

138 FERC 61,202  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Michigan Electric Transmission  
Company, LLC

Docket No. EL11-2-000

ORDER GRANTING IN PART AND DENYING IN PART  
PETITION FOR DECLARATORY ORDER

(Issued March 20, 2012)

1. On October 18, 2010, Michigan Electric Transmission Company, LLC (Michigan Electric) petitioned the Commission (Petition), under Rule 207 of the Commission's Rules and Regulations,<sup>1</sup> for a declaratory order to determine the respective rights and obligations of Michigan Electric and Midland Cogeneration Venture Limited Partnership (Midland) under two late-filed jurisdictional agreements. The two agreements are: (1) a 1988 interconnection agreement (Facilities Agreement)<sup>2</sup> between Consumers Energy Company (Consumers Energy) and Midland, pursuant to which Consumers Energy agreed to construct, own and operate certain interconnection facilities required to connect Midland's cogeneration power plant (Midland Plant) to the grid; and (2) a 2001 agency agreement (Agency Agreement)<sup>3</sup> between Consumers Energy, as principal, and Michigan

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<sup>1</sup> 18 C.F.R. § 385.207 (2011).

<sup>2</sup> See *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,241 (2010) (Facilities Agreement Order). On October 18, 2010, Michigan Electric and Consumers Energy each filed a request for rehearing (Docket Nos. ER10-18145-001 and ER10-2156-001). Our order on rehearing of the Facilities Agreement Order is being issued concurrently with this order. *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,203 (2012) (Facilities Agreement Rehearing Order).

<sup>3</sup> See *Michigan Elec. Transmission Co., LLC*, 133 FERC ¶ 61,238 (2010) (Agency Agreement Order). Our order on rehearing of the Agency Agreement Order is being issued concurrently with this order. *Michigan Elec. Transmission Co.*, 138 FERC ¶ 61,203 (2012) (Agency Agreement Rehearing Order).

Electric, as agent, pursuant to which Consumers Energy delegated to Michigan Electric certain of its operating responsibilities under the Facilities Agreement.<sup>4</sup> As described below, Michigan Electric and Midland are currently involved in litigation in the United States District Court for the Eastern District of Michigan (District Court) involving disputed issues under the Agency Agreement and Facilities Agreement.

2. In the Petition, Michigan Electric asks the Commission to: (1) determine the rights and obligations of the parties to the Agency Agreement and Facilities Agreement, or, if the Commission declines to do so, at least provide the District Court with guidance regarding certain issues regarding the rights and obligations of the parties under these agreements; (2) find that Midland owes Michigan Electric \$1,703,886.78 as reimbursement for costs (including property taxes) incurred by Michigan Electric in operating and maintaining the interconnection facilities that are subject to the Facilities Agreement, plus interest for past due amounts as calculated under the Facilities Agreement; and (3) find that the delay in filing the Facilities Agreement and Agency Agreement does not render those agreements null and void.<sup>5</sup>

3. As explained below, in the Facilities Agreement Order and Agency Agreement Order, the Commission has already addressed the rate issues raised by the filing of the Facilities Agreement and the Agency Agreement. To the extent that there are other issues, the Commission is addressing those issues here.

## **I. Background**

4. Midland<sup>6</sup> owns a 1,566.2 megawatt (MW) net capacity gas-fired cogeneration facility (Midland Plant) located in Midland, Michigan, that has been Commission-certified and self-certified as a Qualifying Facility (QF) since 1987.<sup>7</sup> Consumers Energy

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<sup>4</sup> The Facilities Agreement and Agency Agreement were attached to the Petition as Attachment A and Attachment B, respectively.

<sup>5</sup> Petition at 16.

<sup>6</sup> Midland, a limited partnership, was originally owned by Consumers Energy and Dow Chemical Company (Dow Chemical) and their affiliates. 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*, 127 FERC ¶ 62,045 (2009).

<sup>7</sup> The Commission initially certified the Midland Plant as a qualifying cogeneration facility in Docket No. QF87-237-000 on March 12, 1987. *See CMS Midland, Inc.*, 38 FERC ¶ 61,244 (1987).

purchases substantially all of the electric capacity and energy from the Midland Plant pursuant to a July 17, 1986 Power Purchase Agreement (Power Purchase Agreement), as it has been amended. The Facilities Agreement, which was entered into on July 8, 1988,<sup>8</sup> describes the interconnection facilities that Midland and Consumers Energy agreed to construct in order to connect the Midland Plant to the transmission grid formerly owned by Consumers Energy, as well as to Dow Chemical, the steam host. As relevant to the dispute in this case, the Facilities Agreement provides for Midland to reimburse Consumers Energy for the latter's actual costs (including property taxes) in owning, operating and maintaining certain of the interconnection facilities.<sup>9</sup>

5. On January 10, 2001, the Commission authorized Consumers Energy to transfer ownership of its transmission assets, including the subject interconnection facilities, to Michigan Electric.<sup>10</sup> In connection with the transfer, Consumers Energy requested Midland's consent to assign the Facilities Agreement to Michigan Electric.<sup>11</sup> However, because Consumers Energy was not proposing to assign its rights and obligations under the Power Purchase Agreement, Midland withheld its consent to assignment of the Facilities Agreement.<sup>12</sup> As a result, on April 1, 2001, the effective date of the asset transfer, Consumers Energy and Michigan Electric entered into the Agency Agreement, pursuant to which Consumers Energy delegated to Michigan Electric, i.e., authorized Michigan Electric to act as its agent, in carrying out its operations and maintenance (O&M) responsibilities under the Facilities Agreement with respect to the interconnection facilities transferred to Michigan Electric.

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<sup>8</sup> The Facilities Agreement was amended on June 9, 2008, and May 28, 2009.

<sup>9</sup> The reimbursement obligations are set forth in sections 3.1 and 3.4 of the Facilities Agreement.

<sup>10</sup> See *Consumers Energy Co., et al.*, 94 FERC ¶ 61,018 (2001). Michigan Electric, originally a subsidiary of Consumers Energy, became an independent transmission company in May 2002 when it was bought by Trans Elect Development Company, LLC. See *Trans-Elect, Inc.*, 98 FERC ¶ 61,142 (2002). Since 2006, Michigan Electric has been a subsidiary of ITC Holdings Corporation. See *ITC Holdings Corp., et al.*, 116 FERC ¶ 61,271 (2006).

<sup>11</sup> Petition at 7.

<sup>12</sup> Midland, Motion to Intervene, Docket No. ER10-2156-000 (filed August 27, 2010).

6. Michigan Electric states that, beginning in 2001, Midland reimbursed the costs (including property taxes) incurred by Michigan Electric, acting as Consumers Energy's agent, in carrying out Consumers Energy's duties under the Facilities Agreement, but that, beginning in November 2004, Midland ceased making any further payments. Michigan Electric states that the unpaid balance of the amounts due under the Facilities Agreement is \$1,703,886.78.<sup>13</sup> Notwithstanding, Michigan Electric states that it has continued to discharge its obligations, as Consumers Energy's agent, to provide Midland with interconnection services in accordance with the terms of the Facilities Agreement.<sup>14</sup>

7. In July 2010, Midwest Independent Transmission System Operator, Inc. (MISO) filed a partially executed generator interconnection agreement (GIA) in Docket No. ER10-1814-000 among itself, as transmission provider, Michigan Electric, as transmission owner, and Midland, as interconnection customer. The new GIA was prompted by Midland's request to increase the electrical output of the Midland Plant. MISO determined that the increase would require Midland to execute a new GIA and to terminate or amend the Facilities Agreement so as to avoid conflicting provisions concerning interconnection service. Midland did not execute the new GIA because of its disagreement with certain of its terms. In addition, Midland intervened in Docket No. ER10-1814-000 and protested MISO's assertion that the Facilities Agreement must be either terminated or amended.<sup>15</sup> On August 6, 2010, Consumers Energy filed the Facilities Agreement in Docket No. ER10-2156-000. In the Facilities Agreement Order, the Commission conditionally accepted the new GIA (in Docket No. ER10-1814-000) and accepted the late-filed Facilities Agreement, effective October 5, 2010 (in Docket No. ER10-2156-000).<sup>16</sup> In the Facilities Agreement Rehearing Order, we are denying

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<sup>13</sup> Petition at 7-8.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.* at 10-11.

<sup>16</sup> In accordance with the Facilities Agreement Order, on November 16, 2010, MISO filed compliance revisions to the new GIA. The revised GIA was accepted under delegated authority in *Midwest Transmission Sys. Operator, Inc.*, Docket No. ER11-2137-000 (Jan. 28, 2011) (delegated letter order). On June 9, 2011, MISO filed an Amended and Restated Generator Interconnection Agreement (Amended and Restated GIA) in Docket No. ER11-3764-000. The Amended and Restated GIA is executed by MISO, Midland and Michigan Electric. MISO sought a proposed effective date of June 10, 2011. The filing was accepted pursuant to delegated authority, on July 20, 2011, in an unpublished letter order. According to the filing, the Amended and Restated GIA will not become effective for purposes of governing interconnection service to the Midland

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Consumer Energy's rehearing request and granting certain clarifications requested by Michigan Electric.

8. On January 10, 2010, Michigan Electric filed suit against Midland in state court for the unreimbursed costs that it had incurred, as agent, in carrying out Consumers Energy's O&M obligations under the Facilities Agreement.<sup>17</sup> Midland removed the proceeding to the District Court, invoking the court's jurisdiction over federal question subject matter,<sup>18</sup> i.e., rates of public utilities under the Federal Power Act (FPA).<sup>19</sup> Midland then filed a motion to dismiss the case, arguing, *inter alia*, that Michigan Electric's claims are barred by the filed rate doctrine since neither the Facilities Agreement nor the Agency Agreement had, at that time, been filed with the Commission.<sup>20</sup>

9. On August 25, 2010 – by which time Consumers Energy had filed the Facilities Agreement with the Commission – the District Court denied Midland's motion to dismiss.<sup>21</sup> In denying Midland's motion, the court raised various questions concerning how late-filing of the Facilities Agreement, and the Commission's acceptance of the filing, would affect resolution of the case.<sup>22</sup> The District Court suggested that the

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Plant until the Facilities Agreement between Midland and Consumers Energy is amended or terminated and the new metering configuration specified under the Amended and Restated GIA is put into place. On November 15, 2011, Consumers Energy filed a Notice of Cancellation of the Facilities Agreement in Docket No. ER12-420-000. That filing, which does not address the status of the Agency Agreement, is pending.

<sup>17</sup> Petition at 8.

<sup>18</sup> See 28 U.S.C. §§ 1331, 1441 (2006).

<sup>19</sup> 16 U.S.C. § 824 *et seq.* (2006).

<sup>20</sup> The filed rate doctrine “forbids a regulated entity [from charging] rates for its services other than those properly filed with the appropriate federal regulatory authority.” *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (*Arkla v. Hall*).

<sup>21</sup> *Michigan Elec. Transmission Co. v. Midland Cogeneration Venture, L.P.*, No. 10-10661-BC (E.D. Mich. Aug. 25, 2010).

<sup>22</sup> The Facilities Agreement, which was originally executed on July 8, 1988, was not filed with the Commission until August 6, 2010.

Commission had exclusive jurisdiction over the rate matters at issue.<sup>23</sup> The court also suggested that, even if the Commission did not have exclusive jurisdiction over the matters raised by the dispute, the matters might be better addressed by the Commission. On September 8, 2010, Michigan Electric asked the District Court to hold its proceedings in abeyance pending this Commission's resolution of the issues addressed in the then-pending Facilities Agreement proceeding and in the petition for declaratory order that Michigan Electric shortly thereafter filed in the instant docket.

10. Subsequently, in the Facilities Agreement Order, the Commission noted that Consumers Energy's filing of the Facilities Agreement did not relieve Michigan Electric of its obligation to file the Agency Agreement.<sup>24</sup> Accordingly, on October 18, 2010, Michigan Electric filed the Agency Agreement in Docket No. ER11-136-000, together with the Petition in this docket. On December 17, 2010, in the Agency Agreement Order, the Commission accepted the Agency Agreement, effective December 17, 2010.<sup>25</sup>

## **II. Notice and Responsive Pleadings**

11. Notice of Michigan Electric's Petition was published in the *Federal Register*, 75 Fed. Reg. 66,083 (2010), with protests and interventions due on or before November 17, 2010. Consumers Energy filed a motion to intervene. On November 8, 2010, Midland filed a motion to intervene and protest (Protest) in both this proceeding and the Agency Agreement proceeding. On November 23, 2010, Michigan Electric filed an answer to Midland's Protest, and, on December 8, 2010, Midland filed a reply to Michigan Electric's answer.

## **III. Parties' Pleadings**

### **A. Michigan Electric's Petition**

12. Michigan Electric asks the Commission to find that Midland owes it \$1,703,886.78 as reimbursement for costs (including property taxes) incurred in providing O&M services under the Facilities Agreement, plus interest on the past-due amounts calculated at the rate provided in the agreement.

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<sup>23</sup> Petition at 3-4.

<sup>24</sup> Facilities Agreement Order, 132 FERC ¶ 61,241 at P 27.

<sup>25</sup> See Agency Agreement Order, 133 FERC ¶ 61,238 at P 8.

13. Michigan Electric also asks the Commission to find that the late filing of both the Facilities Agreement and the Agency Agreement does not render those agreements null and void. Michigan Electric argues that, under the Commission's holding in *Central Maine Power Company*<sup>26</sup> and the Commission's *Prior Notice Order*,<sup>27</sup> when a utility has charged an otherwise just and reasonable rate under a jurisdictional agreement, the agreement does not lose its full force and effect merely because it was not filed before service commenced. In such cases, the utility is only required to return the time-value of revenues received before the agreement was filed.<sup>28</sup> In this connection, Michigan Electric notes that Midland has argued that the Facilities Agreement should continue to have force, at least to the extent that Midland benefits from its terms, thereby implicitly acknowledging that a utility's failure to file an agreement prior to commencement of service does not invalidate the parties' obligations, including, in Michigan Electric's view, Midland's payment obligations to Michigan Electric.<sup>29</sup>

14. Lastly, Michigan Electric asks the Commission to find that Michigan Electric's sole obligation resulting from the late filing of the Agency Agreement is to make time-value payments to Consumers Energy for the \$500 per month agency fee that Consumers Energy paid Michigan Electric before the Agency Agreement was filed.<sup>30</sup> Michigan Electric states that Midland is due no time-value payments that would offset Midland's obligations to Michigan Electric. Michigan Electric cites the Commission's policy that the time-value remedy is itself limited so that the utility performing the jurisdictional service does not suffer a loss and recovers at least its variable costs and claims that the Facilities Agreement provides only for the recovery of variable costs.<sup>31</sup>

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<sup>26</sup> 56 FERC ¶ 61,200, *reh'g denied*, 57 FERC ¶ 61,083 (1991).

<sup>27</sup> *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *order on reh'g*, 65 FERC ¶ 61,081 (1993) (*Prior Notice Order*).

<sup>28</sup> *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,980.

<sup>29</sup> Petition at 22 & n.103 (citing Midland, Motion to Intervene and Protest in Docket No. ER10-1814-000 at 7 (filed August 9, 2010)).

<sup>30</sup> Petition at 16, 22. As required by the terms of the Agency Agreement Order, Michigan Electric reimbursed Consumers Energy \$15,042, representing the time value of the \$500 per month agency fee it received prior to the effective date of the Agency Agreement and, on March 15, 2011, filed a refund report in Docket No. ER11-136-002.

<sup>31</sup> Petition at 21-22 & nn.104-05 (citing *Southern California Edison Co.*, 98 FERC ¶ 61,304 (2002); *Fla. Power & Light Co.*, 98 FERC ¶ 61,276, *reh'g denied*, 99 FERC

**B. Midland's Protest**

15. In its Protest, Midland argues that it has no contract with Michigan Electric and that the rates Michigan Electric is seeking to recover through the Agency Agreement are not just and reasonable. On the contrary, Midland maintains that Michigan Electric should be ordered to refund approximately \$6.2 million that Midland paid over the last several years to replace, maintain, and upgrade transmission assets belonging to Michigan Electric.<sup>32</sup>

16. Midland recounts that, under the Facilities Agreement, it agreed to pay the costs of connecting the Midland Plant to Consumers Energy's transmission grid. It paid \$16 million to construct the transmission equipment and necessary network upgrades, with ownership of all network facilities vesting in Consumers Energy. Midland states that the Facilities Agreement also requires it to maintain and replace, if necessary, the transmission facilities and to pay all costs of operating and maintaining the interconnection facilities. Midland states that, for three years following Consumers Energy's transfer of its transmission assets to Michigan Electric, Midland mistakenly paid invoices submitted by Consumers Energy that turned out to be for Michigan Electric's benefit, and made one direct payment to Michigan Electric for 2003 taxes. However, according to Midland, beginning in late 2004, once it realized that these payments were being made, it ordered a cessation of further direct or indirect payments to Michigan Electric.<sup>33</sup> Midland states that its refusal to pay was based on the alleged violation of the anti-assignment clause of the Facilities Agreement and Michigan Electric's refusal to enter into a new interconnection agreement.<sup>34</sup>

17. Midland states that, when Michigan Electric filed the Agency Agreement, Michigan Electric asked the Commission to accept the agreement as just and reasonable, but Michigan Electric's Petition nowhere addresses the justness and reasonableness of the Agency Agreement's charges, despite Michigan Electric bearing the burden of establishing the reasonableness of the charges under section 205 of the FPA.<sup>35</sup> Midland

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¶ 61,320 (2002); *Carolina Power and Light Co.*, 84 FERC ¶ 61,103, at 61,522 (1998), *order on reh'g*, 87 FERC ¶ 61,083, at 61,357 (1999)).

<sup>32</sup> Protest at 8, 10.

<sup>33</sup> *Id.* at 4-5.

<sup>34</sup> *Id.* at 21.

<sup>35</sup> 16 U.S.C. § 824d (2006).

objects to Michigan Electric's assumption that the charges for which it seeks reimbursement are just and reasonable. It argues that, despite the characterization of the charges at issue as reimbursement, they are unjust and unreasonable because they violate three Commission policies: (1) the prohibition against direct assignment of network costs to individual interconnection customers; (2) the prohibition in Order No. 2003<sup>36</sup> on transmission providers looking to interconnection customers to pay property taxes on the providers' transmission equipment;<sup>37</sup> and (3) the prohibition on double recovery.<sup>38</sup>

18. Midland argues that, even if the Commission were to find that Michigan Electric's charges are just and reasonable, Michigan Electric would have no right to collect them retroactively because courts and the Commission have limited the circumstances under which late-filed jurisdictional agreements are given retroactive effect and, in any case, in the Facilities Agreement Order, the Commission denied Michigan Electric's request that the Facilities Agreement be accepted with a retroactive effective date. Moreover, according to Midland, in its motion for clarification of the Facilities Agreement Order and in its Petition in this proceeding, Michigan Electric has shifted its position and is now arguing that the effective date of the Agency Agreement and Facilities Agreement is irrelevant and that acceptance of those filings has mooted any argument that the Facilities and Agency Agreements are invalid due to late filing, the only question being the appropriate remedy for the late filing. Midland argues that the filed rate doctrine prevents Michigan Electric from collecting the rates provided for in the Facilities Agreement. Midland also argues that the Commission has repudiated the notion that unfiled rates are enforceable even if reflected in a consensual bilateral contract. In this regard, Midland asserts that this case is distinguishable from cases in which the Commission applied its *Prior Notice* policy of allowing the collection of unfiled rates

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<sup>36</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (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 F3d. 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

<sup>37</sup> "The Commission rejects the proposal that ad valorem property taxes be included in the Interconnection Customer's obligation to reimburse the Transmission Provider for taxes, since these expenses are annual and are more analogous to operating expenses that are not covered under the LGIA." Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 444.

<sup>38</sup> Protest at 11.

contained in a consensual bilateral contract prior to the effective date of the tariff. Midland argues that the Commission's *Prior Notice* policy does not apply where, as here, the entity receiving service pursuant to an unfiled contract has refused to pay for that service, and the provider of that service did not seek to compel payment for the service.<sup>39</sup>

#### IV. Discussion

##### A. Procedural Matters

19. Under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make Consumers Energy and Midland parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2011), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Michigan Electric's answer or Midland's reply to Michigan Electric's answer.

##### B. Substantive Determinations

20. As we explain in the Facilities Agreement Rehearing Order that is being issue concurrently with this order, the failure of the parties to timely file the Facilities Agreement and the Agency Agreement does not affect their validity and enforceability during the period before they were filed, and nothing in the Facilities Agreement Order was intended to, or did, modify the Commission's policy regarding late-filed agreements. Thus, Consumers Energy is entitled to recover the rates authorized in the Facilities Agreement for the entire period that the Facilities Agreement has been jurisdictional, and Midland is likewise obligated to reimburse Consumers Energy for the costs (including property taxes) properly incurred under the Facilities Agreement to provide the O&M services.

21. Since we have already, in the Facilities Agreement Rehearing Order, addressed the respective obligations of Midland and Consumers Energy under the Facilities Agreement

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<sup>39</sup> *Id.* at 21-22. We note that, in its Protest (at 10, 23), as well as in its January 6, 2011 protest filed in connection with Consumers Energy's December 12, 2010 refund report filed in Docket No. ER10-2156-002, Midland also argues that personal property taxes assessed on the interconnection facilities, which represent most of the \$1.7 million that Michigan Electric seeks from Midland, are a fixed (or annual), rather than variable, cost and, as such, are not subject to the Commission's *Prior Notice* policy. We will address this issue in our order on Consumers Energy's refund report, which was revised in a filing on October 28, 2011, in Docket No. ER10-2156-002.

with regard to the past due amounts, and granted clarification concerning the effect of late filing of the two agreements, it is unnecessary to grant the specific relief that Michigan Electric seeks in the Petition, specifically, an order directing Midland to make payment directly to Michigan Electric. Moreover, since Midland and Michigan Electric are not both parties to any agreement, it is unclear what the contractual basis would be for any such order.<sup>40</sup>

22. In its Protest, Midland argues that the filed-rate doctrine bars the Commission from requiring Midland to pay for interconnection services received prior to the filing of the Facilities Agreement. We disagree. In *Arkla v. Hall*, the Supreme Court explained that, while Congress has withheld the authority to grant retroactive rate increases or to permit the collection of a rate other than the one on file, the Commission may grant a waiver of the requirement to timely file rates.<sup>41</sup> In the *Prior Notice Order*, the Commission stated that it generally would deny a waiver of the prior notice requirement in cases where a jurisdictional agreement was late-filed, but the Commission also stated that it would allow late-filed agreements to be effective from the time they were jurisdictional (with a time-value remedy for the late filing).<sup>42</sup> As we explain in the Facilities Agreement Rehearing Order, we see nothing that prevents application of our *Prior Notice Order* to the current dispute; nor is there anything that precludes the Commission's acceptance of the rates contained in the Facilities Agreement despite the late filing of those rates.

23. We are not persuaded by Midland's attempt to distinguish the present case from those in which the Commission has applied its *Prior Notice* policy to allow the collection of unfiled rates contained in consensual bilateral contracts prior to the effective date. Essentially, while Midland took the service provided, Midland argues that it should not have to pay for that service; i.e., Midland argues that the Commission should not apply its *Prior Notice* policy where, as here, Midland refused to make payments under the Facilities Agreement due to the alleged violation of the anti-assignment clause in the agreement. However, Midland has not filed any complaint against Consumers Energy

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<sup>40</sup> In this regard, as we note in the Facilities Agreement Rehearing Order, the Agency Agreement contemplates that Consumers Energy and Michigan Electric will cooperate on billing and collection matters.

<sup>41</sup> See *Arkla v. Hall*, 453 U.S. at 577 (explaining both the Commission's exclusive role in setting rates and the filed-rate doctrine).

<sup>42</sup> *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,979. See also *El Paso Elec. Co.*, 105 FERC ¶ 61,131, at P 32 (2003).

based on the alleged contract violation, and Consumers Energy has not sought to disclaim its continuing obligation to perform under the Facilities Agreement. Moreover, while Midland has refused to make payments, Midland continues to accept performance from Michigan Electric, as agent for Consumers Energy.

24. Similarly, Midland's argument that the rates contained in the Facilities Agreement are inconsistent with Order No. 2003 is misplaced given the Commission's acceptance of the rates set forth in the Facilities Agreement and Midland's failure to seek rehearing of the Facilities Agreement Order.

25. Finally, if Midland is correct in its claim that Michigan Electric is already recovering the O&M costs (including property taxes) associated with the interconnection facilities from its other customers, such that recovery from Midland would result in double recovery, its only recourse is to file a complaint pursuant to section 206 of the FPA seeking modification to the rates in the Facilities Agreement or Michigan Electric's formula rate in Attachment O of MISO's tariff,<sup>43</sup> or by challenging implementation of Michigan Electric's formula rate through Michigan Electric's Attachment O protocols. Otherwise, Midland must comply with the terms and conditions of its Facilities Agreement.

The Commission orders:

Michigan Electric's Petition is hereby granted in part and denied in part.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>43</sup> 16 U.S.C. § 824e (2006).