

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

Michigan Electric Transmission Company

Docket No. ER03-1003-002

FURTHER ORDER ON REMAND

(Issued April 25, 2006)

1. This order addresses the issues raised by the United States Court of Appeals for the District of Columbia (Court) in remanding the Commission's order of August 29, 2003 in this proceeding, *Michigan Electric Transmission Company*, 104 FERC ¶ 61,236 (2003), *reh'g denied*, 106 FERC ¶ 61,064 (2004).<sup>1</sup> Upon consideration of the submittals of the parties, the Commission reaffirms its rulings in the subject orders, with further explanation.

**Background**

2. On August 29, 2003, as affirmed on rehearing, the Commission allowed Michigan Electric Transmission Company (Michigan Electric) to recover charges, including the Commission's annual charge assessments passed through to it under Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) Open Access Transmission Tariff (OATT), from certain customers, including Michigan Public Power Agency and Michigan South Central Power Agency (collectively, Michigan Agencies) for their use of transmission facilities pursuant to their Ownership and Operating Agreements (O&O Agreements) with Michigan Electric. Michigan Agencies claimed that, as co-owners of certain transmission facilities with Michigan Electric, they were in some cases using transmission facilities pursuant to ownership interests under the O&O Agreements and *not* pursuant to transmission service provided under a filed tariff or rate schedule of Midwest ISO or Michigan Electric. To the extent they were using transmission facilities pursuant to their ownership interests, Michigan Agencies claimed

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<sup>1</sup> *Michigan Public Power Agency and Michigan South Central Power Agency v. FERC*, 405 F.3d 8 (D.C. Cir. 2005).

that they were *not* customers of Midwest ISO or Michigan Electric and should *not* be required to pay costs reflecting annual charges imposed by the Commission on Midwest ISO and in turn passed through to Michigan Electric.

3. In response to Michigan Agencies' claims, the Commission explained that the Commission's annual charges "may be allocated to [Michigan Agencies] by Michigan Electric for service provided by Michigan Electric. Michigan Electric is being assessed these costs based on the Michigan Agencies' capacity entitlement being transferred by Midwest ISO over the Midwest ISO transmission system, under the Midwest ISO OATT, within the Michigan Electric pricing zone. Michigan Electric is merely recovering those costs it is being assessed by Midwest ISO in connection with the transmission capacity entitlements."<sup>2</sup> On rehearing, the Commission stated that "as transmission customers, [Michigan Agencies] may, of course, be charged rates by the transmission provider that reflect annual charges assessed to the transmission provider."<sup>3</sup>

4. On appeal, the Court was concerned with the Commission's failure to address certain arguments and remanded the case to the Commission for further explanation.

5. First, the Court was concerned about the Commission's failure to explain its apparent departure from past practice regarding the assessment of annual charges on the transmission service that Michigan Agencies take under the O&O Agreements.<sup>4</sup> Specifically, the Court cited statements from Michigan Electric that energy delivered under the O&O Agreements was previously excluded from the energy used to determine its predecessor's annual charge assessment each year,<sup>5</sup> but that under the current reporting regulations, this exclusion has been eliminated.<sup>6</sup> The Court stated that the Commission seemingly agreed with Michigan Electric's characterization of the change because it included the transmission capacity under the O&O Agreements when calculating Midwest ISO's annual charges.<sup>7</sup>

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<sup>2</sup> 104 FERC ¶ 61,236 at P 18.

<sup>3</sup> 106 FERC ¶ 61,064 at P 18.

<sup>4</sup> 405 F.3d at 13.

<sup>5</sup> Michigan Electric owns the transmission assets formerly owned by Consumers Energy Company (Consumers Energy), and succeeded Consumers Energy as a party to the O&O Agreements.

<sup>6</sup> 405 F.3d at 13-14.

<sup>7</sup> *Id* at 14.

6. Second, the Court referenced language from Order No. 641 that states that annual charges will be “based on all transmission that [an ISO] provides pursuant to its tariff or rate schedule.”<sup>8</sup> The Court found that, as far as the record before it revealed, when Michigan Agencies take transmission pursuant to their ownership interests, Midwest ISO is not providing transmission service “pursuant to its tariff or rate schedule” because the O&O Agreements are grandfathered under Midwest ISO’s OATT and the O&O Agreements are therefore not subject to Midwest ISO’s OATT’s rates, terms, and conditions.<sup>9</sup>

7. Third, the Court found that the Commission failed “to recognize any distinction, regarding the assessment of annual charges when the Michigan Agencies act as co-owners by taking transmission [service] pursuant to their ownership interests, and when they act as transmission customers taking transmission [service] in excess of those interests.”<sup>10</sup> It found that nothing in the record revealed whether Michigan Agencies could be considered transmission customers when they take transmission pursuant to their ownership interests.<sup>11</sup> It found that the Commission similarly failed to address Michigan Agencies’ arguments that they do not pay a filed tariff rate to Midwest ISO or Michigan Electric for transmission they take pursuant to their ownership interests.<sup>12</sup>

8. In our October 20, 2005 Order on remand, we found that the existing record was not sufficient for us to make a final determination on these issues, and, therefore, we requested additional supporting evidence from the parties to address these issues.<sup>13</sup>

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<sup>8</sup> *Id.* (citing *Revision of Annual Charges Assessed to Public Utilities*, Order No. 641, 65 Fed. Reg. 65,757 (November 2, 2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,109 at 31,855 (2000), *reh’g denied*, Order No. 641-A, 66 Fed. Reg. 15,793 (March 21, 2001), 94 FERC ¶ 61,290 (2001). Order No. 641 revised the method of calculating FERC annual charges and changed who would pay the charges.

<sup>9</sup> 405 F.3d at 14.

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

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

<sup>12</sup> *Id.*

<sup>13</sup> *Michigan Electric Transmission Company*, 113 FERC ¶ 61,054 (2005) (October 20 Order).

9. On November 21, 2005, Michigan Agencies and Michigan Electric filed a Joint Response addressing the 14 questions that the Commission posed in the October 20 Order.

10. Notice of the Joint Response was published in the *Federal Register*, 70 Fed. Reg. 73,998 (2005), with comments due on or before December 21, 2005. None was filed.

### **Discussion**

11. In Order No. 641, the Commission amended its regulations and established a new methodology for the assessment of annual charges to public utilities. Under Order No. 641, the Commission assesses annual charges to a public utility providing transmission service based on the volume of electricity transmitted by that public utility.<sup>14</sup> The Commission thus requires public utilities that provide transmission service to report total volumes of electric energy transmitted in interstate commerce.<sup>15</sup> If an independent system operator (ISO) or regional transmission organization (RTO) has taken over from individual transmission-owning public utilities the function of providing transmission service and has a tariff or rate schedule on file for such service (as it typically would), in order to avoid “double counting” of a single transaction to both a transmission-owning public utility and to the transmission-providing ISO or RTO public utility, the Commission provides that the ISO or RTO should be responsible for paying the annual charges.<sup>16</sup> Order No. 641 also states that as annual charges are a cost of providing transmission service, public utilities may recover annual charges from their transmission customers, including otherwise non-jurisdictional municipal utilities, because they are transmission customers.<sup>17</sup> In this case, the Commission assessed annual charges to Midwest ISO and Midwest ISO, in turn, charged a proportionate share of the annual charges to its transmission customers, including Michigan Electric. The Commission then allowed, and affirmed on rehearing, Michigan Electric’s recovery of these annual charges from certain transmission customers, including Michigan Agencies.

12. Did the Commission improperly depart from past practice when it included the transmission taken by Michigan Agencies under the O&O Agreements to calculate Midwest ISO’s annual charges when, previously, Michigan Electric’s predecessor,

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<sup>14</sup> Order No. 641 at 31,840.

<sup>15</sup> *Id.* at 31,857.

<sup>16</sup> *Id.* at 31,855.

<sup>17</sup> *Id.* at 31,845 & n. 34.

Consumers Energy, apparently had omitted this transmission when reporting transactions for the purpose of annual charge assessments? We think not.

13. Prior to Order No. 641, annual charge assessments were based on the total volumes of long-term firm wholesale power sales and jurisdictional transmission, and short-term wholesale power sales and jurisdictional transmission, for all assessable public utilities, and the reporting requirements then in effect reflected that approach.<sup>18</sup> As discussed above, however, in Order No. 641, the Commission began to assess annual charges on transmission alone, and, accordingly, changed its reporting requirements and required public utilities providing transmission service to report total volumes of electric energy transmitted in interstate commerce, as measured by unbundled wholesale transmission, unbundled retail transmission, and, to the extent the related transmission was not separately reported, bundled wholesale power sales.<sup>19</sup> While in the past the Commission's annual charges were based on both wholesale power sales by public utilities and jurisdictional transmission service provided by public utilities and now the Commission's annual charges are based solely on jurisdictional transmission service provided by public utilities, the Commission's annual charges have always been assessed based on jurisdictional transmission service provided by public utilities, such as the service provided under the O&O Agreements. It did not and does not matter whether the public utility providing the service was previously Consumers Energy or is now Michigan Electric and Midwest ISO. We find nothing in our past annual charge regulations that might have led Consumers Energy or Michigan Electric previously to believe that transmission service provided under the O&O Agreements need not have been reported to the Commission and/or used in the calculation of annual charges prior to Order No. 641.<sup>20</sup> Thus, if they were not reporting this transmission service in past years, it was *not* because they did not have to report it. Rather, it seems they erred in not reporting it. In any event, whatever may have been the case in the past, and whatever the parties should or should not have done or did or did not do, now, here, the Commission is assessing annual charges solely on the volumes of transmission service provided by and reported by Midwest ISO.

14. In the Joint Response, Michigan Agencies argue that they are exempt from annual charges for the transmission they use under the O&O Agreements because they are neither taking a tariff service nor paying a tariff rate.<sup>21</sup> Specifically, Michigan Agencies

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<sup>18</sup> Order No. 641 at 31,842; *see, e.g.*, 18 C.F.R. §§ 382.102, 382.201 (1999).

<sup>19</sup> Order No. 641 at 31,857; *see* 18 CFR § 382.201 (2005).

<sup>20</sup> *See, e.g.*, 18 C.F.R. §§ 382.102, 382.201 (1999).

<sup>21</sup> Joint Response at 10.

argue that they take transmission service “pursuant to their ownership interests,” and, since they are not public utilities, that transmission service should not be subject to annual charges. However, this leaves the false impression that the transmission service that Michigan Agencies take under the O&O Agreements is taken only over transmission lines in which they have an ownership interest. (It is perhaps this erroneous assumption that previously led Consumers Energy to believe that the transmission service under the O&O Agreements need not have been reported to and should not have been used by the Commission in calculating annual charges.) As Michigan Agencies acknowledge in the Joint Response, they *are* using the transmission facilities of Michigan Electric, a public utility. The O&O Agreements, rate schedules on file at the Commission, outline the rates, terms and conditions of service whereby the output of Michigan Agencies’ entitlements from generation sources in the Campbell Station, the Belle River Station, and the Project No. 1 Station in Michigan are transmitted over *both* transmission facilities co-owned by Michigan Agencies and Michigan Electric *and* over transmission facilities owned solely by Michigan Electric. Michigan Agencies explain in the Joint Response that they do not pay a rate under a Midwest ISO or Michigan Electric tariff or rate schedule for service over the Michigan Electric system because Michigan Agencies paid a purchase price for ownership shares in discreet line segments and make ongoing payments for Michigan Electric’s operation and maintenance of these lines in lieu of paying Midwest ISO or Michigan Electric a tariff rate. Critically, though, the designated line segments in which Michigan Agencies have an ownership interest do not form a complete contract path from point of receipt to point of delivery on the Michigan Electric system,<sup>22</sup> and the transmission service under the O&O Agreements necessarily involves use of Michigan Electric facilities to transmit the 300 MW from points of receipt to points of delivery.<sup>23</sup>

15. In short, under the O&O Agreements, Michigan Agencies take transmission service over the Michigan Electric transmission system. Under this arrangement, Michigan Agencies take transmission service in interstate commerce as customers of Michigan Electric, a public utility, pursuant to the rates, terms and conditions of its rate schedule or tariff (here, the O&O Agreements), notwithstanding the exchange or ‘in kind’

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<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.* at 7 and 8. Michigan Agencies admit that they could have structured the O&O Agreements with “slice of system” ownership rights, which would have allowed them to own facilities constituting the complete contract path from point of receipt to point of delivery; however, because of financing requirements, they opted to pay a purchase price for ownership entitlements in the designated line segments rather than paying ongoing tariff rates for transmission over the Michigan Electric system. *Id.* at 4 and 8.

nature of compensation under the O&O Agreements.<sup>24</sup> Thus, the Commission's annual charges should properly reflect this transmission service.

16. The last issue that we must address is why Midwest ISO is being assessed annual charges for the transmission that Michigan Agencies take pursuant to the O&O Agreements. The Commission initially accepted provisions in the Midwest ISO OATT that grandfathered transmission service under certain contracts, including the O&O Agreements. Transmission customers under grandfathered contracts have continued to receive transmission service pursuant to the rates, terms and conditions of those contracts, not pursuant to the rates, terms and conditions of the Midwest ISO OATT.<sup>25</sup> However, in Opinion Nos. 453 and 453-A,<sup>26</sup> the Commission ultimately required that the Midwest ISO OATT be revised to require that all transmission service over the Midwest ISO system, even transmission service under grandfathered contracts, be provided by Midwest ISO under the Midwest ISO OATT in the first instance, in order that Midwest ISO satisfy Order No. 2000's requirement that it be the sole transmission provider for facilities over which it has operational control.<sup>27</sup> Michigan Agencies recognize that the transmission service they receive pursuant to the O&O Agreement ultimately relies on facilities owned solely by Michigan Electric and which are under the operational control of Midwest

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<sup>24</sup> Under the O&O Agreements, Michigan Agencies pay for the costs of owning, operating and maintaining discrete transmission facilities that comprise the Michigan Electric transmission system, and receive, in kind, transmission service over the entire Michigan Electric transmission system. The Commission's filing requirements at 18 C.F.R. § 35.2(a) (2005), however, define electric service as including "transmission of electric energy in interstate commerce . . . without regard to the form of payment or compensation," and specifically mention exchanges.

<sup>25</sup> *Midwest Independent Transmission System Operator, Inc.*, 84 FERC ¶ 61,231 at 62,169-70, *order on reconsideration*, 85 FERC ¶ 61,250, *order on reh'g*, 85 FERC ¶ 61,372 (1998).

<sup>26</sup> *Midwest Independent Transmission System Operator, Inc.*, Opinion No. 453, 97 FERC ¶ 61,033 at 61,170, *order on reh'g*, Opinion No. 453-A, 98 FERC ¶ 61,141 at 61,413 (2002), *order on remand*, 102 FERC ¶ 61,192 (2003), *reh'g denied*, 104 FERC ¶ 61,012 (2003), *aff'd sub nom. Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004).

<sup>27</sup> *See Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 at 31,108 (2000), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Feb. 25, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd*, *Public Utility District No. 1 of Snohomish County, Washington, v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

ISO.<sup>28</sup> Therefore, under the requirements of Opinion Nos. 453 and 453-A and Order No. 2000, Midwest ISO is the transmission provider in the first instance for the transmission service that Michigan Agencies receive under the O&O Agreements.

17. Midwest ISO provides transmission service under its OATT to transmission owners, such as Michigan Electric, to satisfy their obligations under their grandfathered contracts, and recovers its costs of providing that service from those transmission owners pursuant to schedule 10 of its OATT.<sup>29</sup> In this proceeding, Michigan Electric has sought to pass through to Michigan Agencies amounts charged to it under schedule 10 of the Midwest ISO OATT for service associated with the O&O Agreements (it is the pass through of that component of such schedule 10 charges that reflects Midwest ISO's costs associated with the Midwest ISO's annual charge assessment to which Michigan Agencies object). Thus, Midwest ISO does provide service pursuant to its OATT to meet Michigan Electric's obligations under the O&O Agreements. Accordingly, for purposes of assessing the Commission's annual charges, Midwest ISO properly reported to the Commission the transmission service provided to Michigan Electric under the Midwest ISO OATT, and that Michigan Electric provided, in turn, to Michigan Agencies under the O&O Agreements ).<sup>30</sup>

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<sup>28</sup> Joint Response at 8-10.

<sup>29</sup> While, upon commencement of operations as a transmission provider in 2002, Midwest ISO billed transmission owners for schedule 10 service associated with transactions under their grandfathered agreements, we note that, beginning April 1, 2005, with the commencement of Midwest ISO's energy markets, Michigan Agencies have agreed to be directly responsible to Midwest ISO for charges assessed by Midwest ISO, under its tariff, for Michigan Agencies' transactions under their O&O Agreements. *See Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,042 at P 150 & n.158, *order on reh'g*, 112 FERC ¶ 61,311 (2005).

<sup>30</sup> As noted above, if an ISO or RTO has taken over from individual transmission-owning public utilities the function of providing transmission service and has a tariff or rate schedule on file for such service, in order to avoid "double counting" of a single transaction to both a transmission-owning public utility and to the ISO or RTO public utility, the Commission provides that the ISO or RTO should be responsible for paying the annual charges. If Midwest ISO were not providing transmission service under its OATT to Michigan Electric, to satisfy Michigan Electric's obligations under the O&O Agreements, then Michigan Electric, a public utility, would be required to report the transmission that it provides to Michigan Agencies under the O&O Agreements for purposes of assessing the Commission's annual charges.

18. Upon further consideration and given the additional facts presented by Michigan Electric and Michigan Agencies in the Joint Response, we find that Michigan Agencies take transmission service over Michigan Electric's transmission facilities under the O&O Agreements, and it is appropriate for the Commission to assess annual charges on such service and for Michigan Electric ultimately to pass through such annual charges to Michigan Agencies as a cost of transmission service. Michigan Agencies are "transmission customers" of Michigan Electric and, as Order No. 641 states, public utilities may pass through annual charges to transmission customers, including municipal utilities that are transmission customers.

The Commission orders:

The Commission hereby reaffirms its earlier orders in this proceeding.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.