duquesne notes that none of the costs attributable to these projects will be allocated to entities outside the Duquesne zone.

⁴⁹ Specifically, FirstEnergy relies on schedule 6, section 1.4 of the PJM Operating Agreement, which provides that the PJM RTEP will reflect "transmission enhancements and expansions; load forecasts; expected demand response; and capacity forecasts, including generation additions and retirements, for at least the ensuing ten years." In addition, FirstEnergy notes that under schedule 6, section 1.5.6(g), RTEP allocations are based on PJM's "assessment of the contributions to the need for, and benefits expected to be derived from, the pertinent enhancement or expansion by affected Market Participants."

FirstEnergy argues that under this authority, PJM has factored Duquesne's load into its RTEP allocations and that it has made these allocations based upon a determination that Duquesne contributed to the need for and will benefit from these RTEP projects. FirstEnergy adds that these obligations have been incurred and that, as such, Duquesne's withdrawal from PJM will not change any of the factors that led to the need for these RTEP projects.

47. FirstEnergy also argues that settlement judge procedures are appropriate to address the many unresolved issues raised by Duquesne's filing.

5. Commission Findings

48. We find that Duquesne has satisfied the withdrawal requirements of the TO Agreement, subject to the conditions provided below. First, we find that Duquesne has satisfied the written notice requirement applicable to its withdrawal request. While FirstEnergy suggests that Duquesne's notice is a nullity because Duquesne's intent to withdraw is conditional, section 3.2 of the TO Agreement requires only that the transmission owner provide written notification that it will withdraw upon the Commission's acceptance of the conditions of its section 205 filing.

49. We also find, subject to conditions, that Duquesne will satisfy the requirements of section 3.2(i) of the TO Agreement regarding the reliability standards applicable to its transmission facilities. Duquesne states that it intends to rely on the centralized balancing provisions proposed by the Midwest ISO in Docket No. ER07-1372-000. In that filing, the Midwest ISO proposes to implement its new balancing arrangements effective June 1, 2008. If these provisions are accepted and become effective as of that date, we agree with Duquesne that the requirements of section 3.2 will be satisfied. Duquesne also states that even without the acceptance of the Midwest ISO proposal, it would propose to designate, in a separate filing, a NERC-approved balancing authority for the Duquesne zone.

50. FirstEnergy, in its protest, argues that the Midwest ISO's proposed balancing arrangements could be delayed with no evidence presented in this case that Duquesne would be able to make alternative arrangements. We agree that, in the event implementation of the Midwest ISO's proposed central balancing authority is delayed, Duquesne must provide assurance that an alternative balancing arrangement will be in place. We accept Duquesne's commitment that, in the event of such a delay, it will postpone its withdrawal from PJM accordingly and assume the associated liability to PJM for the additional costs incurred, or have in place an alternative arrangement (e.g., the utilization of the services of other Midwest ISO members that can undertake balancing authority functions on Duquesne's behalf). We will require that such an arrangement satisfactory to the Commission be in place as a condition for withdrawal.

51. We also find, subject to conditions, that Duquesne will satisfy the requirements of section 3.2(ii) of the TO Agreement regarding the submission of replacement arrangements capable of satisfying the Commission's requirements regarding comparable transmission services. We agree that Duquesne's integration into the Midwest ISO, if approved by the Commission, will satisfy this requirement. While intervenors raise a number of possible concerns which either could arise or have not been answered, to date, we agree with Duquesne that the Midwest ISO integration filing provides a suitable forum in which to consider these issues. We clarify, however, that this integration will be required to address, among other things, grandfathered arrangements of the sort raised by Allegheny regarding its AES Beaver Valley plant.

52. Section 3.4 of the TO Agreement provides that Duquesne, upon its withdrawal, will remain liable "for any and all obligations under this Agreement that [it] has incurred, that were incurred on [its] behalf ... or that arose hereunder prior to the date upon which [Duquesne's] withdrawal ... became effective." Intervenors assert that this liability extends to RTEP-approved allocations that may not become due until after Duquesne's departure from PJM. However, this issue has not been extensively briefed by the parties. In *Midwest Independent Transmission System Operator, Inc.*,⁵⁰ the Commission addressed similar language in the Midwest ISO transmission owner's agreement and found that the withdrawing party must remain liable for all costs allocated to it prior to its withdrawal. However, because the record on this issue remains largely undeveloped, we require Duquesne to submit a filing within 45 days of the date of this order addressing this issue and include in its filing an identification of all RTEP related costs that have been allocated to it by PJM.

53. Duquesne states that it has discussed with PJM the level and composition of all remaining obligations and that there is no dispute with PJM regarding these matters. However, PJM and other intervenors disagree. Specifically, PJM argues that Duquesne has not provided information about how it intends to resolve its TO Agreement obligations in detail reasonably sufficient to support its proposed termination date. Exelon points out that Duquesne fails to address its liability for PJM's new control center.

54. We agree with intervenors that Duquesne has failed to fully itemize and discuss the full extent of its transmission-function obligations. Accordingly, we direct Duquesne

⁵⁰ See *Midwest Independent Transmission System Operator, Inc.*, 120 FERC ¶ 61,080 at PP 83-84 (2007) (noting that under the Midwest ISO transmission owners agreement "[a]ll financial obligations incurred and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by the Midwest ISO and the withdrawing Owner.").

to address in its filing a full and complete accounting of the “obligations” for which it believes it is liable, including but not limited to all administrative charges assessable pursuant to Schedule 9 of the PJM OATT, retail load reconciliations, and credits and/or refunds applicable to Duquesne’s collateral payments. If Duquesne believes it is not liable for particular charges, it should provide an explanation in support of its position. We will notice that filing for comment, and will resolve any disputes relating to it thereafter.

D. Whether (and Subject to What Requirements) Duquesne is Entitled to Withdraw from the RA Agreement

1. Duquesne’s Position

55. Duquesne states that its entitlement to withdraw from PJM as an LSE is governed, in part, by article V of the RA Agreement, which addresses, at section 5.1, “Withdrawal of a Party,”⁵¹ and at section 5.1.2, “Determination of Obligations.”⁵² Duquesne states that it has satisfied, or will satisfy, each of these requirements prior to its requested withdrawal date.

56. Duquesne also states that the RA Agreement is the agreement by which PJM now implements its RPM requirements and procedures (as supplemented by the applicable provisions of the PJM OATT). As a declaratory matter, therefore, Duquesne requests that the Commission consider the relevant provisions of the RA Agreement as they relate to the issue of Duquesne’s liability to PJM for RPM capacity charges that will not arise until after Duquesne has withdrawn from PJM. Specifically, Duquesne requests that the Commission issue an order finding that Duquesne’s liability to PJM for RPM capacity is limited to RPM capacity delivered before its withdrawal. Duquesne requests a ruling that it is not liable for RPM capacity deliverable after its withdrawal.

57. Duquesne relies on an analysis of the RA Agreement and Attachment DD of the PJM OATT regarding the calculation of the quantity term used to derive the Locational Reliability Charge payable by an LSE in a given delivery year. According to Duquesne, because one of the three components used to calculate the quantity term, i.e., the

⁵¹ Section 5.1.1 states that “[u]pon written notice to the Office of Interconnection, any Party may withdraw from this Agreement, effective upon the completion of its obligations hereunder and the documentation by such Party, to the satisfaction of the Office of the Interconnection, that such Party is no longer [an LSE].”

⁵² Section 5.1.2 states, in relevant part, that “[a] Party’s obligations hereunder shall be completed as of the end of the last month for which such Party’s obligations have been set at the time said notice is received”

Obligation Peak Load, would be zero in the case of an LSE that serves no load, Duquesne's RPM obligation would also be zero if it has withdrawn from PJM as of that date.

58. By way of explanation, Duquesne states that a Local Reliability Charge is the product of two factors: a price term (referred to as the Final Zonal Capacity Price) and a quantity term (referred to as the Daily Unforced Capacity Obligation).⁵³ Duquesne states that the Final Zonal Capacity Price is the market clearing price for capacity in the RTO as a whole, plus any applicable locational price adder and adjustment, if necessary, to account for make-whole payments to capacity sellers.⁵⁴ Duquesne adds that an LSE's Daily Unforced Capacity Obligation is defined as the product of: (i) the Forecast Pool Requirement;⁵⁵ (ii) the Final Zonal RPM Scaling Factor;⁵⁶ and (iii) its Obligation Peak Load. Duquesne states that this final factor, the Obligation Peak Load (the definition on which it chiefly relies), is defined in relevant part at Schedule 8.A of the RA Agreement as follows:

59. Daily Unforced Capacity Obligation = [Obligation Peak Load (OPL)] x Final Zonal RPM Scaling Factor x [the Forecast Pool Requirement] where OPL [is] defined as

⁵³ See RA Agreement at section 7.2:

Except to the extent its capacity obligations are satisfied through the FRR Alternative, each Party shall pay, as to the loads it serves in each Zone during a Delivery Year, a Locational Reliability Charge for each such Zone during such Delivery Year. The Locational Reliability Charge shall equal such Party's Daily Unforced Capacity Obligation in a Zone, as determined pursuant to Schedule 8 of this Agreement, times the Final Zonal Capacity Price for such Zone, as determined pursuant to Attachment DD of the PJM [OATT].

See also PJM OATT, Attachment DD at section 5.14(e): "In accordance with the [RA Agreement], each LSE shall incur a Locational Reliability Charge (subject to certain offsets as described in section 5.13 and 5.15) equal to such LSE's Daily Unforced Capacity Obligation in a Zone during such Delivery Year multiplied by the applicable Final Zonal Capacity Price in such Zone."

⁵⁴ See PJM OATT, Attachment DD as section 5.14(f) (determination of Zonal Capacity Prices).

⁵⁵ See RA Agreement at Schedule 4.1.

⁵⁶ *Id.* at Schedule 8.B.

the daily summation of the weather-adjusted coincident summer peak, last preceding the Delivery Year, of the end-users in such Zone (net of operating Behind the Meter Generation, but not to be less than zero) for which such Party was responsible on that billing day, as determined in accordance with the procedures set forth in the PJM Manuals.

60. Duquesne argues that based on this definition, if an LSE is not responsible for any end-users in a PJM zone on a given delivery day, its Obligation Peak Load is zero. Duquesne concludes that likewise, if an LSE's Obligation Peak Load is zero, the Daily Unforced Capacity Obligation would also be zero and that, as such, the Locational Reliability Charge would also be zero. Duquesne asserts that the application of this formula leads to the unavoidable conclusion that an LSE incurs the obligation to pay an RPM charge only to the extent it serves load within a PJM zone during the delivery year.

61. Duquesne argues that this conclusion is repeated clearly in another section of the RA Agreement governing the responsibility to pay Locational Reliability Charges. Duquesne notes that under this provision, at section 7.2, “[e]xcept to the extent its capacity obligations are satisfied through the FRR Alternative, each Party shall pay, as to the loads it serves in each Zone during a Delivery Year, a Locational Reliability Charge for each such Zone during such Delivery Year.”⁵⁷

62. Duquesne also argues that a contrary view would be inconsistent with the RA Agreement's withdrawal rights, as set forth at section 5.1.2, which provide that “a Party's obligations hereunder shall be completed as of the end of the last month for which such Party's obligations have been set at the time said notice [of withdrawal] is received....” Duquesne argues that, by contrast, the multi-year, forward commitment envisioned under PJM's RPM interpretation renders meaningless the TO Agreement's 90-day withdrawal notice provision.

2. Responsive Pleadings

63. Strategic (an LSE in the Duquesne zone that questions the justness and reasonableness of Duquesne's withdrawal from PJM) nonetheless agrees with Duquesne's interpretation of the RA Agreement regarding Duquesne's RPM liability. Strategic also seeks clarification regarding its own liability, i.e., that other Duquesne zone LSEs will not be held liable for these charges following the effective date of Duquesne's

⁵⁷ Duquesne adds that PJM Manual 18, at p. 98, also repeats this same conclusion, stating that “[e]ach LSE that serves load in a PJM Zone or load outside PJM using PJM resources (None-Zone Network Load) during the Delivery Year is responsible for paying a Locational Reliability Charge.”

withdrawal. Strategic argues that this finding offers the best approach for holding other LSEs harmless and is justified under principles of cost causation.

64. Other intervenors disagree, arguing that Duquesne's argument regarding its RPM liability is contrary to the terms of the RPM Settlement, inconsistent with the conceptual framework and policy rationale underlying RPM, and unsupported by the clear language of the RA Agreement and PJM OATT. These intervenors conclude that Duquesne is (and should be) obligated to pay RPM capacity charges covering each of the RPM auctions in which its load projections have been, or will be, included.

65. First, intervenors rely on the intent of the parties to the RPM Settlement and the underlying rationale of RPM. Exelon argues that Duquesne's view regarding its RPM obligations would eviscerate the fundamental purpose of RPM, which is focused on the need to secure forward commitments. PJM adds that this requirement was designed to ensure the forward predictability necessary to spur new investment and the retention of existing generation.⁵⁸ Allegheny agrees, asserting that these new capacity requirements were designed to replace a prior construct found by the Commission, in the *Initial RPM Order*, to be unjust and unreasonable. PJM adds that the RPM Settlement, in which these new capacity obligations were established, was not opposed by Duquesne.

66. Intervenors also rely on the express language of the RA Agreement and the PJM OATT to challenge Duquesne's argument regarding its RPM obligations. PJM argues that under the RA Agreement, the obligations of an LSE must be met as a condition of withdrawal. Specifically, section 5.1.3 of the RA Agreement states that an LSE's obligations to pay capacity charges incurred in PJM's forward auctions survive the withdrawal of the LSE.⁵⁹ Exelon adds that Attachment DD of the PJM OATT secures

⁵⁸ Reliant notes that no developer of new generation or demand response capability would make any substantial investment if it had reason to believe that, even before the end of the very first delivery year, an LSE would be permitted to avoid its obligations in the auction. Reliant adds that, conversely, no LSE would reasonably take the risk of covering shortfalls in the millions of dollars as a result of a transmission owner electing to exit PJM.

⁵⁹ Section 5.1.3 ("Survival of Obligations upon Withdrawal") states as follows:

The obligations of a Party upon its withdrawal from this Agreement and any obligations of that Party under this Agreement at the time of its withdrawal shall survive the withdrawal of the Party from this Agreement. Upon the withdrawal of a party from this Agreement, final settlement of the obligations of such Party under Articles 7 and 11 of this Agreement shall include the accounting through the date established pursuant to section 5.1.1 and 5.1.2.

(continued...)

this same commitment at section 1(b) and section 2.5.⁶⁰ PJM, Exelon and others argue that these obligations are clear and unambiguous.⁶¹

67. PJM asserts that under section 5.1 of the RA Agreement, an LSE is “obligated” to pay a Locational Reliability Charge for each zone in which it serves load based on the Daily Unforced Capacity Obligation of its loads in that zone. PJM argues that this obligation, by design, is intended to cover three years of future capacity commitments. Duke agrees, noting that while these RPM requirements allow for additional, incremental auctions to cover the need for additional *increased* capacity, adjustments to reflect downward projections in forecasted load are prohibited. Duke adds that the initial auctions establishing these obligations must remain settled and cannot be revised retroactively under the filed rate doctrine.

68. Intervenors assert that under section 5.1.2 of the RA Agreement, the obligations that must be completed prior to withdrawal are “set” as of the end of the last month during which notice is provided. However, intervenors take differing positions as to the triggering event establishing this obligation. Some argue that an LSE’s obligations become “set” when the LSE’s forecasted loads are included by PJM in its auction parameters.⁶² Others assert that these obligations become set by way of the auction itself.⁶³ The divergence of opinion on this issue notwithstanding, intervenors agree that these obligations, once set, are not rendered indeterminate or otherwise unbinding by the

⁶⁰ See PJM OATT at Attachment DD, section 1(b), stating that RPM provides a “competitive auction mechanism to secure the forward commitment of additional Capacity Resources and Qualifying Transmission Upgrades as necessary to satisfy the portion of LSE’s Unforced Capacity Obligations not satisfied through Self-Supply, in order to ensure the reliability of the PJM Region for future Delivery Years....” See also *Id.* at section 2.5, stating that the “‘Base Residual Auction’ shall mean the auction conducted three years prior to the start of the Delivery Year to secure commitments from Capacity Resources as necessary to satisfy any portion of the Unforced Capacity Obligation of the PJM Region not satisfied through Self-Supply.”

⁶¹ See, e.g., Constellation protest at 9; Reliant protest at 36.

⁶² See PJM protest at 12; PJM argues that the requirement to post forecasted load in advance of the RPM auction is an important component of the RPM process because it ensures that parties will have actionable information prior to the auction for use in possible bilateral arrangements (an available option in lieu of participating in an auction). See also Reliant protest at 8; FirstEnergy protest at 27.

⁶³ See Constellation protest at 10; Exelon protest at 12.

degree of uncertainty (and future adjustments) necessary regarding an LSE's precise obligation.⁶⁴ PJM argues that an LSE's obligation to procure capacity for a future delivery year is set when the LSE's forecasted load is included in the parameters for the RPM auction for that year. PJM further argues that the requirement to include and post forecasted load in advance of the auction is a critical component in the RPM construct, necessary to ensure that market participants have actionable information available prior to the auction. PJM notes that, among other things, this information is used and relied upon by market participants as a basis for bilateral arrangements (an option available to LSEs in lieu of participating in the auction).

69. Exelon argues that Duquesne's theory (that an LSE's obligation does not accrue until the delivery year) is erroneously based on the RA Agreement's formula for calculating the final charge. Exelon asserts that this price true-up should not be mistaken for the underlying commitment itself. FirstEnergy concurs, noting that Duquesne's argument incorrectly focuses on the derivation and calculation of the RPM charge, as opposed to the underlying commitment.

70. PJM challenges Duquesne's assertion that the elimination of the Duquesne zone pursuant to the withdrawal provisions of the TO Agreement, necessarily eliminates any and all LSE obligations relating to that zone, as provided under the RA Agreement. PJM argues that these agreements must be read *in pari materia* such that each is given full force and effect.

71. Reliant asserts that Duquesne's argument regarding its RPM obligations is inconsistent with the treatment of LSEs who opt to establish FRRs. Reliant notes that these LSEs must submit FRR capacity plans demonstrating that the LSE owns or has entered into contractual arrangements allowing it to secure sufficient capacity to satisfy its capacity obligations for the delivery year three years hence. Reliant asserts that there would be no sound reason why the Commission would construe the RA Agreement as setting the obligations of FRR entities at the time they are required to establish their FRR capacity plans, but not find that the obligations of RPM participants to pay for capacity procured in the RPM auction is not set until the delivery year.

⁶⁴ PJM notes that while its pre-auction projections will closely approximate the final obligation that will accrue to the load in a given zone, the specific amounts payable for capacity will be based on the auction (3 months later), the results of any second incremental auction (approximately 26 months later), the obligation peak load determined by the local distribution company (33 months later), and any nomination of ILR (36 months later).

72. Intervenors dispute Duquesne's argument that a three-year capacity charge commitment, under the RAA, renders the TO Agreement 90-day withdrawal notice right meaningless. Reliant argues that Duquesne fails to distinguish between its rights and obligations as a transmission owner under the TO Agreement and its rights and obligations as an LSE under the RA Agreement.⁶⁵ Allegheny adds that under section 3.4 of the TO Agreement, a party that withdraws from the TO Agreement "shall remain liable for any and all obligations under [the TO] Agreement that such Party incurred, that were incurred on behalf [of] such Party, or that arose hereunder prior to the date upon which such Party's withdrawal ... became effective." Exelon notes that while the RA Agreement requires LSEs to fulfill obligations established while they were members of PJM, it does establish or require any post-membership commitment.

73. Finally, Allegheny requests clarification that, upon Duquesne's withdrawal, generation resources in the Duquesne zone will only be eligible to retain their status as capacity resources (and thus be eligible to participate in the RPM auctions) if they meet the requirements applicable to external resources.⁶⁶ Allegheny requests clarification that these generation resources will only be eligible to fulfill a PJM LSE's capacity obligations if firm transmission service has been obtained to deliver electricity and capacity into the newly constituted PJM market.

3. Duquesne's Answer

74. Duquesne responds to intervenors' interpretation of a departing LSE's RPM obligations by characterizing these asserted obligations as implied, at best. Duquesne also reiterates its arguments that the RA Agreement provisions on which it relies expressly provide that an LSE incurs an obligation to pay a Locational Reliability Charge only by serving load within PJM during the delivery year. Duquesne notes, for example, that in section 7.2 of the RA Agreement (addressing an LSE's responsibility to pay Locational Reliability Charges), the obligation to pay is expressly tied to the "loads [an LSE] serves in each Zone during a Delivery Year." Duquesne adds that this formulation

⁶⁵ See also FirstEnergy protest at 28 (arguing that because it is possible for a PJM participant to withdraw from the TO Agreement without withdrawing from the RA Agreement, a participant's continuing obligations under the RA Agreement are separate and distinct from its obligations under the TO Agreement).

⁶⁶ Allegheny explains that under the RA Agreement, at Schedule 10, generation resources that are used to fulfill an entity's capacity obligations must be deliverable. Allegheny states that for an external resource to meet this requirement, its capacity and energy must be delivered to PJM's metered boundaries through firm transmission service.

was no fluke or act of careless draftsmanship because PJM Manual 18 describes precisely the same rule using different language, as does the Schedule 8.A formula itself.

75. Duquesne also responds to intervenors' conflicting arguments as to when an LSE's RPM obligations become set. Duquesne argues that intervenors' differing views on this issue are, in a sense, understandable given the fact that neither viewpoint has any basis in the text of the RA Agreement.

76. Duquesne also responds to Exelon's argument that Attachment DD of the PJM OATT, at sections 1(b) and 2.5, expressly obligates Duquesne to pay RPM charges for periods following its withdrawal. Duquesne responds that the cited provisions concern the commitments of generators, not LSEs. Duquesne adds that the question before the Commission in this case is not whether generators are contractually obligated to honor their cleared bids (or whether PJM is contractually obligated to pay these generators the clearing price). The question, rather, according to Duquesne, is whether LSEs incur the obligation to pay at the time of the RPM auction or at the time of the load forecast, or whether, instead, the obligation can only be incurred by serving load during the delivery year.⁶⁷

77. Duquesne further responds to the argument that Duquesne should be obligated to make an up-front payment for all future RPM delivery years at the time of its withdrawal. Duquesne argues that such a requirement would violate the filed rate doctrine, because it would not be based on any tariff formulation, express or implied. Duquesne adds that it would also constitute undue discrimination because it would base Duquesne's ultimate liability on a methodology that would not be applied to any other LSE. Duquesne further argues that PJM's position is based on the erroneous assumption that these future-year charges are currently due and knowable. Duquesne argues that, in fact, PJM's RPM auctions are based on only estimates of future load and load responsibility. Duquesne adds that there is no way of knowing, today, whether it will have any POLR customers after 2010 (the year in which its current agreement with these customers expires).

78. Duquesne also responds to intervenors' assertions that the Commission, in its RPM orders, addressed the issue of Duquesne's RPM liability following its withdrawal.

⁶⁷ Duquesne adds that the argument that an LSE must be bound by the auction results as counter parties to the generators who are so bound ignores the basic structure of the RPM system. Duquesne argues that RPM does not establish binding bilateral contracts between individual generators and individual LSEs. Duquesne argues that, instead, these procedures establish obligations between generators and PJM (with separate tariff requirements applicable to LSEs).

Duquesne responds that neither in the *Initial RPM Order* or in the *RPM Settlement Order* did the Commission address RTO withdrawal issues.

79. Finally, Duquesne asserts that intervenors have failed to contradict the fundamental basis for Duquesne's claim, namely, that the applicable PJM agreements and tariff provide no mechanism by which a departing LSE can be held responsible for an RPM payment for periods after it has withdrawn and is no longer serving load in PJM.

4. Additional Answers

80. Reliant argues that Duquesne's answer fails to acknowledge that the RPM bidding restrictions imposed by PJM's market power mitigation rules were premised on the assumption that LSEs could not avoid their RPM obligations. Reliant asserts that based on this assumption, these rules do not allow capacity suppliers to recover risk premiums attributable to such events as Duquesne's withdrawal.

5. Commission Findings

a. Duquesne's Obligation to Pay for Capacity Acquired On its Behalf

81. We find that Duquesne will satisfy the withdrawal requirements of the RA Agreement, subject to the clarifications and conditions provided below. The RA Agreement, at section 5.1.1, states that an LSE may withdraw from the RA Agreement "effective upon the completion of [the LSE's] obligations hereunder...." Section 5.1.2 states that these "obligations ... shall be completed as of the end of the last month for which [the LSE's] obligations have been set at the time [that a notice of withdrawal] is received." Duquesne asserts, and no intervenor disputes, that these provisions permit an LSE to withdraw from the RA Agreement, provided that the LSE's "obligations" have been satisfied. We agree. The disagreement here, however, concerns two related issues. First, what are Duquesne's obligations under the RA Agreement? Second, at what point do these obligations become "set," or established?

82. Duquesne attempts to answer both questions by reference to the equation used to calculate a quantity term that is used, in turn, to calculate an LSE's Locational Reliability Charge under the RA Agreement, at section 7.2, and the PJM OATT, at Attachment DD, section 5.14(e). Specifically, Duquesne asserts that because one of the components in this calculation, i.e., the Obligation Peak Load as set forth in Schedule 8.A of the RA Agreement, is based, in part, on the LSE's actual load on the delivery year billing day, the obligation to pay this RPM charge cannot be "set" prior to the given delivery year. Duquesne relies on the language of Schedule 8.A, which states that the Obligation Peak Load is based, among other things, on the LSE's prior year summer peak load "for which such [LSE] was responsible on that billing day...." In addition, Duquesne relies on the language of section 7.2 of the RA Agreement, which states that "[e]xcept to the extent

[an LSE's] capacity obligations are satisfied through the FRR Alternative, each [LSE] shall pay, as to the loads its serves in each Zone during a Delivery Year, a Locational Reliability Charge for each such Zone during such Delivery Year.”

83. We find that the RA Agreement and Attachment DD of the PJM OATT are ambiguous as to the determination of an LSE's obligations with respect to auctions for which the delivery year is in the future. In interpreting these agreements based on the intent and structure of RPM, we find that Duquesne is responsible for paying for all the capacity PJM acquired on its behalf up through and including the upcoming January auction.

84. First, we find that the definition of Obligation Peak Load does not expressly address any circumstance pertaining to the withdrawal of an LSE from PJM. In addition, while section 7.2 makes a short hand reference to *what* an LSE must pay (i.e., an RPM charge “as to the loads it serves in each Zone during a Delivery Year”), it does not expressly address a departing LSE's underlying RPM commitment. For example, it does not address *whether* this charge applies in the case of a departing LSE, nor does it expressly rule out the possibility of a proxy charge applicable to such a withdrawal. These provisions pertain to the manner in which billing under RPM takes place in the ordinary course, but do not address the “obligations” that are incurred for a departing LSE under section 5.

85. A contract or tariff is not ambiguous simply because the parties disagree as to its interpretation.⁶⁸ However, an ambiguity may be found where, as here, the contract or tariff is susceptible to different constructions or interpretations.⁶⁹ When a contract or tariff provision is found to be ambiguous, the ambiguity must be resolved by reference to the contract or tariff as a whole.⁷⁰ In addition, extrinsic evidence of interpretation or

⁶⁸ See *Appalachian Power Co. v. FPC*, 529 F.2d 342, 347-48 (D.C. Cir.), *cert. denied*, 429 U.S. 816 (1976).

⁶⁹ See *Southern California Edison Co.*, 41 FERC ¶ 61,188 (1987).

⁷⁰ See *Arkansas Electric Cooperative Corp. v. Entergy Arkansas, Inc.*, 119 FERC ¶ 61,314, at P 19 (2007) (contract provisions should be interpreted as consistent with the contract as a whole); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (“[It is a] cardinal principle of contract construction[] that a document should be read to give effect to all its provisions and to render them consistent with each other.”); *Southern Co. Servs., Inc. v. FERC*, 353 F.3d 29, 35 (D.C. Cir. 2003) (rejecting interpretation that would render contract provisions superfluous, and stating “contracts must be read as a whole, with meaning given to every provision.”).

intent may be considered to prove a meaning to which the tariff language is reasonably susceptible.⁷¹

86. Here, then, to interpret PJM's RPM tariff provisions as they apply to a withdrawing LSE's RPM obligations, we are required to consider the RA Agreement and Attachment DD of the PJM OATT, read as a whole. We also consider the relevant extrinsic evidence, i.e., the terms of the RPM Settlement, the context giving rise to PJM's adoption of its RPM procedures, and the Commission's prior orders addressing these issues, including the *RPM Settlement Order* and the *Initial RPM Order*. Based on all these considerations and for the reasons discussed below, we conclude that Duquesne's obligations to pay Locational Reliability Charges, under the RA Agreement, became set at such time as Duquesne's loads were included by PJM in its auction parameters.

87. We begin with the context giving rise to PJM's RPM procedures. In the *Initial RPM Order*, the Commission found that PJM's then-existing capacity obligation rules were unjust and unreasonable.⁷² These rules, the Commission noted, were based on the assumption that generating resources located anywhere within PJM could satisfy the capacity needs in any local area within PJM. These rules also allowed for the daily and monthly procurement of capacity. The Commission found that this construct failed to address PJM's needs for resource adequacy and reliability on a long-term basis because, among other things, it failed to: (i) produce prices adequate to assure a continued supply of capacity; (ii) support necessary planning sufficiently in advance of the time of delivery; or (iii) deter volatility, as caused by the exit and re-entry of generating units over periods as short as a single day.⁷³

88. In the *RPM Settlement Order*, the Commission approved, with conditions, a settlement addressing the concerns outlined by the Commission in the *Initial RPM Order*. The RPM Settlement, among other things, established new capacity procurement rules at Attachment DD of the PJM OATT and the RA Agreement. These rules, among other things, required LSEs to contract with suppliers three years in advance and provided that prices would be set through an auction market. These rules, the Commission found, would enable PJM to obtain sufficient energy to reliably meet the needs of its system,

⁷¹ *New York Independent System Operator, Inc. v. Astoria Energy LLC*, 118 FERC ¶ 61,216 at P 34 (2007); see also *Mississippi River Transmission Corp.*, 96 FERC ¶ 61,185 at 61,819, citing *Consolidated Gas Transmission Corp.*, 771 F.2d 1536, 1554 (D.C. Cir. 1985).

⁷² *Initial RPM Order*, 115 FERC ¶ 61,079 at P 29.

⁷³ *Id.*

elicit sufficient investment in energy, transmission, and demand response, and ensure just and reasonable rates.⁷⁴

89. Under RPM, PJM is responsible for procuring capacity on behalf of LSEs in each zone three years in advance based on the auction results, and PJM's obligation to pay the generators is fixed at the time of the auction. The billing provisions to which Duquesne refers delay the determination of actual bills to the LSEs in order to take into account changes in the distribution of load among LSEs, particularly in open access states such as Pennsylvania in which Duquesne is located. While the overall load in Duquesne's territory will remain relatively stable, the distribution of that load among Duquesne and the other LSEs in that zone may vary on a year to year basis, as one LSE may attract customers from the others. The billing provisions, therefore, only delay the allocation of costs among LSEs based on their relative market shares as of the billing year. But these provisions do not eliminate the obligation incurred by PJM on behalf of those LSEs. In this case, Duquesne understood that PJM was procuring capacity on its behalf and therefore should be obligated to pay for that capacity.⁷⁵ Indeed, allowing Duquesne to escape its obligations to pay for the capacity acquired on its behalf will force PJM to collect the amount it is obligated to pay the generators from the remaining participants in PJM, hardly a just and reasonable result.

90. The RA Agreement and Attachment DD of PJM OATT, read as whole, also support our finding. For example, the RA Agreement, at article 2, provides that "[t]his Agreement is intended to ensure that adequate Capacity Resources, including planned and existing Generation Capacity Resources, planned and existing Demand Resources, and ILR will be planned and made available to provide reliable service to loads within the PJM Region, to assist other Parties during Emergencies and to coordinate planning of source resources consistent with the Reliability Principles and Standards." Section 3.3.2 states "[a]ny provision of this Agreement that expressly *or by implication* comes into or remains in force following the termination of this Agreement shall survive such termination." (emphasis added).

⁷⁴ *RPM Settlement Order*, 117 FERC ¶ 61,331 at P 1.

⁷⁵ Duquesne was aware that PJM was procuring capacity on its behalf and that PJM would rely to its detriment in incurring contractual obligations with generators to serve Duquesne. See *Midwest Independent Transmission System Operator, Inc.*, 120 FERC ¶ 61,080 at P 83-85 (2007) (finding that the parties relied on prior cost allocations). Cf. *Public Service Company v. FERC*, 201 F.3d 497, 503 (D.C. Cir. 2000) (customers failed to show detrimental reliance on prior policy).

91. Similarly, section 5.1.3 states that “[t]he obligations of a Party upon its withdrawal from this Agreement and any obligations of that Party under this Agreement at the time of its withdrawal shall survive the withdrawal of the Party from this Agreement.” We also find that the Schedule 8 provisions relied upon by Duquesne are essentially formulaic in their nature, of principal use to an accountant in calculating a final bill, but not to this Commission in divining the extent of a departing LSE’s underlying commitment. Even if Duquesne, as a transmission owner, has withdrawn from PJM, there is no requirement on PJM to remove Duquesne from the RA Agreement.⁷⁶

92. Based on these tariff provisions read as whole, then, we conclude that Duquesne’s RPM liability extends to all auctions in which its load forecasts are included.⁷⁷ We also agree with PJM that these obligations are set at the time that PJM establishes its RPM auction parameters. This conclusion is warranted given the necessary reliance that market participants place on these published forecasts and is otherwise consistent with the intent and underlying purpose of the RA Agreement.⁷⁸ For example, LSEs seeking to rely on the FRR alternative (in lieu of participating in the auction) are required to notify PJM of their election to do so at least two months in advance of the RPM auction.⁷⁹ This decision, which can have significant financial implications, must be based, in part, on

⁷⁶ Indeed, Duquesne places great weight on the argument that the Duquesne zone will no longer be included in the RA Agreement upon its withdrawal. But it cites to no provision requiring PJM to remove that zone from the RAA until all underlying obligations are satisfied.

⁷⁷ We discuss below, in section IV.F, Duquesne’s obligations with respect to future auctions.

⁷⁸ *See, e.g.*, section 7.1(a) of the RA Agreement, which provides that “[t]he Forecast Pool Requirement shall be established to ensure a sufficient amount of capacity to meet the forecast load plus reserves adequate to provide for the unavailability of Generation Capacity Resources, load forecasting uncertainty, and planned maintenance outages.” In addition, Schedule 4, section B plainly states that “[n]o later than three months in advance of each Base Residual Auction for a Delivery Year ... the PJM Board shall establish the Forecast Pool Requirement, including the PJM Region Installed Reserve Margin for all Parties, including FRR Entities, for such Delivery Year.” *See also* Schedule 4, section B which provides that “[u]nless otherwise agreed [to] by the PJM Board, the Forecast Pool Requirement and PJM Region Installed Reserve Margin for such Planning Period shall be considered firm and not subject to re-determination thereafter.”

⁷⁹ *See* PJM Manual 18 at section 11.

PJM's published auction parameters.⁸⁰ Similarly, other market participants will make business decisions and enter into binding contracts, including financial hedges and bilateral arrangements, based on these auction parameters.

93. Since we are ruling that Duquesne is obligated to pay for the capacity that PJM has acquired on its behalf, we find also that PJM needs to support reasonable arrangements to permit Duquesne to utilize that capacity in satisfying its reliability obligations to the Midwest ISO or to any other reliability organization. The capacity Duquesne has acquired at just and reasonable rates can be used by Duquesne to satisfy reliability requirements of the Midwest ISO or other organizations assuming responsibility for assuring reliability. PJM has suggested that it can make the capacity acquired by Duquesne "portable."⁸¹ As such, we will require PJM to negotiate with the Midwest ISO, or other entities who may be involved in providing for Duquesne's reliability, to implement an acceptable means of permitting Duquesne and the other Duquesne zone LSEs to utilize the capacity acquired in RPM to satisfy their ongoing reliability requirements.

94. Because the same RA Agreement provisions apply to the remaining Duquesne zone LSEs, the same procedures applicable to Duquesne will apply to them. These LSEs will be financially responsible for their allocated portion of the just and reasonable costs for capacity acquired on behalf of the Duquesne zone and will have this capacity available to satisfy whatever reliability obligations will be applied in the future.

95. Duquesne argues that it should be relieved of its RPM obligations because PJM may be able to mitigate some of the cost exposure it incurs by purchasing capacity because PJM holds second and third incremental auctions. Duquesne appears to contend that if there is load growth or generators do need to purchase additional capacity in these other auctions, PJM may be able to offer some of the capacity acquired on behalf of Duquesne in these auctions. However, it is not clear that additional capacity will in fact be needed, or that capacity acquired on behalf of the Duquesne zone is substitutable with

⁸⁰ These auction parameters identify and/or forecast, among other things: (i) preliminary RTO and zonal peak loads; (ii) interruptible loads required for reliability (ILRs) for each modeled locational deliverability area; (iii) installed reserve margins; (iv) demand resource factors; (v) reliability requirements; (vi) VRR curves; (vii) transmission upgrades projected to be in service for the given delivery year; (viii) the cost of new entry; and (ix) net energy and ancillary services revenue offsets. *See* PJM Manual 18 at section 5.

⁸¹ *See* Duquesne filing at Ex. G (PJM's October 15, 2007 correspondence to Duquesne at p. 4).

capacity needed in other zones. Moreover, even if PJM were able to use this capacity in one of the incremental auctions, PJM would not be assured that it would be able to recover a large proportion of its obligation to the resource providers. Because the capacity was acquired on behalf of and for the benefit of Duquesne's customers, Duquesne is the party that should bear the cost. Duquesne does not argue that RPM, or the rates it will be required to pay for capacity are unjust and unreasonable, and as discussed above, we are requiring PJM to negotiate to ensure that Duquesne will be able to use the capacity it has acquired to meet its reliability obligations when it withdraws from PJM.⁸²

96. While we will not permit Duquesne to avoid its responsibility to pay for capacity PJM acquired on its behalf, we find that PJM should be required to mitigate the cost obligations of the LSEs in Duquesne's zone in the incremental auctions when possible. In some instances, there may be demand for additional capacity in any of the three incremental auctions that PJM or previously committed capacity resources would otherwise seek to meet through the purchase of additional capacity that could instead be met by using some of the capacity acquired on behalf of the Duquesne zone. Reallocating such capacity, when it is possible to do so in light of transmission or other constraints, would benefit Duquesne loads and reduce PJM's cost of purchasing additional capacity. To ensure that such reallocation will not raise prices either to load or to resources, resources acquired on behalf of the Duquesne zone should be used only in circumstances in which the costs of using the Duquesne resources are no higher than the bids in the auction that the Duquesne resources replace. We therefore will require PJM to allow LSEs in the Duquesne zone to request that PJM substitute capacity acquired on their behalf, to the extent that the capacity acquired on behalf of the Duquesne zone could be used to meet the increased demand without violating transmission or other constraints.⁸³

97. We recognize that PJM will need to set up a timetable and work out details under which the Duquesne zone LSE's can make such elections in order to ensure that the elections do not impose increased costs to PJM or other market participants. We will require PJM to work with these LSEs and all affected stakeholders to develop a reasonable process for allowing the use of resources acquired for the Duquesne zone to

⁸² Thus, we are not requiring PJM to expand its transmission capacity or its system.

⁸³ LSEs authorizing PJM to use the capacity would lose the right to make this capacity portable for use in the Midwest ISO.

be used in the incremental auctions. We will require PJM to make a filing notifying us of the details of the procedures after they have been developed.⁸⁴

b. Determination of Payment Levels

98. Our analysis cannot end without a consideration of the specific RPM payments for which Duquesne will be held liable upon its withdrawal from PJM. Reliant argues that Duquesne should be required to pay PJM the net present value of its RPM obligations based on the parameters as they exist at the time of Duquesne's withdrawal. Duquesne asserts, however, that this liability cannot be calculated because the load for which Duquesne will be responsible in future delivery years (a component in the Schedule 8.A equation) is an unknown. Duquesne further asserts that the payment obligation advocated by PJM is unauthorized under the PJM tariff and thus, if applied, would violate the filed rate doctrine.

99. The RA Agreement does not specify a method for determining payment obligations for a withdrawing LSE. However, we find that the parties can continue to operate under the terms of the RA Agreement and wait until each delivery year to determine how the capacity costs will be allocated among the LSEs in the Duquesne zone. In the event this option is chosen, the Midwest ISO will be required to cooperate with PJM in establishing the appropriate shares of each LSE in the zone for each delivery year. Or, the parties may establish other mechanisms for resolving this issue. Towards this end, the Commission's on-call settlement judge procedures are available to the parties.

E. Whether Duquesne's Withdrawal from PJM is Just, Reasonable and Not Unduly Discriminatory

100. As noted above, Duquesne's RTO withdrawal request is subject to our review and approval under the just and reasonable standard of FPA section 205. This review is also required as a contractual obligation under section 3.2(iii) of the TO Agreement and section 5.1.4 of the RA Agreement.

1. Duquesne's Position

101. Duquesne asserts that its withdrawal from PJM is just, reasonable and not unduly discriminatory because: (i) Duquesne has met, or will meet, all contractual obligations applicable to its withdrawal; (ii) the Midwest ISO's operation of Duquesne's

⁸⁴ PJM, to the extent it reconsiders its procedures governing withdrawal, can consider whether to make such provisions a part of its RA Agreement and/or tariff as it reconsiders its procedures governing withdrawal.

transmission facilities will ensure comparable, open and non-discriminatory access to these facilities and will satisfy all RTO formation requirements as set forth by the Commission in Order No. 2000;⁸⁵ (iii) withdrawal is necessary in order for Duquesne to continue to provide reliable service to its customers at the lowest reasonable cost; (iv) Duquesne is permitted to end its voluntary participation in PJM pursuant to the Commission's policies and precedent;⁸⁶ (v) a party proposing to withdraw from an RTO need not demonstrate that the costs of remaining a member are less than the benefits of withdrawing;⁸⁷ and (vi) Duquesne's withdrawal will have no adverse impacts on PJM markets, operations and remaining members.

102. Duquesne argues that the justness and reasonableness of its withdrawal request is tied, principally, to the cost savings that will result if it is permitted to avoid its RPM exposure. With respect to market impacts, Duquesne states that PJM's markets will continue to function in a just and reasonable manner in accordance with their underlying market design. Duquesne argues that while individual members and customers may face less advantageous market results, such an impact is a natural risk attendant to participants in any competitive market where entry and exit are not prohibited. Duquesne adds that, similarly, PJM will continue to meet the Order No. 2000 requirements for organization as an RTO, given Duquesne's small size and border location.

103. Duquesne states that following its withdrawal from PJM, there will also be no adverse inter-RTO transmission rate impacts. Duquesne notes that PJM and the Midwest ISO operate a seamless transmission market and that transactions sourced in either the Midwest ISO or PJM pay for transmission based on the sinking zone for the transmission concerned, paying the applicable zonal transmission rate plus applicable congestion charges. Duquesne states that transactions sourced in the Duquesne zone will still pay for transmission based on the sinking zone's zonal rate whether Duquesne is in the Midwest ISO or PJM. Duquesne adds that transactions sinking in the Duquesne zone will pay for transmission based on the Duquesne load zone rate under the Midwest ISO OATT, rather than the PJM OATT, but that otherwise there will be no difference in the amount

⁸⁵ See *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Red. 809 (2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

⁸⁶ Duquesne transmittal sheet at 26, *citing Atlantic City Elect. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002).

⁸⁷ *LG&E Withdrawal Order*, 114 FERC ¶ 61,282 at P 29.

charged. Duquesne states that it does not propose any change to its transmission formula rate revenue requirements.⁸⁸

104. Duquesne also asserts that its withdrawal will not adversely affect regional transmission expansion planning. Duquesne states that, currently, PJM and the Midwest ISO jointly plan certain transmission expansions across their borders to ensure that their respective members are able to obtain adequate transmission service to meet their future needs.

105. Duquesne acknowledges that its withdrawal from PJM will affect the operation of PJM's RPM auctions.⁸⁹ Nonetheless, Duquesne asserts that the resulting markets will continue to function in accordance with their design and will continue to produce just and reasonable results.⁹⁰ In addition, while Duquesne acknowledges that certain generators may prefer Duquesne to remain in PJM for purpose of maintaining the demand for capacity and sustaining high market-clearing prices in the RPM auctions, these market participants have no right to expect a perpetually static market. Duquesne argues that changes in supply and demand are the very definition of markets and should not be construed as harmful.

106. Duquesne adds that RPM was designed with clear expectations that a number of the variables taken into account in auctions would change over time. Duquesne notes that RPM includes provisions that adjust billings if load changes in a particular zone between the time of the auction and the time of delivery. Duquesne further notes that the

⁸⁸ Duquesne notes that a settlement regarding these rates was submitted for Commission review, on October 9, 2007, in Docket No. ER06-1549-000, as is currently pending before the Commission.

⁸⁹ Duquesne states, for example, that the transfer of generators and load serving entities in the Duquesne zone from PJM to the Midwest ISO cannot be done without some changes in the inputs and outcomes of the RPM auctions, whether past or future. Duquesne therefore acknowledges that supply and demand will be altered. Duquesne adds that capacity obligations and load (estimated and actual) will change and that total capacity requirements within PJM may be different in Base Residual Auctions. Duquesne states that, in fact, individual market participants will face different results as a consequence of Duquesne's withdrawal.

⁹⁰ Duquesne notes, for example, that the load and capacity resources in the Duquesne zone are in approximate balance, i.e., that while approximately 3,000 MW of load will be moving from PJM to the Midwest ISO, an equal amount of capacity resources will also be making this transition.

incremental auctions take into account generator availability and provide for new auctions to meet shortfalls.⁹¹

107. Duquesne states that one consequence of its withdrawal is that LSEs within the Duquesne zone will transition from the PJM OATT to the Midwest ISO OATT. Duquesne states that this transition will remove their load from the RPM market, thus reducing the amount of capacity to be procured in PJM's RPM auctions. Duquesne states that in place of RPM, these LSEs will become subject to the Midwest ISO's capacity obligation requirements.

108. Finally, Duquesne states that existing transmission customers within the Duquesne zone will not be adversely affected by Duquesne's withdrawal even if they require transmission into or out of PJM. Duquesne states that PJM and the Midwest ISO already operate reciprocally to eliminate through and out transmission charges for transmission transactions that cross the PJM/Midwest ISO seam. Duquesne states that no duplicative, pancaked transmission charges will be produced by Duquesne's withdrawal from PJM and future membership in the Midwest ISO.

2. Responsive Pleadings

109. Intervenors argue that Duquesne has failed to show that its withdrawal from PJM is just and reasonable. Reliant asserts that Duquesne has failed to carry its burden of proof. Strategic argues that Duquesne's filing raises disputed issues of material fact. EPSA argues that while the cost of RPM is the primary basis for Duquesne's withdrawal request, basing RTO membership on this consideration alone is short-sighted and harmful to the market at large. PJM agrees, noting that Duquesne's withdrawal will result in the involuntary withdrawal of all LSEs in the Duquesne zone.

110. Reliant argues that Duquesne has failed to address how, or the price at which, Duquesne will satisfy the Midwest ISO's resource adequacy requirements.⁹² Reliant further argues that Duquesne's departure from PJM will lead to an increase in the amount of its unhedgeable market risk.⁹³ PJM asserts that Duquesne's apparent intent to rely on

⁹¹ See PJM OATT at Attachment DD, sections 5.4(b)-(d).

⁹² Reliant further asserts that Duquesne has provided no evidence that over the long-run its customers actually will enjoy lower capacity costs in the Midwest ISO than they would were Duquesne to remain in PJM. Reliant notes that, in fact, there is no reason to think that the cost of new generation to Duquesne load will be the same, regardless of the RTO to which Duquesne belongs.

⁹³ Reliant argues, for example, that investors will require higher returns to offset increased risks, or will avoid building generation altogether.

short term capacity commitments for an interim period (prior to the Midwest ISO's reform of its capacity markets) is a goal and strategy that should be rejected by the Commission. PJM argues that if Duquesne's withdrawal is not rejected, it should be conditioned on Duquesne's preparation of a detailed long-term capacity plan.⁹⁴ PJM also disputes Duquesne's assertion that its capacity costs have skyrocketed. PJM notes that while RPM prices have been higher than expected they are not fundamentally out of line with historical norms. PJM argues that, regardless, the purpose of RPM is to price capacity accurately by ensuring that all LSEs procure capacity on a long-term basis.

111. Reliant labels as unsupported Duquesne's suggestion that existing transmission customers within the Duquesne zone will not be adversely affected by Duquesne's withdrawal (even if they require transmission in or out of PJM). Reliant asserts that, among other things, Duquesne fails to address the means by which these customers could obtain reservations prior to the effective date of Duquesne's withdrawal, or how generators located in the Duquesne zone will be able to obtain transmission to support their RPM obligations to PJM. Reliant argues that unless and until Duquesne and the Midwest ISO provide information about transmission service and rates, the Commission cannot determine the impact of Duquesne's withdrawal on existing customers in the Duquesne zone.

112. Reliant asserts that Duquesne's filing is primarily based on Duquesne's interest in protecting its affiliate, Duquesne Power, at the expense of Duquesne's competitors and its affiliate's competitors.⁹⁵ Reliant asserts that this motive constitutes an unlawful preference. Reliant also disputes Duquesne's assertion that it is seeking to protect its customers by withdrawing from PJM. Reliant argues that, in fact, Duquesne's residential and small commercial and industrial customers taking service from Duquesne under its POLR service pay rates that are fixed through 2010. Reliant asserts that, as such, there is no basis for Duquesne's claim that its participation in RPM will wipe out all of the savings provided by Duquesne's multi-year rate plans. Reliant also labels as unsupported Duquesne's assertion that there will be no electrical changes to system power flows. In fact, Reliant doubts the accuracy of this assertion, given the existing RPM commitments that generators, like Reliant, have in the Duquesne zone and the need Duquesne will have to designate network resources in the Midwest ISO.

⁹⁴ PJM notes that this requirement could take the form of an FRR capacity plan or some other specification of requirements that the Commission deems adequate for this purpose.

⁹⁵ *See also* Strategic protest at 5-6.

113. With respect to market participant impacts, Reliant states that it could incur hundreds of millions of dollars in potential PJM capacity deficiency penalties, increased power supply costs, and increased operating costs, as well as face substantial uncertainties about the cost and profitability of its operations in the future. AMP-Ohio calculates that its portion of Duquesne's capacity costs for delivery years 2008-09 and 2009-10 could exceed \$2 million. Con Ed calculates that PJM's remaining LSEs will see their capacity obligations rise by 3 percent. FirstEnergy estimates that if the Duquesne zone exits PJM and does not pay its RPM obligations for the 2009-10 planning period, a shortfall of approximately \$125 million would be created for generators that have committed to RPM.

114. PJM and Reliant argue that Duquesne has failed to establish the justness and reasonableness of its proposed withdrawal date. Reliant asserts that a June 1, 2008 effective date cannot be approved until such time as the Midwest ISO becomes a balancing authority and implements a new ancillary services market.⁹⁶ PJM asserts that, by contrast, LG&E's and KU's withdrawal from the Midwest ISO came after a notice of withdrawal made in December of 2004 as applicable to an October 2006 withdrawal. PJM argues that, by contrast, the seven months that Duquesne is proposing with the myriad of unresolved issues is infeasible.

115. Exelon argues that Duquesne's withdrawal could not be regarded as just and reasonable, absent the application of a hold harmless requirement. Exelon asserts that consistent with the Commission's ruling in *Alliance Companies*,⁹⁷ all PJM members, including generators, must be held harmless.⁹⁸ In particular, Exelon points to the incremental increase in congestion costs that will result from Duquesne's withdrawal.⁹⁹

⁹⁶ See *supra* note 6.

⁹⁷ 102 FERC ¶ 61,214, at P 7 (2003) (*Alliance*).

⁹⁸ See also Dominion protest at 12; PSEG protest 9; Pepco comments at 4; RESA protest at 12; Strategic protest at 8.

⁹⁹ Exelon asserts that PJM dispatches all generation within its operations centrally to manage congestion throughout its system and that once PJM is no longer dispatching the generation with Duquesne's zone, there will be changes in the electrical flow. Exelon adds that since this generation will no longer be available to PJM for managing congestion on its system, congestion costs will rise because losing generation from PJM's central dispatch will necessarily make PJM's congestion management less efficient. See Exelon comments at 18, citing *Wisconsin Public Service Corp. v. Midwest Independent Transmission System Operator, Inc.*, 118 FERC ¶ 61,089 at P 40 (noting that even if PJM

(continued...)

Exelon argues that to effectively hold remaining PJM members harmless from the effects of Duquesne's withdrawal, the Commission should either require greater coordination between PJM and the Midwest ISO, or require Duquesne to devise a remedy to hold other members harmless. RESA argues that Duquesne's hold harmless obligation should include compensation to the retail suppliers with whom Duquesne competes covering all transition costs attributable to its conversion to the Midwest ISO.

116. Finally, Exelon challenges Duquesne's assertion that under the Duquesne withdrawal proposal, no duplicative, pancaked transmission charges will result. Exelon argues that rates between the Midwest ISO and PJM will remain pancaked for certain services, including ancillary services under Schedules 1 and 2. Exelon asserts that to avoid harming transmission customers in PJM, customers transmitting electricity out of Duquesne's zone in the Midwest ISO into PJM should not be charged any higher rates than they would have paid had Duquesne remained in PJM.¹⁰⁰

3. Duquesne's Answer

117. Duquesne responds to intervenors' arguments that its withdrawal from PJM would not be just and reasonable. Duquesne argues that in addressing this issue, intervenors fail to factor in the interests of Duquesne's customers. Duquesne argues that, in fact, if its customers are required to pay Duquesne's RPM charges following its withdrawal, the price of electricity in the Pittsburgh area will rise significantly.

118. Duquesne also responds to intervenors' arguments that LSEs in PJM will be harmed because they will have purchased more capacity than they would have purchased had Duquesne's load not been included. Duquesne responds that any capacity oversupply, in this instance, will be minor, easily mitigated, and consistent with normal function of increases and decreases in market supply and demand. Duquesne adds that its load represents only a tiny fraction of PJM's overall capacity requirement and that any harm attributable to its departure would be partially offset by the value of having excess capacity at PJM's disposal.¹⁰¹

and the Midwest ISO implemented a single system dispatch, there would still be price differences at the RTO border), *reh'g denied*, 120 FERC ¶ 61,269 (2007).

¹⁰⁰ Exelon comments at 17, *citing LG&E Withdrawal Order*, 114 FERC ¶ 61,282 at P 111.

¹⁰¹ Duquesne also notes that the existence of this additional capacity is contemplated by the RPM construct because RPM uses a downward-sloping demand curve, as opposed to a horizontal demand curve, based on the belief that capacity has value even in excess of the installed reserve margin.

119. Duquesne also argues that PJM has the ability to eliminate, or at least mitigate, whatever additional reserve margin may arise as a result of its departure. This is so, Duquesne asserts, because PJM will conduct second and third incremental auctions applicable to the 2009-10 and 2010-11 delivery years. Duquesne asserts that PJM implicitly acknowledged this fact, in its protest, when it argued that the removal of load from the Duquesne zone renders remote the possibility that a second incremental auction will be required. Duquesne notes that, according to PJM, a second incremental auction would only be held if there was load growth equal to or greater than 100 MW (a possibility that would be significantly minimized by Duquesne's departure).

120. Duquesne adds that if capacity oversupply concerns remain in the third incremental auction, as a result of Duquesne's withdrawal, PJM could bid in the capacity it argues it has procured on Duquesne's behalf at the market clearing price of the RPM auction. Duquesne asserts that every MW that clears would reduce the oversupply and that every dollar payable as a result could be used to offset RPM charges.

121. Duquesne also responds to intervenors' arguments that Duquesne's withdrawal from PJM would be unjust and unreasonable to the extent it is based only on the intention of avoiding PJM's new capacity obligation rules. Duquesne responds that the Midwest ISO's rates, terms and conditions have also been determined to be just and reasonable. Duquesne argues that, as such, allegations that Duquesne's transition will somehow threaten long-term reliability by moving away from the PJM resource adequacy requirements represent a collateral attack on the Commission-approved reliability rules and Midwest ISO capacity requirements.

122. Duquesne also challenges intervenors' arguments that LSEs within the Duquesne zone will be harmed by its withdrawal from PJM. Duquesne argues that, in fact, these LSEs will benefit by not being required to pay RPM charges.

123. Duquesne also challenges intervenors' arguments that generators within the Duquesne zone will be harmed by its withdrawal. First, Duquesne notes that of the three generators at issue (FirstEnergy, AES and Reliant), only Reliant makes this argument. With respect to Reliant's concerns, Duquesne submits that generators in the Duquesne zone will be permitted to obtain transmission service into PJM and that this service can be scheduled through the Midwest ISO. Duquesne asserts that intervenor claims of generalized harm to the market resulting from its withdrawal are largely speculative, not based on any specific evidence, or otherwise unsupported.

124. Finally, Duquesne challenges Exelon's assertion that a hold harmless requirement can be justified in this case based on *Alliance*. Duquesne responds that in the *LG&E*

Withdrawal Order, the Commission explicitly rejected the argument that *Alliance* is valid precedent with respect to a party exercising its right to withdraw from an RTO.¹⁰²

4. Additional Answers

125. FirstEnergy responds to Duquesne's argument that generators in the Duquesne zone will not be harmed by Duquesne's withdrawal because these generators will be permitted to obtain transmission service into PJM and that this service can be scheduled through the Midwest ISO. FirstEnergy answers that while a generator such as itself may have the ability to schedule under the Midwest ISO's tariffs, the issue is what steps have been taken to ensure that this transmission will, in fact, be provided. FirstEnergy argues that absent this explanation, it cannot be assumed that Duquesne's application will include transmission arrangements that are consistent with or superior to FirstEnergy's existing transmission arrangements or are otherwise just and reasonable.

126. Reliant adds that Duquesne's answer fails to provide any assurance that Reliant will be able to obtain firm transmission from the Midwest ISO to PJM so that Reliant's Duquesne zone generation can fulfill its RPM obligations. Specifically, Reliant asserts that Duquesne fails to address the fact that if it is permitted to withdraw, Reliant's Duquesne zone generation will have to qualify as external PJM capacity resources in order to continue to fulfill their existing RPM obligations.

5. Commission Findings

127. In the *LG&E Withdrawal Order*, our consideration of the justness and reasonableness of applicants' withdrawal proposal turned, among other things, on applicants' proposed replacement arrangements as well as applicants' compliance with their contractual obligations regarding their right to withdraw. Here, by contrast, Duquesne's proposed replacement arrangements are not before us at this time. As such, a final determination regarding the justness and reasonableness of Duquesne's withdrawal from PJM cannot be made here.¹⁰³ Similarly, it would be premature at this time to consider the establishment of hearing procedures.

128. Nonetheless, certain preliminary findings are appropriate regarding the issues raised by intervenors. First, we find that Duquesne's movement from one Commission-approved RTO to another is not barred by Order No. 2000. As we recognized in *LG&E*,

¹⁰² *Id.* at 24, citing *LG&E Withdrawal Order*, 114 FERC ¶ 61,282 at P 25.

¹⁰³ To the extent that protesters raise arguments based on Duquesne's continuing obligation for RPM costs, such concerns are moot given our resolution of the RA Agreement, above.

companies that voluntarily join RTOs should have the ability to withdraw from an RTO as long as the replacement rates that are established are just and reasonable. As we recognized in the *LG&E Withdrawal Order*, companies that voluntarily join RTOs should have the ability to withdraw as long as the replacement rates that are established are just and reasonable, the contractual obligations under the RTO arrangement are met, and adverse effects on remaining RTO members as a result of the transmission owner's withdrawal have been considered.

129. We agree that Duquesne's membership in the Midwest ISO has the potential of ensuring comparable, open and non-discriminatory access to Duquesne's facilities, particularly since PJM and the Midwest ISO operate under a joint operating agreement (JOA) that helps to ensure comparability of service. However, we can make no final determination on this issue, or on whether additional changes will be necessary to the JOA, prior to our review of the Midwest ISO's integration filing. We also address herein contractual obligations that must be met to ensure that remaining RTO members and their customers do not inappropriately assume costs that should be borne by the departing member.

130. PJM argues that in this case, permitting the withdrawal should be deemed unjust and unreasonable, because it will have the concomitant result of requiring involuntary withdrawal by other LSEs in the Duquesne zone. While we recognize that in many cases, LSEs may be required to associate with the same RTO as the transmission owner, we cannot find this to be a sufficient basis to deny the transmission owner the right to withdraw transmission assets from an RTO.

131. Reliant asserts that Duquesne's withdrawal from PJM is motivated by an unlawful preference it seeks to grant to its LSE affiliate, Duquesne Power. There is no indication on this record that Duquesne's action might result in an unlawful preference under the FPA to its affiliate. Additionally, Duquesne's withdrawal will occur on the condition that its resulting service will not be unduly discriminatory and will comply with the requirements of Order Nos. 888 and 890.

132. Intervenors argue that Duquesne's withdrawal request should be rejected because it is based primarily on its interest in avoiding an RPM construct that the Commission has found to be in the public interest in the *RPM Settlement Order*. However, the Midwest ISO (the RTO to which Duquesne will become subject) also operates pursuant to a just and reasonable tariff. The Commission has permitted RTOs to adopt different just and reasonable approaches based on the circumstances of their systems.

133. Reliant asserts that Duquesne's filing offers no evidence that over the long-run its customers will enjoy lower capacity costs in the Midwest ISO than they would under RPM. However, in the *LG&E Withdrawal Order*, the Commission stated that because RTO participation is voluntary, an entity proposing to withdraw need not demonstrate

that the costs of remaining a member of the RTO are less than the benefits of withdrawing.¹⁰⁴

134. Finally, we reject Exelon's and RESA's arguments that the Commission's rulings in *Alliance* require Duquesne to hold third parties harmless with respect to its withdrawal. In *Alliance*, the Commission addressed the application of a hold harmless obligation in the context of a transmission owner's request to join PJM as opposed to the Midwest ISO, when that choice had the effect of creating a seam causing harm to other parties. The determination of whether an RTO has sufficient scope to eliminate seams is a predicate related to the formation of the RTO. In this case, however, no party has pointed to comparable seams issues created by Duquesne leaving PJM and entering the Midwest ISO given the fact that Duquesne borders both RTOs. Moreover, since RTO withdrawal is expressly permitted under the TO Agreement, parties were on notice that withdrawal was a possibility and that, in the event of withdrawal, they might need to enter into other transmission agreements and incur other costs. On the record presented here, then, we cannot find a general obligation to hold parties harmless from all costs occasioned by a withdrawal contemplated under the RTO agreements.¹⁰⁵ However, intervenors may, if they wish, present additional evidence regarding the specific effects of Duquesne's withdrawal on market participants at such time as these effects come into a clearer focus, i.e., at such time as Duquesne submits its replacement arrangements.

F. Whether Duquesne Should Be Relieved of its Obligations Regarding PJM's January and May 2008 RPM Auctions

1. Duquesne's Position

135. Duquesne asserts, for the reasons cited above, that its loads should be removed from PJM's January and May 2008 RPM auctions.¹⁰⁶ Duquesne argues that there is no justification for including Duquesne in these yet-to-be conducted auctions, given the fact that Duquesne's notice of withdrawal was made as early as it was (on September 12, 2007). Duquesne states that if, for any reason, Duquesne finds itself still in PJM during

¹⁰⁴ 114 FERC ¶ 61,282 at P 29.

¹⁰⁵ *Id.* P 25.

¹⁰⁶ Duquesne argues that its liability as to PJM's RPM capacity procurement process applies to *all* auctions past and future. *See* Duquesne filing at 43. Duquesne also relies on its assumption that PJM is capable of removing the Duquesne zone from its auction so long as it has several weeks advance notice. Duquesne bases this assumption on PJM's representation to Duquesne regarding its FRR option.

these future delivery years, Duquesne commits to take appropriate action to comply with all PJM capacity requirements.

2. Responsive Pleadings

136. Certain intervenors, as noted above, argue that once PJM has established its auction parameters, an LSE cannot be relieved of its corresponding RPM obligations. PJM argues that this conclusion is appropriate given the reasonable reliance of all market participants on these auction parameters. Allegheny agrees, adding that any attempt to undo these commitments is prohibited by the filed rate doctrine and the rule against retroactive ratemaking.¹⁰⁷

137. With respect to the January 2008 auction, PJM asserts that Duquesne's load should not be removed because the parameters for this auction were posted on its website on October 19, 2007. With respect to its May 2008 auction, however, PJM states that a Commission order, issued prior to February 1, 2008, would be sufficient to remove Duquesne's load. FirstEnergy disagrees, arguing that because Duquesne will remain an LSE through at least May 31, 2008, its load must be included in both the January and May 2008 auctions. FirstEnergy notes that it is mandatory that all available unforced capacity from existing generation within the PJM market footprint be offered in the RPM auction.¹⁰⁸

3. Duquesne Answer

138. Duquesne asserts that given its announced notice of withdrawal and the rapid-fire sequence of RPM auctions conducted by PJM, it was inevitable that one or more RPM auctions would take place between the date that Duquesne gave notice and the date of a Commission order addressing its requested withdrawal. Duquesne argues, however, that no participant in any subsequent RPM auction, after the notice of its withdrawal, can have a reasonable expectation that Duquesne load would, in fact, be served by PJM for delivery years covered by the auctions conducted following Duquesne's notice.

4. Commission Findings

139. Neither Duquesne nor intervenors cite any express provision of the RA Agreement or PJM OATT as to the deadline applicable to the removal of an LSE's load forecasts from the RPM auction. While Duquesne provided a conditional notice of an intent to

¹⁰⁷ Allegheny comments at 13, *citing Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981).

¹⁰⁸ FirstEnergy protest at 29, *citing* PJM Manual 18 at 6.

withdraw from PJM in September 2007, that notice was predicated on receipt of the required authorization to withdraw from the Commission.¹⁰⁹ Section 5.1.4 of the RA Agreement requires that any withdrawal from the RA Agreement be accompanied by a Commission approval of the withdrawal. Here, Duquesne's filing seeking this authorization was not made until November 8, 2007.

140. With respect to the January 2008 auction, PJM gathered the information to establish the auction parameters starting September 3, 2007, and published these parameters on October 19, 2007. As explained earlier, the RA Agreement is ambiguous with respect to LSE withdrawals, and does not reconcile the notice provision in section 5.1.1 with the requirement in section 5.1.4 for Commission approval of the withdrawal. While in most cases the time interval between the withdrawal notice, the withdrawal filing, and the Commission order addressing that request to withdraw would not have any appreciable operational significance, it does here.¹¹⁰ In this case, Duquesne did not make clear its intent to withdraw until it made its filing herein.

141. As we stated earlier, however, once the RPM auction parameters are posted, parties rely on these parameters to make commitments and determinations.¹¹¹ Given the conditional nature of the withdrawal notice, then, we cannot find that PJM acted improperly in not excluding Duquesne from the January auction parameters in October based solely on Duquesne's conditional notice of withdrawal without the requisite Commission filing, or a Commission order on that filing. In these circumstances, Duquesne's load should continue to be included in the January 2008 auction.

142. However, PJM has not yet published its auction parameters for the May 2008 RPM auction, and, in this order, we find that, subject to the conditions outlined in the order, Duquesne's section 205 withdrawal plan is acceptable. Thus, it is appropriate to permit Duquesne to be excluded from the May 2008 auction. We therefore direct PJM to remove the load from the Duquesne zone from the May 2008 auction, provided that Duquesne file with PJM and the Commission, by February 1, 2008, a written notice that it commits to withdrawing from PJM before the delivery year for the May 2008 auction. Such a commitment is necessary to protect the other LSEs in the Duquesne zone who

¹⁰⁹ In fact, Duquesne has subsequently amended the withdrawal date from its September withdrawal notice.

¹¹⁰ Duquesne does not explain how PJM could exclude it from the January auction without predetermining the Commission's ruling on Duquesne's as-yet-unfiled FPA section 205 application to withdraw from PJM and the RA Agreement under section 5.1.4.

¹¹¹ See *supra* note 92.

may face much higher capacity costs if the Duquesne zone were excluded from the May 2008 auction and Duquesne later decided to remain in PJM.

The Commission orders:

(A) Duquesne's RTO withdrawal authorizations are hereby approved, subject to conditions and additional filings, as discussed in the body of this order.

(B) PJM is hereby ordered to remove Duquesne from its May 2008 auction, provided that Duquesne file with PJM and the Commission, by February 1, 2008, a written notice that it commits to withdraw from PJM before the delivery year applicable to the May 2008 auction.

(C) Duquesne is hereby ordered to make a filing within 45 days of the date of this order, providing a full and complete accounting of its RTEP allocations and all other obligations under section 3.4 of the TO Agreement, as discussed in the body to this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix**List of Intervenors**

American Electric Power Service Corporation (AEP)
Allegheny Energy Companies (Allegheny)
Ameren Services Company (Ameren)
American Municipal Power – Ohio, Inc. (AMP-Ohio)
Bear Energy LP, BE Allegheny LLC, BE Ironwood LLC, and BE Red Oak LLC (Bear Energy)
Consolidated Edison Energy, Inc. and Consolidated Edison Solutions, Inc. (Con Ed)
Constellation Energy Commodities Group, Inc., Constellation NewEnergy, Inc., and Constellation Power Source Generation, Inc. (Constellation)
Dayton Power and Light Company (Dayton)
DC Energy Midwest, LLC and DC energy, LLC (DC Energy)
Dominion Resources Services, Inc. (Dominion)
Duke Energy Corporation (Duke)
Duquesne Industrial Intervenors
Edison Mission Energy and Edison Mission Marketing & Trading, Inc. (Edison Mission)
Electric Power Supply Association (EPSA)
Exelon Corporation (Exelon)
FirstEnergy Service Company (FirstEnergy)
FPL Energy Generators
Indianapolis Power & Light Company (Indianapolis)
J. Aron & Company
Long Island Power Authority and LIPA (LIPA)
Macquarie Cook Power Inc. (Macquarie Cook)
Mirant Parties
NRG Companies (NRG)
North Carolina Electric Membership Corporation, Old Dominion Electric Cooperative and the Borough of Chambersburg, Pennsylvania (NCEMC, *et al.*)
Office of the People’s Counsel of the District of Columbia
PPL Corporation (PPL)
PJM Interconnection, L.L.C. (PJM)
PJM Power Providers Group, Inc. (PJM Power Providers)
PSEG Companies (PSEG)
Pennsylvania Public Utility Commission (Pennsylvania Commission)
Pennsylvania Office of Consumer Advocate (Pa OCA)
Pepco Holding, Inc. (Pepco)
Reliant Energy, Inc. (Reliant)
Retail Energy Supply Association (RESA)
Rockland Electric Company (Rockland)
Strategic Energy, LLC (Strategic)