

133 FERC ¶ 61,179
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ITC Midwest LLC and Interstate Power and Light
Company

Docket No. ER10-2142-000

ORDER ACCEPTING AND SUSPENDING PROPOSED OPERATIONS SERVICES
AGREEMENT AND ESTABLISHING HEARING AND SETTLEMENT JUDGE
PROCEDURES

(Issued November 29, 2010)

1. On August 4, 2010, ITC Midwest, LLC (ITC Midwest) and Interstate Power and Light Company (Interstate) (collectively, Applicants) submitted for filing an Operations Services Agreement for 34.5 kV Transmission Facilities (Operations Services Agreement or Agreement) providing for Interstate's continued operation of ITC Midwest's 34.5 kV transmission facilities. In this order, we accept for filing the Operations Services Agreement, effective January 1, 2011, subject to refund, and establish hearing and settlement judge procedures.

I. Background

2. On December 20, 2007, ITC Midwest acquired the transmission assets of Interstate, including transmission facilities of 34.5 kV and above, associated real property and support facilities, contracts, agreements, books, and records. In authorizing the disposition of the facilities by Interstate, the Commission conditionally approved a Transition Services Agreement in which Interstate agreed to provide ITC Midwest with corporate administrative services, construction and maintenance services, engineering services, system operations services, for a transitional term of one year with the option for four additional six-month renewal periods.¹

¹ *ITC Holdings Corp.*, 121 FERC ¶ 61,229 (2007) (Disposition Order). This order authorized the sale of Interstate's jurisdictional transmission assets rated at voltages of 34.5 kV and above to ITC Midwest.

3. When the Commission approved the Transition Services Agreement, it directed ITC Midwest to file biannual reports on its efforts to complete the transition from reliance on services provided by Interstate under the Transition Services Agreement. The Commission noted that, in addressing a similar arrangement between Detroit Edison Company and International Transmission Company, LLC (International Transmission), the Commission recognized there were valid reasons for such an interim arrangement, but found that it could not permit the agreement to continue for a protracted time period because of its obvious threat to International Transmission's independence and therefore limited the term of the agreement to one year.² However, rather than limit ITC Midwest's flexibility to extend the Transition Services Agreement beyond the initial term, if necessary, the Commission instead required ITC Midwest to file biannual informational status reports on its progress in making the transition to independence, stating that it expected ITC Midwest to use reasonable efforts to complete the transition as soon as possible.³

II. Application

4. The Operations Services Agreement provides for Interstate to continue to provide system operations services for ITC Midwest's 34.5 kV transmission facilities, including emergency operations, security analysis, shutdown coordination, and planned operations support. Applicants state that, over time, ITC Midwest will upgrade the 34.5 kV transmission facilities to 69 kV, and when this is completed, ITC Midwest will incorporate the 69 kV into its operating and monitoring systems. Applicants state that ITC Midwest cannot specify a schedule for the upgrade of its 34.5 kV transmission facilities to 69 kV given the numerous uncertainties involved. Applicants state, however, that ITC Midwest expects to complete the upgrades within 12 to 18 years.

5. Applicants request an effective date of January 1, 2011, for the Operations Services Agreement, to coincide with the expiration of the Transition Services Agreement. The Operations Services Agreement has a four-year initial term that starts on January 1, 2011, and it continues from year-to-year thereafter until terminated by either party upon not less than one year prior notice. It will be designated as a service agreement under the Midwest Independent Transmission System Operator, Inc., (Midwest ISO) Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff).

² *Id.* P 69 (citing *ITC Holdings Corp.*, 102 FERC ¶ 61,182, at P 52-54, *reh'g denied*, 104 FERC ¶ 61,033 (2003)).

³ *Id.*

6. Applicants state that in ITC Midwest's 2009 biannual reports, ITC Midwest informed the Commission that it was performing all the services that Interstate originally provided under the Transition Services Agreement with the limited exception of those related to the operation of ITC Midwest's 34.5 kV transmission facilities. Further, Applicants state that ITC Midwest informed the Commission that it intended to retain Interstate's services for the operation of the 34.5 kV transmission facilities until 2010, the final extension period allowed under the Transition Services Agreement. Applicants state that ITC Midwest also indicated that it intended to negotiate with Interstate to continue the operation of the 34.5 kV transmission facilities until the facilities are upgraded to 69 kV and placed under ITC Midwest's control.

7. Applicants state that direct operation by ITC Midwest of the 34.5 kV transmission facilities would not be cost effective at this time. Applicants explain that if ITC Midwest takes direct control of the 34.5 kV transmission facilities, ITC Midwest would have to hire substantial additional labor resources to perform the frequent switching needed to maintain service over these lines. Applicants further explain that ITC Midwest would have to construct separate systems to control the 34.5 kV transmission facilities in their present configuration, and once the lines are upgraded to 69 kV, the separate systems would become stranded assets. Applicants state that once the facilities are upgraded to 69 kV, however, they can be incorporated into ITC Midwest's present operating and monitoring systems. Applicants contend that, under these circumstances, there is no compelling reason for ITC Midwest to incur the additional expenses in question or create potential stranded costs.

8. Applicants state that the Operations Services Agreement safeguards the independent operation of the 34.5 kV transmission facilities because ITC Midwest will manage Interstate's operation of these assets, subject to any Midwest ISO direction. In addition, Applicants state that ITC Midwest will specify the maintenance and construction work and schedules for the 34.5 kV transmission facilities and must approve any subcontractor hired by Interstate to perform any functions under the Agreement. The Operations Services Agreement also requires Interstate to comply with the Commission's Standards of Conduct regulations. Applicants assert that for these reasons, Interstate will have no opportunity to use its operation of the 34.5 kV transmission facilities to benefit any Interstate marketing affiliates.

9. Applicants state that the compensation provisions in the Operation Services Agreement are consistent with the compensation provisions in the Transition Services Agreement that the Commission approved in the Disposition Order. Specifically, for services that Interstate provides under the Operations Services Agreement, ITC Midwest will pay all of Interstate's and its affiliates' verifiable direct and indirect costs, which will be allocated using the same methodology that Interstate historically employed in

connection with services Interstate provided to its affiliates and business units. These costs will be actual costs without any profit factor.⁴

III. Notice of Filing and Responsive Pleadings

10. Notice of the filing was published in the *Federal Register*, 75 Fed. Reg. 49,920 (2010), with protests or interventions due on or before August 25, 2010. Municipal Transmission Group, Missouri River Energy Services, and WPPI Energy (together, Midwest TDU) filed a timely joint motion to intervene, and Jo-Carroll Energy, Inc. (Jo-Carroll) filed a timely motion to intervene and a protest. Applicants filed an answer to Jo-Carroll's protest.

11. In its protest, Jo-Carroll states that while the Operations Services Agreement is nominally a bilateral contract between Interstate and ITC Midwest, it will have a direct effect on third parties such as Jo-Carroll, which is a transmission customer of ITC Midwest. In particular, Jo-Carroll contends that ITC Midwest will pass the costs it incurs under the Operations Services Agreement to its transmission customers (including Jo-Carroll) through the formula rate in Attachment O to the Midwest ISO Tariff.

⁴ Section 4(a) of the Operations Services Agreement states:

As consideration for the Services, [ITC Midwest] shall pay to [Interstate] the following amounts:

(i) for all Services performed by personnel of [Interstate] and its affiliates, all verifiable direct and indirect costs (including but not limited to all such costs of labor, benefits, materials, storage and transportation) allocated in accordance with the same methodology employed historically by [Interstate] in connection with the provision of services to affiliated entities and business units; provided that, for purposes of this provision, "costs" means fully-loaded costs without any profit factor, including, where applicable but not by way of limitation, all payroll related overheads, payroll taxes, stores loadings, transportation loadings, facility and supplies, and an A&G overhead to cover the costs associated with processing and billings, consistent with Provider's past practice;

(ii) for all Services performed by Subcontractors not affiliated with [Interstate], an amount equal to all reasonable costs invoiced to and paid by [Interstate] arising under such subcontracts.

Jo-Carroll argues that in these circumstances, the Commission cannot assume, without analysis, that the Operations Services Agreement negotiated between Interstate and ITC Midwest adequately protects consumers.

12. Jo-Carroll acknowledges that the Transition Services Agreement that the Commission previously accepted contains substantially similar compensation provisions as in the proposed Operations Services Agreement. Jo-Carroll notes, however, that no party protested the compensation provisions in the Transition Services Agreement, and the Commission did not address the compensation provisions when it accepted the Transition Services Agreement for filing. In addition, Jo-Carroll states that the Transition Services Agreement was intended to be effective for a maximum term of three years and that the Commission emphasized the short-term, transitional nature of the Transition Services Agreement when it accepted the Transitions Services Agreement for filing.⁵ Jo-Carroll argues that, in contrast, the Operations Services Agreement has an initial term of four years and will then continue indefinitely until terminated by either of the parties. Jo-Carroll argues, therefore, that the Commission's prior acceptance of Transition Services Agreement is not precedent that should be applied to the Operations Services Agreement.

13. Jo-Carroll contends that Applicants have not shown that the rates and charges under the Operations Services Agreement are just and reasonable. Jo-Carroll asserts that the Operations Services Agreement does not include any specific charges, does not provide any cost basis for the charges, and does not identify the transmission facilities for which the costs will be incurred. Jo-Carroll contends that the Operations Services Agreement does not include any stated rates, has no rate formula, and does not identify which costs included in Interstate's FERC Form No. 1 will be allocated to ITC Midwest. In addition, Jo-Carroll contends that the Operations Services Agreement effectively eliminates any opportunity for consumers to understand, evaluate, or challenge the cost basis underlying the charges they will eventually pay because the Operations Services Agreement does not provide for third party audit rights and requires Interstate and ITC Midwest to keep confidential the information concerning the cost basis for Interstate's invoices to ITC Midwest. Jo-Carroll further argues that Applicants do not provide support for the request for a waiver of the Commission's cost of service filing requirements.

14. In addition, Jo-Carroll argues that the Operations Services Agreement does not identify the Interstate affiliates that will be providing services nor whose costs will be included in the invoices Interstate provides to ITC Midwest. Jo-Carroll asserts that Applicants do not specify the methods that Interstate and its affiliates have historically

⁵ Jo-Carroll Protest at 5 (citing Disposition Order, 121 FERC ¶ 61,299 at P 69).

employed to allocate costs among them, much less which of those methods will be used under the Operations Services Agreement. Jo-Carroll also asserts that Applicants have not demonstrated whether such allocation methods are consistent with the Commission's affiliate transactions rules.

15. Jo-Carroll also argues that, while the Operations Services Agreement has a schedule of the services that Interstate will provide, it has no schedule of the ITC Midwest transmission facilities for which Interstate will provide services. According to Jo-Carroll, without knowing the ITC Midwest facilities that Interstate is operating under the Agreement, it is impossible for the Commission and the public to judge whether the charges under the Agreement are just and reasonable. Jo-Carroll asserts that, because Interstate's allocation of costs to ITC Midwest presumably depends on which ITC Midwest facilities Interstate is operating at any given time, it will be difficult for the Commission and the public to make year-to-year or month-to-month evaluations of Interstate's charges without knowing the specific facilities to which those charges apply.

16. Applicants state in their answer that allowing Interstate to perform services under the Operations Services Agreement for ITC Midwest's 34.5 kV transmission facilities is more efficient and less costly to Jo-Carroll and other ITC Midwest customers than if ITC Midwest were to perform those services itself. Applicants state that, based on their experience under the Transition Services Agreement, they anticipate the continued charges to ITC Midwest under the Operations Services Agreement will be approximately \$400,000 per year. Applicants assert that ITC Midwest could not itself perform for less than \$400,000 a year the services Interstate will perform under the Operations Services Agreements.

17. Applicants state that the approximately \$400,000 in annual charges that ITC Midwest will pay to Interstate under the Operations Services Agreement will be added to ITC Midwest's Schedule 1 revenue requirement under the Midwest ISO Tariff, and the estimated increase will represent only about \$.0004 per kilowatt month of the current Schedule 1 rate.⁶ Applicants further assert that with Jo-Carroll's average monthly load of less than 60 megawatts, the rate impact on Jo-Carroll specifically is a *de minimis* amount of less than \$300 per year.

⁶Schedule 1 under the Midwest ISO Tariff provides for Scheduling, System Control and Dispatch Service. Applicants state that the payments ITC Midwest makes to Interstate under the Agreement will be booked to Account No. 561 of the Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, 18 C.F.R. Part 101. They also state that costs booked to Account No. 561 may be recovered by Midwest ISO independent transmission companies like ITC Midwest via Schedule 1 of the Midwest ISO Tariff.

18. In response to Jo-Carroll's concerns on the lack of cost support, Applicants argue that Article 4 of the Operations Services Agreement is quite detailed as to the charges payable under the Agreement and the basis for them. Applicants also assert that these pricing terms are consistent with other agreements on file with the Commission, which establish rates that pass through the actual costs incurred by the service provider to the customer for operations and maintenance services similar to those that Interstate will perform. In addition, Applicants state that in order to avoid misunderstandings concerning charges under the Operations Services Agreement, ITC Midwest will provide details on the specific charges under the Agreement. Applicants states that pursuant to the Midwest ISO Tariff, ITC Midwest posts each September its projected transmission rates for the following calendar year. Applicants state that ITC Midwest is willing to include as part of this posting details on the charges that it expects to incur under the Operations Services Agreement.

IV. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 318.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

20. 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 and/or answer unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it has provided information that has assisted us in our decision-making process.

B. Commission Determination

21. We find the issues raised by Jo-Carroll concerning the rate provisions in section 4 (a)(i) of the Operations Services Agreement involve issues of material fact that cannot be resolved on the record before us and are more appropriately addressed in hearing and settlement judge procedures ordered below. We agree with Jo-Carroll that the Operations Services Agreement does not include the actual cost allocation formula that will be used. In addition, we note that, to the extent that Interstate intends to bill ITC Midwest for costs resulting from services provided by affiliates, it will have to provide and support the methodology it will use to allocate service company costs among its affiliates.⁷

⁷ The Public Utility Holding Company Act of 2005 provides for Commission review of the allocation of costs for non-power goods and services between regulated and non-regulated affiliates within a holding company system. 42 U.S.C. § 16462 (2006). *See, e.g., Entergy Services, Inc.*, 117 FERC ¶ 61,288 (2006).

22. Our preliminary analysis indicates that the proposed rates under the Operations Services Agreement have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we accept the Applicants' proposed Operations Services Agreement for filing, suspend it for a nominal period, and allow it to become effective January 1, 2011, subject to refund, and set the rates in the Operations Services Agreement for hearing and settlement judge procedures.

23. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁸ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁹ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

24. Although we are setting the rates in the Operations Services Agreement for further procedures, we find that under the circumstances in this case, it is appropriate for ITC Midwest to extend its arrangement with Interstate to provide operations services for ITC Midwest's 34.5 kV transmission facilities. The Operations Services Agreement pertains to a limited set of facilities that ITC Midwest intends to upgrade to higher voltage. According to Applicants, if Interstate does not operate the facilities during the period until the upgrade of the facilities is completed, the frequent switching necessary to maintain service to customers would require ITC Midwest to hire substantial labor resources for this purpose. In addition, Applicants state that ITC Midwest would have to construct separate control systems for the 34.5 kV transmission facilities that would become stranded assets once the facilities are upgraded to 69 kV.

⁸ 18 C.F.R. § 385.603 (2010).

⁹ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

25. In addition, we conclude that, under the facts and circumstances presented here, the Operations Services Agreement does not compromise the independence of ITC Midwest's operations. The limited set of 34.5 kV transmission facilities that ITC Midwest intends to upgrade to higher voltage transmission facilities will be operated by Interstate subject to ITC Midwest's direction and Midwest ISO oversight. ITC Midwest will specify the maintenance and construction work and schedules for the 34.5 kV transmission facilities, and Interstate will be required to comply with the Commission's Standards of Conduct, which prevents operation of the facilities for the benefit of Interstate's affiliates. ITC Midwest must also approve any subcontractor that Interstate hires to perform any services under the Agreement.

26. Further, consistent with the requirement the Commission imposed in the Disposition Order, we will also require ITC Midwest to submit to the Commission annual informational status reports on its progress upgrading its 34.5 kV transmission facilities to 69 kV. This report should specify which facilities Interstate operated for ITC Midwest during each month for the year covered by the report. ITC Midwest must file these informational reports each year beginning on the first anniversary of the date that operations begin under the Operations Services Agreement. We also accept ITC Midwest's commitment to provide details of the specific charges under the Agreement when ITC Midwest posts each September its projected transmissions rates for the following calendar year.

The Commission orders:

(A) The Operations Services Agreement is hereby accepted for filing and suspended for a nominal period, to become effective January 1, 2011, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Applicants' filing. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2006), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge

designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.