



Limited Partnership (Midland)<sup>2</sup> (July 19 Filing).<sup>3</sup> As described below, the filing was prompted by Midland's request to increase the electrical output of its cogeneration facility. Midwest ISO requests that the Commission accept the Interconnection Agreement as filed, which, by its terms, requires amendment or termination of an existing Facilities Agreement (Facilities Agreement)<sup>4</sup> between Midland and Consumers Energy. In the alternative, Midwest ISO requests that, if the Commission does not accept the Interconnection Agreement, subject to amendment or termination of the Facilities Agreement, the July 19 Filing be deemed withdrawn to avoid any conflict or duplication. For the reasons discussed below, we will accept the Interconnection Agreement, effective July 20, 2010, conditioned upon termination or amendment of the Facilities Agreement. In addition, we will require Midwest ISO to revise the Interconnection Agreement, as discussed below.

2. On August 6, 2010, in Docket No. ER10-2156-000, Consumers Energy submitted for filing the previously unfilled Facilities Agreement (August 6 Filing), requesting that the Commission allow the Facilities Agreement to become effective 60 days after filing. For the reasons discussed below, we will accept the Facilities Agreement, effective October 5, 2010, 60 days after filing, and will direct Consumers Energy to refund the time value of the revenues it collected for the entire period during which Consumers Energy collected revenues under the Facilities Agreement without Commission authorization.

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<sup>2</sup> Midland, a limited partnership, was originally owned by Consumers Energy and Dow Chemical Company (Dow Chemical) and their affiliates. *See CMS Midland, Inc.*, 38 FERC ¶ 61,244 (1987) (CMS Midland). Since 2009, Midland has been owned by EQT Infrastructure, a Swedish private equity firm, and Fortistar, a United States energy investment group. *See Midland Cogeneration Venture Ltd. Partnership*, Docket No. EC09-60-000 (April 17, 2009) (unpublished letter order).

<sup>3</sup> Midwest ISO and Michigan Electric, but not Midland, executed the Interconnection Agreement.

<sup>4</sup> The Facilities Agreement is dated as of July 8, 1988, but made effective as of November 30, 1987. It was amended on June 9, 2008, and again on May 28, 2009.

## I. Background

3. Midland owns and operates a natural gas-fired, electrical and steam cogeneration facility located in Midland, Michigan (Midland Facility).<sup>5</sup> The Midland Facility, which has a maximum net electric power production capacity of 1575 MW, produces electric power for sale to Consumers Energy, with whose transmission system the plant interconnects, and industrial steam for sale to Dow Chemical.<sup>6</sup> In 1987, the Commission granted Midland's application for certification of the plant as a qualifying cogeneration facility (QF) under section 3(18)(B) of the Federal Power Act.<sup>7</sup> At that time, Consumers Energy and its wholly-owned subsidiaries owned a 49 percent share in Midland.<sup>8</sup>

4. Under the terms of a June 9, 2008 Amended and Restated Power Purchase Agreement (Restated Power Agreement), which replaced and superseded an earlier power purchase agreement, dated July 17, 1986 (Power Purchase Agreement),<sup>9</sup> Consumers Energy has the right to call upon 1240 MW of capacity and energy produced by Midland through March 15, 2025. To deliver this power, Midland and Consumers Energy (then known as Consumers Power Company) entered into the Facilities Agreement. In addition to describing the facilities required for interconnection with Consumers Energy's transmission system, the Facilities Agreement required Midland to provide two billing meters and associated equipment to be located at the two points of

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<sup>5</sup> The Midland Facility was originally intended to be a nuclear power plant. It was converted to an electric and steam cogeneration plant in 1986 and began commercial operation on March 16, 1990.

<sup>6</sup> Dow Chemical also has a contractual right to designated amounts of the plant's electric capacity and energy. This contractual right is outlined in a separate agreement titled "Backup Steam and Electric Power Agreement" dated January 20, 1987.

<sup>7</sup> 16 U.S.C. § 796(18)(B) (2006).

<sup>8</sup> *See supra*, note 2, *CMS Midland*. The plant was re-certified as a qualifying cogeneration facility on July 23, 2008. *Midland Cogeneration Venture Ltd. Partnership*, 124 FERC ¶ 62,060 (2008).

<sup>9</sup> The Restated Power Agreement can be found at Attachment A of Michigan Public Service Commission, *Midland Cogeneration Venture Limited Partnership*, Case No. U-15320, Order Approving Settlement Agreement (June 10, 2008), available at <http://efile.mpsc.state.mi.us/efile/docs/15320/0078.pdf>. Excerpts from the original Power Purchase Agreement can be found at Exhibit A of Midland Comments in the Docket No. ER10-2156-000 proceeding.

delivery defined in the Power Purchase Agreement.<sup>10</sup> Under the terms of the Facilities Agreement, Midland conveyed these facilities to Consumers Energy at no additional cost, and in return, Midland has the right to use the conveyed facilities to deliver power to and receive power from the points of delivery, i.e., the two billing meters.

5. Section 10 of the Facilities Agreement provides that neither party may assign its rights under the agreement without the other party's consent, and that the agreement may not be assigned unless the Power Purchase Agreement is assigned in the same manner and at the same time. When Consumers Energy transferred its transmission assets to Michigan Electric,<sup>11</sup> Midland did not consent to assignment of the Facilities Agreement. Thus, Consumers Energy and Michigan Electric entered into an agreement, dated as of April 1, 2001 (Agency Agreement), pursuant to which Consumers Energy delegated its duties and obligations under the Facilities Agreement to Michigan Electric.<sup>12</sup> Section 12 of the Facilities Agreement provides that it will continue in effect until termination of the Power Purchase Agreement.

## **II. Facilities Agreement**

6. In the August 6 Filing, Consumers Energy states that, at the time the Midland Facility began commercial operation, the Facilities Agreement was not under the Commission's jurisdiction because Consumers Energy, the local utility where the Midland Facility is located, had the right to purchase all of the facility's electrical output, except for that sold to Dow Chemical and other end-users. Consumers Energy states that contractual arrangements between it and Midland facilitated buy-sell arrangements under which Consumers Energy sold, at wholesale, a portion of the energy it purchased from Midland, and that the Commission was aware of these arrangements, which the

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<sup>10</sup> Facilities Agreement at section 1.6. The Restated Power Agreement, at section 1(v), defines the Point of Delivery as the billing meters used for financial settlement with Midwest ISO. Item 1 of the May 28, 2009 amendment to the Facilities Agreement, which was entered into in conjunction with execution of the Restated Power Purchase Agreement, provides that all references to the "Power Purchase Agreement" in the Facilities Agreement shall mean the Restated Power Agreement.

<sup>11</sup> See *Consumers Energy Co.*, 94 FERC ¶ 61,018 (2001); *Trans-Elect, Inc.*, 98 FERC ¶ 61,142 (2002).

<sup>12</sup> Consumers Energy included the Agency Agreement in Attachment C of the August 6 Filing.

Commission considered to be wholesale sales by Midland to Consumers Energy, rather than wholesale sales by Midland to purchasers other than Consumers Energy.<sup>13</sup>

7. Consumers Energy further states that, when the Commission granted Midland market-based rate authority for wholesale sales in 2006, Consumers Energy was unaware that Midland's sale of energy at wholesale to other third-party purchasers transformed the Facilities Agreement into a Commission-jurisdictional agreement. Consumers Energy states that it became aware that the Facilities Agreement was jurisdictional earlier this year.<sup>14</sup>

8. Consumers Energy states that it has found no record prior to 2006 of any Midland wholesale sales to any party other than Consumers Energy, and that, according to Midland's third quarter 2006 Electric Quarterly Report, Midland began making market-based rate sales into the Midwest ISO market on July 26, 2006.<sup>15</sup> Consumers Energy further states that, since July 2006, it has collected a total of \$11,507.50 from Midland under the Facilities Agreement for ongoing operation and maintenance expense associated with the two billing meters that Consumers Energy retained when it transferred its transmission facilities to Michigan Electric.<sup>16</sup> Consumers Energy acknowledges that its revenues for operation and maintenance charges collected under the Facilities Agreement may be subject to time-value refunds, pursuant to the Commission's Prior Notice Policy.<sup>17</sup>

9. Consumers Energy asks the Commission to accept the Facilities Agreement and to permit it to become effective 60 days after the date of filing.

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<sup>13</sup> August 6 Filing at 1-2 (citing *Midland Cogeneration Venture Ltd. Partnership*, 56 FERC ¶ 61,361, at 62,397-62,398 (1991)).

<sup>14</sup> *Id.* at 2-3 (citing a petition for declaratory order in Docket No. EL10-43-000).

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.* at 4-5.

<sup>17</sup> *Id.* at 4 (citing *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,979, *order on reh'g*, 65 FERC ¶ 61,081 (1993), in which the Commission stated that if a utility files an otherwise just and reasonable cost-based rate after new service has commenced, the Commission requires the utility to refund to its customers the time value of the revenues collected, calculated pursuant to section 35.19a of the Commission's Regulations.

### III. Interconnection Agreement

10. In the July 19 Filing, Midwest ISO submitted a partially executed Interconnection Agreement among itself, Michigan Electric and Midland. Midwest ISO states that the Interconnection Agreement conforms to its *pro forma* Generator Interconnection Agreement (GIA)<sup>18</sup> in Attachment X of its Open Access Transmission, Energy, and Operating Reserve Markets Tariff (Midwest ISO Tariff) and addresses Midland's request to increase the Midland Facility's Network Resource Interconnection Service by 335 MW, from 1240 MW to 1575 MW. Midwest ISO states that, for the Interconnection Agreement to become effective, the Facilities Agreement must be amended or terminated to insure that there will be only one agreement that covers the facility ownership, interconnection service, and maintenance obligations of the interconnected parties and to avoid a violation of the "No Conflict" provisions in section 28.1.3 of the Interconnection Agreement. Accordingly, the Recitals in the Interconnection Agreement provide that the agreement will not become effective until the Facilities Agreement is amended or terminated.<sup>19</sup>

11. Midwest ISO further explains that Midland requested that Midwest ISO file the partially executed Interconnection Agreement because of an impasse among the parties over several issues, including, but not limited to: (1) Midwest ISO's refusal to permit Midland to execute the Interconnection Agreement until the Facilities Agreement is terminated or amended; (2) Michigan Electric's requirement that Midland pay for the installation of six new revenue meters in place of the existing two revenue meters; (3) Michigan Electric's failure to confirm that it will not seek to impose new transmission charges on Midland; and (4) inconsistencies in the reactive power requirements between the body and the appendices of the Interconnection Agreement.<sup>20</sup>

12. Midwest ISO requests that the Commission conditionally accept the partially executed Interconnection Agreement, subject to an amendment or termination of the related Facilities Agreement, and waive its 60-day notice requirement, as required by section 35.3(a) of the Commission's Regulations, 18 C.F.R. § 35.3(a) (2010), to permit the Interconnection Agreement to become effective as of July 20, 2010. Midwest ISO

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<sup>18</sup> Midwest ISO states that the Interconnection Agreement will be updated to reflect modifications to the *pro forma* GIA that Midwest ISO proposed, on July 15, 2010, in Docket No. ER10-1791-000, should the Commission ultimately accept these modifications. (July 19 Filing at 2 n.3).

<sup>19</sup> July 19 Filing at 2.

<sup>20</sup> *Id.* at 3.

also requests that termination or amendment of the Facilities Agreement be effective July 20, 2010 to prevent conflicts between the two agreements.

#### **IV. Notices of Filing and Responsive Pleadings**

13. Notice of the July 19 Filing (Docket No. ER10-1814-000) was published in the *Federal Register*, 75 Fed. Reg. 44,785 (2010), with protests and interventions due on or before August 9, 2010. Midland filed a motion to intervene and a protest (Midland Protest). Michigan Electric filed a motion to intervene and comments (Michigan Electric Comments). Consumers Energy filed a motion to intervene. On August 24, 2010, motions for leave to answer and answers to the Midland Protest were filed by Midwest ISO (Midwest ISO Answer) and Michigan Electric (Michigan Electric Answer). On September 8, 2010, Midland filed a motion for leave to answer and an answer to the Michigan Electric Answer (Midland September 8 Answer).

14. Notice of the August 6 Filing (Docket No. ER10-2156-000) was published in the *Federal Register*, 75 Fed. Reg. 49,921 (2010), with protests and interventions due on or before August 27, 2010. Midland filed a motion to intervene and comments (Midland Comments). Midwest ISO and Michigan Electric each filed a motion to intervene. On September 13, 2010, Michigan Electric filed a response to the Midland Comments (Michigan Electric Response). On September 15, 2010, Midland filed a reply to the Michigan Electric Response (Midland Reply).

15. On September 7, 2010, Consumers Energy filed an answer in Docket No. ER10-2156-000 (Consumers Energy Answer and Request), which included a request that the Commission set the matters in both dockets for joint settlement proceedings. Concurrently, Consumers Energy filed a similar request in Docket No. ER10-1814-000. On September 10, 2010, Midland filed, in both dockets, a motion for leave to answer and an answer to both of Consumer Energy's September 7, 2010 answers and requests for joint settlement (Midland September 10 Answer).

#### **V. Discussion**

##### **A. Procedural Matters**

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Midwest ISO's, Michigan Electric's, Midland's and Consumers Energy's answers, Michigan Electric's Response, and Midland's Reply because they have provided information that assisted us in our decision-making process.

**B. Docket No. ER10-2156-000****1. Comments and Answer**

18. In its comments, Midland disagrees with Consumers Energy as to when the Facilities Agreement came under the Commission's jurisdiction and thus should have been filed. Midland states that Consumers Energy is mistaken in suggesting that the trigger for the Facilities Agreement becoming subject to the Commission's jurisdiction was when Midland actually made third-party sales. Midland states that the trigger was when Midland secured the right to make wholesale sales to third parties. In that regard, Midland states that it reserved that right in the Facilities Agreement, which provides that, if Consumers Energy decides not to exercise its limited right of first refusal to purchase any residual capacity or energy available from the facility, then Midland would be free to sell some or all of such residual capacity and energy of the facility to another utility.<sup>21</sup> Midland states that Consumers Energy further committed to provide transmission for such sales in a 1988 Wheeling Agreement,<sup>22</sup> and therefore, Consumers Energy's filing obligation arose in 1988, when the Facilities Agreement and the Wheeling Agreement were executed, and certainly no later than 1992 when the Commission clarified its position that, whenever a QF (such as the Midland Facility) has the right to sell any of its output to a third party, the Commission has exclusive jurisdiction over the interconnection between the facility and the directly interconnected utility and over agreements affecting or relating to such service.<sup>23</sup>

19. Lastly, Midland asks that the Commission clarify that Consumers Energy's filing of the Facilities Agreement does not relieve Michigan Electric of its responsibility to file the Agency Agreement, an agreement that, according to Midland, circumvents the anti-assignment provisions of the Facilities Agreement.

20. Consumers Energy disagrees with Midland's conclusions about when Midland obtained the contractual right to make third-party wholesale sales. In the August 6 Filing,

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<sup>21</sup> Midland Comments at 10-11. Midland cites Article 3(c) of the original Power Purchase Agreement, excerpts of which were filed as Exhibit A to the Midland Comments, as the basis for its right to make wholesale sales to third parties if Consumers Energy did not exercise its right of first refusal. Midland also includes, at Exhibit J to the Midland Comments, copies of a partially executed May 29, 1998 sales agreement with Engage Energy US L.P. and two invoices to that company, dated May 26 and 29, 1998.

<sup>22</sup> Midland Comments, Exhibit B.

<sup>23</sup> *Id.* at 11-12.

Consumers Energy puts forth July 2006 as the date when the Facilities Agreement should have been filed. This is the date when Midland received its market-based rate authority. However, Consumers Energy also acknowledges that Midland made some incidental third-party wholesale sales, as early as 1998, before it obtained its market-based rate authority.<sup>24</sup> Consumers Energy contends that, while Midland bases its belief as to when it had the right to make wholesale sales on the Facilities Agreement and the Wheeling Agreement, neither of these agreements gives Midland the right to make third-party sales. Consumers Energy explains that the Facilities Agreement deals with the construction and operation of interconnection facilities and the Wheeling Agreement deals with transmission arrangements if third-party sales were made. Consumers Energy further states that no transmission arrangements for third-party sales were ever made under the Wheeling Agreement.<sup>25</sup>

21. Finally, Consumers Energy requests that the Commission accept the Facilities Agreement in Docket No. ER10-2156-000 and the Interconnection Agreement in Docket No. ER10-1814-000, suspend them, and set them for joint settlement proceedings for the parties to work out remaining disputes.

22. In the Midland September 10 Answer, Midland disagrees with Consumers Energy's contention that the parties need a settlement judge to oversee discussions over any potential refunds. Midland states that the Commission's refund policies provide guidance on the types of costs that are covered and how to calculate the amount. Midland further states that once the Commission determines when Consumers Energy should have filed the Facilities Agreement, then Consumers Energy can file a refund calculation. Midland states that the refund calculation should include appropriate supporting documentation for the charges that Consumers Energy levied which were truly straight pass-through expenses and did not include any profit element, as alleged by Consumers Energy, and which in fact contained a mark up.<sup>26</sup>

23. In the Michigan Electric Response, Michigan Electric urges the Commission to accept the Facilities Agreement retroactively to the date that it is found to be jurisdictional. Michigan Electric claims that Midland has always been aware that its rights with respect to third-party sales could affect the jurisdictional status of the Facilities Agreement. Michigan Electric states that the jurisdictional status of the Agency Agreement was and remains unclear and that the Commission should clarify whether the

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<sup>24</sup> Consumers Energy Answer and Request at 6-7.

<sup>25</sup> *Id.* at 4-5.

<sup>26</sup> Midland September 10 Answer at 4.

Agency Agreement is Commission-jurisdictional. Michigan Electric asks the Commission to exercise its discretion and to decline to order any refunds related to the late-filing of the Facilities Agreement. Alternatively, if the Commission orders time value refunds, Michigan Electric states that there should be no refunds from February 2005 until the present because Midland has not made any contractual payments for interconnection service during that time period, and that, by withholding payment, Midland has effectively already received the time value of amounts it should have paid. Further, if the Commission orders time value refunds for any period, Michigan Electric urges that such refunds be offset against the amounts owed by Midland for interconnection service since 2005.<sup>27</sup> In the September 15 Midland Reply, Midland opposes retroactive enforcement of the Facilities Agreement.<sup>28</sup>

## 2. Commission Determination

24. In Order No. 2003,<sup>29</sup> the Commission addressed the boundary between state and federal jurisdiction over agreements pursuant to which QFs interconnect with the transmission grid. As the Commission explained:

The Commission's Regulations govern a QF's interconnection with most electric utilities in the United States<sup>[30]</sup> including normally non-jurisdictional utilities [footnote omitted]. When an electric utility is obligated to interconnect under Section 292.303 of the Commission's Regulations, that is, when it must purchase the QF's total output, the relevant state authority exercises authority over the interconnection and the

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<sup>27</sup> Michigan Electric Response at 3, 4, 7, 8, 9.

<sup>28</sup> Midland September 15 Reply at 3.

<sup>29</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 813 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

<sup>30</sup> Citing 18 C.F.R. §§ 292.303, 292.306 (2003).

allocation of interconnection costs.<sup>[31]</sup> But when an electric utility interconnecting with a QF does not purchase all of the QF's output and instead transmits the QF power in interstate commerce, the Commission exercises jurisdiction over the rates, terms, and conditions affecting or related to such service, such as interconnections.<sup>[32]</sup>

The Commission thus concluded that it has jurisdiction over a QF's interconnection to a transmission system if the QF's owner may sell any of the QF's output to an entity other than the electric utility directly interconnected to the QF. The Commission explained that the presence of the right to sell *any* output to a third party determines Commission jurisdiction.<sup>33</sup>

25. This jurisdictional rule applies whenever the owner of a QF seeks interconnection to a transmission system for the purpose of selling any of the output of the QF to a third party. Commission jurisdiction applies when a new QF plans to sell its output to a third party, and when an existing QF, which historically sold its total output to a directly interconnected utility (or an on-site customer), and which is already interconnected to a transmission system pursuant to a state approved agreement, now plans to sell output to a third party. In *Niagara Mohawk Power Corp.*, the Commission explained that an agreement which releases the interconnecting utility from its obligation to purchase the QF's full output authorizes the QF to make sales that require the transmission of electric energy in interstate commerce, and any interconnection agreements affecting or relating to such sales require Commission authorization.<sup>34</sup>

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<sup>31</sup> Citing *Western Massachusetts Electric Co.*, 61 FERC ¶ 61,182 (1992) (*Western Massachusetts*), *aff'd sub nom. Western Massachusetts Electric Co. v. FERC*, 165 F.3d. 922 (D.C. Cir. 1999).

<sup>32</sup> Citing *Western Massachusetts*, 61 FERC at 61,661-62. In that case, the Commission further clarified that the use of facilities for non-jurisdictional services is not dispositive when determining jurisdiction, stating that: "The fact that the facilities used to support the jurisdictional service might also be used to provide various non-jurisdictional services, such as back-up and maintenance power for a QF, does not vest state regulatory authorities with authority to regulate matters subject to the Commission's exclusive jurisdiction."

<sup>33</sup> Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 814.

<sup>34</sup> *Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,183 (2007), *order denying reh'g*, 123 FERC ¶ 61,061 at P 12 (2008).

26. Consistent with the above summary of our jurisdiction over interconnections related to QFs, we find that the Facilities Agreement is jurisdictional and we accept the Facilities Agreement, effective October 5, 2010, sixty days after filing. We also find that the Facilities Agreement became jurisdictional on the date that Midland was first authorized (by contract or otherwise) to make third-party sales, i.e., sales other than to the directly-interconnected utility. In that regard, we find that the original Power Purchase Agreement provides for contractual arrangements to make third-party sales of residual capacity and energy to third-party purchasers and that the Facilities Agreement became jurisdictional at that time. Therefore, within 60 days of the date of this order, Consumers Energy (or Michigan Electric as its agent) must refund the time value of revenues collected under the Facilities Agreement for the entire period during which Consumers Energy collected revenues without Commission approval. Consumers Energy must also submit a refund report, within 30 days after the refunds are made, showing that it refunded the time value of the revenues from the date that Consumers Energy first received revenues under the Facilities Agreement.

27. In addition, we clarify that Consumers Energy's submittal of the Facilities Agreement does not relieve Michigan Electric of its responsibility to file the Agency Agreement. The Agency Agreement encompasses terms and conditions related to the Facilities Agreement. In essence, Michigan Electric, by providing operation and maintenance services related to the transmission of electric energy in interstate commerce, is providing a jurisdictional services.<sup>35</sup> Therefore, the services provided under the Agency Agreement are jurisdictional and the Agency Agreement must be filed with the Commission within 30 days of the date of this order.

28. Given our disposition of this matter, no purpose would be served by ordering settlement proceedings, as requested by Consumers Energy. Moreover, there appears to be no reason to delay action on the July 19 Filing in Docket No. ER10-1814-000, as discussed below, pending resolution of disputes between Consumers Energy and Midland that relate to the Facilities Agreement. Accordingly, we will deny Consumers Energy's requests for joint settlement proceedings.

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<sup>35</sup> *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC at pp. 61,993-94, *order on reh'g*, 65 FERC ¶ 61,081.

**C. Docket No. ER10-1814-000****1. Governance of Interconnection Facilities****a. Comments and Protests**

29. Midland argues that the Commission's acceptance of the Interconnection Agreement should not be conditioned upon the termination or amendment of the Facilities Agreement. Midland states that upsetting its longstanding commercial relationship with Consumers Energy in return for increasing capacity at the Midland Facility and increasing the deliveries into the Midwest ISO controlled-grid is unreasonable. Midland states that the Interconnection Agreement, once accepted, would supersede the Facilities Agreement "to the extent that they conflict." Thus, Midland argues that it would take interconnection service from Midwest ISO under the Interconnection Agreement and that those provisions of the Facilities Agreement that relate in any way to interconnection service would be rendered moot. Midland further states that once those provisions are rendered moot, there is no conflict and section 28.1.3 of the Interconnection Agreement (the "No Conflict" provision) would be satisfied.<sup>36</sup>

30. Michigan Electric answers that the Facilities Agreement clearly and directly conflicts with the Interconnection Agreement, and therefore, both agreements cannot be in effect and enforced at the same time.<sup>37</sup> Michigan Electric argues that Midland wishes to obtain the increased service and other benefits provided by the Interconnection Agreement, but it is unwilling to terminate or amend the Facilities Agreement to remove provisions that deal with interconnection service, and the ownership, operation and maintenance of the connecting facilities. In effect, Michigan Electric states, Midland seeks to use the beneficial provisions of both the Interconnection Agreement and the Facilities Agreements while avoiding having to comply with less advantageous provisions of the agreements.<sup>38</sup> Michigan Electric states that Midland has not even attempted to raise the issue with Consumers Energy and that Midland bears the responsibility, not Midwest ISO or Michigan Electric, to rid itself of conflicting agreements before it can obtain increased interconnection service.<sup>39</sup>

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<sup>36</sup> Midland Protest at 9.

<sup>37</sup> Michigan Electric Answer at 2.

<sup>38</sup> Michigan Electric Comments at 3.

<sup>39</sup> Michigan Electric Answer at 4.

31. Midwest ISO answers that Commission precedent requires the use of a new *pro forma* interconnection agreement when there is an increase in capacity at an existing generating facility. Midwest ISO notes that the Commission has found that concurrent amendment of an existing interconnection agreement is appropriate and, therefore, amendment or termination of the Facilities Agreement does not deny service to Midland or unreasonably condition provisions of interconnection service. Midwest ISO states that such a policy is necessary to ensure that potentially conflicting terms do not apply to the same interconnection.<sup>40</sup>

32. Midwest ISO argues that, while Midland acknowledges concerns with conflicting terms between the Facilities and Interconnection Agreements, Midland has not specified which terms conflict and which terms would be superseded by the Interconnection Agreement. Without a specific amendment or termination of the Facilities Agreement, Midwest ISO argues that potentially conflicting terms will exist that would be better addressed by either amending the terms of the Facilities Agreement or terminating that agreement.<sup>41</sup>

**b. Commission Determination**

33. Order No. 2003 provides that, when interconnection customers make new interconnection requests, these new interconnection requests must comply with the applicable Large Generator Interconnection Procedures.<sup>42</sup> Midwest ISO's *pro forma* Interconnection Procedures explicitly provide that any increase in generation capacity from an existing generator requires a new interconnection request and a new interconnection agreement conforming to the transmission provider's current *pro forma* interconnection agreement.<sup>43</sup>

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<sup>40</sup> Midwest ISO Answer at 5-6 & n.8. Midwest ISO refers to the Commission's acceptance of a *pro forma* GIA and concurrent amendment to a related existing "umbrella" interconnection agreement among Michigan Electric, Consumers Energy and Midwest ISO. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,277, at P 2, 11-13 (2008) (Hardy LGIA Order).

<sup>41</sup> Midwest ISO Answer at 6.

<sup>42</sup> Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 4, n.5.

<sup>43</sup> *See* Midwest ISO *pro forma* Large Generator Interconnection Procedures, section 1 (defining an interconnection request as a request "to interconnect a new Generating Facility, or to increase the capacity of, or make a Material Modification to the

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34. Therefore, we agree that the request to increase the generation capacity at the Midland Facility requires a new interconnection request and a new interconnection agreement conforming to the Midwest ISO's *pro forma* GIA. The parties do not dispute this requirement. Midland instead opposes Midwest ISO's and Michigan Electric's insistence that Midland must amend or terminate its Facilities Agreement with Consumers Energy before it can execute the Interconnection Agreement among itself, Midwest ISO and Michigan Electric. Since Midland does not specify which provisions under the Facilities Agreement would remain in effect and which provisions would become governed by the Interconnection Agreement, we find, consistent with the Commission findings in the Hardy LGIA Order, that allowing both the Interconnection Agreement and the Facilities Agreement, in its current form, to remain in effect will cause unnecessary confusion and uncertainty among the parties.<sup>44</sup>

35. Therefore, Midland has the option of choosing between whether to continue the status quo and having its interconnection governed by the Facilities Agreement or increasing its capacity at the Midland Facility and having its interconnection governed by the provisions of the *pro forma* GIA. As a result, we will accept the Interconnection Agreement, effective July 20, 2010, conditioned upon Midland's and Consumers Energy's agreement to amend or terminate the Facilities Agreement. If Midland chooses to increase the capacity at the Midland Facility and if Midland and Consumers Energy choose to amend the Facilities Agreement rather than terminate it, the parties will need to remove from the Facilities Agreement any and all language pertaining to the interconnection service. Further, if Midland chooses to become a party to the Interconnection Agreement, Midwest ISO must revise the Interconnection Agreement to include Midland as a signatory.

36. Midwest ISO states that the body of the Interconnection Agreement conforms to the Midwest ISO *pro forma* GIA, except for the Recitals wherein Midwest ISO and Michigan Electric request a termination or amendment of the Facilities Agreement. Such is not the case. Midwest ISO notes that it included in the Interconnection Agreement language related to "shared network upgrades" that was proposed in a July 15, 2010 filing, with a requested effective date of July 16, 2010.<sup>45</sup> Additionally, the

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operating characteristics of, an existing Generating Facility that is interconnected with the ... Transmission System").

<sup>44</sup> Hardy LGIA Order, 124 FERC ¶ 61,277 at P 11.

<sup>45</sup> On July 15, 2010, in Docket No. ER10-1791-000, Midwest ISO proposed revisions to its *pro forma* GIA. It incorporated those proposed revisions in the Interconnection Agreement. Specifically, on Original Sheet No. 10 of the Interconnection Agreement, Midwest ISO included a definition for a "Shared Network

(continued...)

Interconnection Agreement failed to include the definitions for “HVDC Facilities” and “HVDC Service” on Original Sheet No. 7.

37. Therefore, the Commission requires Midwest ISO to revise the proposed Interconnection Agreement, in a compliance filing with 60 days of the date of this order, to include the definitions for HVDC Facilities and HVDC Service so that the Interconnection Agreement conforms to Midwest ISO’s *pro forma* GIA. In addition, the Commission will accept the language included in the Interconnection Agreement related to the shared network upgrades, subject to the outcome of the proceedings in Docket No. ER10-1791-000.

## 2. Metering

### a. Comments and Protest

38. Midland also refused to execute the Interconnection Agreement because of Michigan Electric’s requirement that Midland pay for six new revenue meters. Michigan Electric states that there is no disputing the fact that six points of interconnection exist between the Midland Facility and the Michigan Electric transmission system. Michigan Electric also states that, under section 7.1 of the *pro forma* GIA,<sup>46</sup> it has the right to require that Midland install and maintain metering equipment at each of those six points of interconnection.

39. Midland argues that replacing its two existing meters is an unnecessary expense with costs expected to exceed \$2 million. Midland argues that the six new meters are unnecessary, as it has operated using the existing two meters for over 20 years. Midland argues that the two existing meters can measure electricity deliveries even without being located at the points of interconnection by using algorithmic adjustments for losses between the meters and the points of interconnection.<sup>47</sup>

40. Midland explains that the *pro forma* GIA does not mandate new meters in all cases and that Michigan Electric should exercise its discretion not to require new metering

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Upgrade.” In addition, Midwest ISO included sections 11.3.3 and 11.5.4 on Original Sheet Nos. 50 and 53, respectively, which are related to the shared network upgrades.

<sup>46</sup> Section 7.1 of the *pro forma* GIA provides that, unless the parties agree otherwise, the interconnecting customer must own and maintain meters at the point of interconnection.

<sup>47</sup> Midland Protest at 8.

facilities. Further, it argues that Michigan Electric has not required all interconnecting customers to pay for and maintain meters, and, despite Michigan Electric's claim that it requires all interconnection customers to be responsible for their own meters, Michigan Electric has at least 17 interconnection agreements on file where it pays for and maintains customers' meters. Midland argues that it should be treated no differently than those 17 generators and that Michigan Electric is using the *pro forma* GIA as a source of leverage in negotiations with Midland.<sup>48</sup> Midland requests that the Commission require Michigan Electric to designate the current meter locations as metering points under Article 7.5 of the Interconnection Agreement or to eliminate the *pro forma* GIA's requirement that the interconnecting customer pay for new meters.

41. Michigan Electric explains that the 17 agreements that Midland refers to are older agreements that it inherited from its predecessors when it purchased its transmission facilities. Michigan Electric states that it has consistently required, in new interconnection agreements and replacement agreements involving an increase in generation capacity, that customers own and maintain required metering equipment at the points of interconnection. Citing *Southwest Power Pool, Inc.*, Michigan Electric also argues that deviations from the *pro forma* GIA must be justified by "specific reliability concerns, novel legal issues or other unique factors" and that a party "seeking a case-specific deviation from [a] *pro forma* interconnection agreement bears a high burden to justify and explain that its changes are not merely 'consistent with or superior to' the *pro forma* agreement, but are *necessary* changes."<sup>49</sup> It argues that Midland has not shown how its requested deviation from the *pro forma* GIA is necessary or justified based on reliability concerns, novel legal issues, or other unique factors.

42. In its answer, Midland asserts that 11 Michigan Electric interconnection agreements, on file with the Commission, explicitly permit continued use of existing meters and adjusted meter readings accounting for losses between existing meters and points of interconnection.<sup>50</sup> Midland continues to argue that Michigan Electric has provided no basis for treating Midland differently than other customers and that it has provided no evidence of operational need for the new meters. Midland states that the

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<sup>48</sup> *Id.* at 10.

<sup>49</sup> *Southwest Power Pool, Inc.*, 132 FERC ¶ 61,062, at P 3 (2010) (emphasis in original); Michigan Electric also cites *Midwest Indep. Transmission Sys. Operator Inc.*, 113 FERC ¶ 61,082, at P 27 (2005).

<sup>50</sup> Midland September 8 Answer at Exhibit A.

Commission should direct Michigan Electric to allow Midland to continue using its existing meters.<sup>51</sup>

**b. Commission Determination**

43. Section 7.1 of the *pro forma* GIA provides that an interconnection customer shall install and maintain metering equipment at the point of interconnection prior to any operation of the generating facility, unless otherwise agreed by the parties. Absent such an agreement between Midland and Michigan Electric, the Commission finds that Michigan Electric has the discretion to require the new metering equipment at the six points of interconnection. We also believe that the metering configuration proposed in Appendix A of the Interconnection Agreement should provide reliability benefits for the parties as well. Compared to the current two meter configuration, the six meter configuration at the points of interconnection will improve system awareness by providing telemetry data of the transmission facilities where a change in ownership occurs in order to account for losses on the interconnection customer's side of the points of interconnection.

44. Therefore, Midland must decide whether to increase the generating capacity under the Interconnection Agreement or continue to be governed by the Facilities Agreement and avoid the cost of installing the meters at the points of interconnection. However, if Midland elects to increase its generation capacity, then Michigan Electric may implement the new metering configuration and Midland would bear the costs of installing and maintaining the metering equipment, consistent with the Midwest ISO *pro forma* GIA.

**3. Interconnection Service**

**a. Midland Protest**

45. Midland also refused to execute the Interconnection Agreement because of a dispute over its "existing transmission rights" under the Facilities Agreement. Midland states that the Facilities Agreement provides for service to delivery points at the existing revenue meters and that it is not assessed any charges for transmission service to the points of delivery. Midland claims that while Michigan Electric has demanded termination of the Facilities Agreement, it has not agreed to preserve Midland's right to transmission service at no additional charge should Midland's energy deliveries into the Midwest ISO grid continue to occur at the two existing revenue meters, which are located on Michigan Electric facilities. Midland states that it is faced with the prospect of giving

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<sup>51</sup> *Id.* at 2-3.

up, at Midwest ISO's and Michigan Electric's insistence, its right to transmission service in order to obtain an expansion of its existing interconnection service.<sup>52</sup>

**b. Commission Determination**

46. It appears that Midland is concerned that it will have to pay for transmission service under the Interconnection Agreement because the six new billing meters will be in different locations than the two existing billing meters. However, our review of the language in the two agreements indicates that Midland will receive service under the Interconnection Agreement that is comparable to the service it receives under the Facilities Agreement, and Midland will not have to pay an additional charge for transmission service. As noted above, the Facilities Agreement provides that Midland can deliver energy from the Midland Facility at the *points of delivery*, which the Restated Power Agreement defines as the billing meters used for financial settlement with Midwest ISO.<sup>53</sup> Therefore, any delivery service over transmission facilities beyond the point of delivery under the Facilities Agreement requires separate transmission arrangements. Under the Interconnection Agreement, Midland can deliver energy from the Midland Facility at the *points of interconnection*, which are the six new billing meters.<sup>54</sup> Once the six new meters are in place, they will replace the existing two meters to become the meters used for financial settlement with Midwest ISO.<sup>55</sup> Thus, the existing Facilities Agreement and the Interconnection Agreement both give Midland the ability to deliver energy from the Midland Facility at the billing meters used for financial settlement with Midwest ISO, without incurring a separate charge for transmission

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<sup>52</sup> Midland Protest at 7-8. In this regard, however, we note that, in its Answer and Request in Docket No. ER10-2156-000, Consumers Energy states that Midland has misstated the service that it receives under the Facilities Agreement. Consumers Energy states that Midland receives interconnection service under the Facilities Agreement, not "transmission" or delivery service, and that a separate agreement is required for delivery service. (Consumers Energy Answer and Request at 14).

<sup>53</sup> See *supra*, note 10. The two existing meters are currently the points of delivery under the Facilities Agreement.

<sup>54</sup> Interconnection Service is defined in the Interconnection Agreement as the service provided by Midwest ISO associated with interconnecting the Generating Facility to the Transmission System and enabling it to receive electric energy and capacity from the Generating Facility at the Point of Interconnection, pursuant to the terms of the Interconnection Agreement and, if applicable, the Tariff.

<sup>55</sup> See Interconnection Agreement at section 7.1-Metering.

service.<sup>56</sup> Any delivery beyond the six new billing meters (*i.e.*, beyond the points of interconnection) will require separate arrangements for transmission service under the Midwest ISO Tariff,<sup>57</sup> just as delivery beyond the two existing meters currently requires separate transmission arrangements.

#### **4. Reactive Power Requirements**

##### **a. Protest and Answers**

47. The last reason that Midland refused to execute the Interconnection Agreement involves the reactive power requirements in section 9.6.1 and Appendix C of the Interconnection Agreement. Midland does not dispute the actual power factor requirements and acknowledges that the requirements are consistent with those that Michigan Electric and Consumers Energy apply to all generation units in the local balancing authority area.<sup>58</sup> Midland, however, expresses concern that the Interconnection Agreement was not clear as to whether Michigan Electric could unilaterally change the reactive power factor requirements in Appendix C if the requirements posted on Midwest ISO's website for the local balancing authority changed. Midland believes that once the Interconnection Agreement is executed, the requirements in Appendix C will remain the same even if a change occurs to the requirements on Midwest ISO's website in the future, unless all parties mutually agree to amend the Interconnection Agreement. Midland requests that the Commission confirm this interpretation of the power factor requirements.<sup>59</sup>

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<sup>56</sup> We note that neither Midwest ISO nor Michigan Electric claims that Midland will be subject to transmission charges to deliver energy from the Midland Facility to the points of interconnection.

<sup>57</sup> The Interconnection Agreement provides Midland with Network Resource Interconnection Service (Interconnection Agreement at section 4.1). Although Network Resource Interconnection Service does not convey transmission service, it does allow Midland to integrate the Midland Facility with the Midwest ISO transmission system in the same manner as for any generating facility being designated as a network resource.

<sup>58</sup> [http://www.midwestmarket.org/publish/Document/735a38\\_109988af51a\\_-7b610a48324a/MISO\\_Power\\_Factors\\_Requirements.pdf?action=download&\\_property=Attachment](http://www.midwestmarket.org/publish/Document/735a38_109988af51a_-7b610a48324a/MISO_Power_Factors_Requirements.pdf?action=download&_property=Attachment). Section 1.11 of Appendix C is consistent with the factors posted on Midwest ISO's website. The Midland Facility will be required to maintain a power factor of 0.93 leading to 0.90 lagging at the points of interconnection.

<sup>59</sup> Midland Protest at 13-14.

48. Midwest ISO concurs with Midland's understanding that under the Interconnection Agreement the power factor requirements would be fixed at 0.93 leading and 0.90 lagging unless the Interconnection Agreement is amended by mutual consent of the parties, regardless of any changes made to the power factor values posted on the Midwest ISO website. Midwest ISO adds that were Midland to increase capacity or otherwise trigger the need for a new interconnection agreement, the power factor requirements would be updated to conform to the current requirements posted on the Midwest ISO website for the applicable local balancing authority area.<sup>60</sup>

49. Michigan Electric also concurs with Midland. Michigan Electric states that it has never claimed that it could unilaterally change the power factor design criteria that apply to the Midland Facility under the Interconnection Agreement. Like Midwest ISO, Michigan Electric notes that the power factor would update to the current requirements for Midland's local balancing authority area were Midland to trigger the need for a new interconnection agreement.<sup>61</sup>

**b. Commission Determination**

50. The Commission agrees with the parties that the power factor should remain at 0.93 leading and 0.90 lagging, as stated in the Interconnection Agreement, unless the parties mutually agree upon a change. However, as observed by Midwest ISO and Michigan Electric, should Midland be subject to a new interconnection agreement, then Midland's applicable power factor requirements must be consistent with the transmission provider's *pro forma* GIA applicable to that new interconnection agreement.

The Commission orders:

(A) Consumers Energy's requests to set matters for joint settlement proceedings are denied, as discussed above.

(B) The Facilities Agreement is accepted, effective October 5, 2010, 60 days after filing, as discussed above.

(C) Consumers Energy is hereby ordered to make refunds, as discussed in the body of this order, within 60 days of the date of this order, and to file a refund report with the Commission within 30 days of the date refunds are made.

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<sup>60</sup> Midwest ISO Answer at 8.

<sup>61</sup> Michigan Electric Answer at 7.

(D) Michigan Electric is hereby ordered to submit for filing its Agency Agreement with Consumers Electric within 30 days of this order.

(E) The Interconnection Agreement is conditionally accepted, effective July 20, 2010, subject to the outcome of the proceedings in Docket No. ER10-1719-000.

(F) Midwest ISO is hereby ordered to submit a compliance filing, as discussed in the body of this order, within 60 days of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.