

133 FERC ¶ 61,238  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

December 17, 2010

In Reply Refer To:  
Michigan Electric Transmission Company, LLC  
Docket No. ER11-136-000

Troutman Sanders LLP  
401 9<sup>th</sup> Street NW, Suite 1000  
Washington, DC 20004

Attention: Clifford S. Sikora, Esq.

Dear Mr. Sikora:

1. By order dated September 17, 2010, in Docket No. ER10-2156-000, the Commission accepted for filing, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> a previously unfiled July 8, 1988 agreement, as amended (Facilities Agreement), between Consumers Energy Company (Consumers Energy) and Midland Cogeneration Venture Limited Partnership (Midland).<sup>2</sup> Under the Facilities Agreement, Consumers Energy agreed to operate and maintain certain interconnection facilities used to deliver electric energy from Midland's cogeneration facility to Consumers Energy. In the September 17 Order, the Commission also directed that the April 1, 2001 agreement

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<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,241 (2010) (September 17 Order). The September 17 Order also conditionally accepted, in Docket No. ER10-1814-000, a partially executed generator interconnection agreement among the Midwest Independent Transmission System Operator, Inc., as transmission provider, Michigan Electric Transmission Company (Michigan Electric), as transmission owner, and Midland, as transmission customer, which, if executed by Midland, would amend or terminate the Facilities Agreement. Michigan Electric and Consumers Energy have sought rehearing of the September 17 Order as it relates to the Facilities Agreement. The rehearing proceeding is pending.

(Agency Agreement) between Michigan Electric, as agent, and Consumers Energy, as principal, be filed with the Commission. Under the Agency Agreement, Consumers Energy delegated its operating responsibilities under the Facilities Agreement to Michigan Electric. The Commission determined that, because the Agency Agreement encompasses terms and conditions related to the Facilities Agreement, Michigan Electric is, in essence, providing operation and maintenance services related to the transmission of electric energy in interstate commerce, a jurisdictional service.<sup>3</sup> On October 18, 2010, you submitted the Agency Agreement for filing<sup>4</sup> and requested an effective date of December 17, 2010.

2. The recitals to the Agency Agreement state that, among the transmission assets that Consumers Energy transferred to Michigan Electric on April 1, 2001,<sup>5</sup> are the facilities described in the Facilities Agreement that interconnect Midland's plant to Consumers Energy's transmission system. Under the Agency Agreement, Michigan Electric performs Consumers Energy's obligations under the Facilities Agreement to operate and maintain the transferred interconnection facilities for compensation of \$500 per month, exclusive of any indemnity payments.<sup>6</sup> The Agency Agreement states that the \$500 monthly payment for the services that Michigan Electric performs on Consumers Energy's behalf is the only compensation and reimbursement from Consumers Energy to which Michigan Electric is entitled, but also provides that Michigan Electric "shall be entitled to the payments from [Midland] pursuant to the [Facilities Agreement]," with an exception that is not relevant here.<sup>7</sup>

3. Notice of the submittal was published in the *Federal Register*, 75 Fed. Reg. 65,621 (2010), with interventions and comments due on or before November 8, 2010. Consumers Energy intervened in this proceeding. Midland intervened and filed, in the same pleading, protests to the Agency Agreement and also to Michigan Electric's filing in Docket No. EL11-2-000 (Midland's Protest). On November 23, 2010, Michigan

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<sup>3</sup> September 17 Order, 132 FERC ¶ 61,127 at P 27.

<sup>4</sup> The submittal also included Michigan Electric's related petition for declaratory order (Docket No. EL11-2-000). In the petition for declaratory order, Michigan Electric claims that, under the Facilities and Agency Agreements, Midland owes Michigan Electric \$1,703,886.78 for operation and maintenance of the interconnection facilities described in the Facilities Agreement.

<sup>5</sup> See *Consumers Energy Co.*, 94 FERC ¶ 61,018 (2001).

<sup>6</sup> Agency Agreement, Article III (Compensation).

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

Electric filed a motion for leave to answer Midland's Protest and filed an answer (Michigan Electric's Answer) addressing matters in both this proceeding and Docket No. EL11-2-000. On December 8, 2010, Midland filed, in this proceeding and in Docket No. EL11-2-000, a reply to Michigan Electric's Answer (Midland's Reply).

4. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>8</sup> 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<sup>9</sup> prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Michigan Electric's Answer and Midland's Reply because they have provided information that assisted us in our decision-making process.

5. Midland asserts that the rates that Michigan Electric seeks to collect through the Agency Agreement are neither just nor reasonable, stating that the charges constitute an impermissible direct assignment of network charges, that they are for non-recoverable property taxes, that they constitute double recovery for Michigan Electric, and that enforcing the Agency Agreement retroactively would violate the Commission's filed rate doctrine and the ban on retroactive ratemaking.

6. Michigan Electric answers that the Agency Agreement did not modify the Facilities Agreement, the rates under the Facilities Agreement, or Midland's obligation to pay for services under the Facilities Agreement. It continues that the Commission accepted the Facilities Agreement without Midland protesting the rates, terms, and conditions contained therein, or seeking rehearing of the September 17 Order. Michigan Electric cites the Commission's *Prior Notice Order*<sup>10</sup> as holding that the filing of an agreement after service commences does not invalidate that agreement. Rather, the payor is entitled to receive the time-value of the monies that the utility received under the late-filed agreement. Concerning the Agency Agreement, Michigan Electric asks the Commission to find that the Agency Agreement is just and reasonable, that its late filing does not render the services provided under it null and void, and that only time-value refunds payable by Michigan Electric to Consumers are owed.

7. In its reply, Midland repeats previous arguments in its protest. Midland then disputes Michigan Electric's assertion that by failing to contest the filing of the Facilities

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<sup>8</sup> 18 C.F.R. § 385.214 (2010).

<sup>9</sup> 18 C.F.R. § 385.213(a)(2) (2010).

<sup>10</sup> *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,979-980, *order on reh'g*, 65 FERC ¶ 61,081 (1993) (*Prior Notice Order*).

Agreement, in Docket No. ER10-2156-000, Midland lacks standing to contest the filing of the Agency Agreement. Further, in response to Michigan Electric's argument that the Agency Agreement did not modify the rates in the Facilities Agreement, Midland invokes the Commission's policy barring utilities from incorporating by reference the rates of other utilities.

8. This instant proceeding is concerned solely with the terms of the Agency Agreement, not with the rates in the Facilities Agreement. We agree with Michigan Electric that the Agency Agreement does not purport to amend the Facilities Agreement or the rates thereunder. Moreover, neither Midland nor Michigan Electric has pointed to any provision in the Agency Agreement that incorporates by reference the rates under the Facilities Agreement. The only rate specified in the Agency Agreement is the \$500 monthly fee payable by Consumers Energy to Michigan Electric. We find that this rate is not unjust and unreasonable nor unduly discriminatory. We hereby accept the Agency Agreement, effective December 17, 2010, as requested.<sup>11</sup> Other issues raised by Midland are before the Commission in the Docket No. EL11-2-000 proceeding.

9. Midland's objections to the rates in the Agency Agreement do not pertain to the \$500 monthly fee, but rather to the payments under the Facilities Agreement that Midland is required to make for operation and maintenance services. However, Midland did not protest the justness and reasonableness of the Facilities Agreement's rates in the Docket No. ER10-2156-000 proceeding. In the September 17 Order, the Commission found that the rates under the Facilities Agreement are just and reasonable. Moreover, Midland, although a party to the Docket No. ER10-2156-000 proceeding, failed to request rehearing of the September 17 Order. We find, therefore, that Midland's challenge in the instant proceeding to rates under the Facilities Agreement represents an impermissible collateral attack on the rates that the Commission has already approved in the September 17 Order.<sup>12</sup>

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<sup>11</sup> Our acceptance of the Agency Agreement is not a determination that Michigan Electric has rights, enforceable against Midland, to collect and retain payments that Midland is obligated to make under the Facilities Agreement. That question is properly part of the Docket No. EL11-2-000 proceedings.

<sup>12</sup> See, e.g., *Calif. Indep. Sys. Operator Corp.*, 131 FERC ¶ 61,148, at P 17 (2010). Midland may challenge the justness and reasonableness of the rates in the Facilities Agreement by filing a complaint under section 206 of the FPA, 16 U.S.C. § 824e (2006).

10. We direct Michigan Electric to refund to Consumers Energy, within 60 days of the date of this order, the time-value of the monthly fees paid by Consumers Energy under the Agency Agreement for the entire period during which such payments have been made without Commission approval. Michigan Electric must also submit a refund report, within 30 days after the refunds are made, showing that it has made these refunds.

By direction of the Commission

Nathaniel J. Davis, Sr.,  
Deputy Secretary.