

138 FERC ¶ 61,204
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission
System Operator, Inc.

Docket No. ER10-1814-001

Consumers Energy Company

Docket Nos. ER10-2156-001
ER10-2156-002

(not consolidated)

ORDER ON REHEARING

(Issued March 20, 2012)

1. On September 17, 2010, the Commission, in Docket No. ER10-2156-000, accepted a late-filed facilities agreement (Facilities Agreement) between Consumers Energy Company (Consumers Energy) and Midland Cogeneration Venture Limited Partnership (Midland). The Facilities Agreement, dated July 8, 1988 and amended on May 28, 2009, governs the interconnection of Midland's cogeneration facility (Midland Plant) to the transmission grid formerly owned by Consumers Energy and now owned by Michigan Electric Transmission Company, LLC (Michigan Electric).¹ The Commission accepted the Facilities Agreement effective October 5, 2010. The Commission also conditionally accepted, in Docket No. ER10-1814-000, a partially executed generator interconnection agreement (GIA) among Midwest Independent Transmission System Operator, Inc., Midland, and Michigan Electric, which, subject to amendment or termination of the Facilities Agreement, would replace the Facilities Agreement.²

¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,241 (2010) (September 17 Order).

² The new GIA would permit Midland to increase capacity at and sales of electric energy from the Midland Plant. Midland did not execute the new GIA because, among other things, it objected to the provision of the new GIA requiring either amendment or

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2. Consumers Energy has requested rehearing of the September 17 Order. Michigan Electric filed a request for clarification or, in the alternative, rehearing of the September 17 Order. For the reasons discussed below, we are denying the requests for rehearing and granting the clarification requested by Michigan Electric.

I. Background

3. The Midland Plant is a 1,566.2 megawatt (MW) net capacity gas-fired combined cycle cogeneration facility located in Midland, Michigan that, over the course of its operating history, has been certified by the Commission, and has self-certified, as a Qualifying Facility (QF),³ pursuant to section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA).⁴ The Midland Plant was interconnected to Consumer Energy's system in the late 1980s and was placed in commercial operation in 1990. Midland and Consumers Energy entered into a power purchase agreement (Power Purchase Agreement) on July 17, 1986, pursuant to which Midland sells capacity and energy to Consumers Energy.⁵ The Power Purchase Agreement was amended and restated most recently on June 9, 2008. The Facilities Agreement sets forth the terms of the interconnection of the Midland Plant to Consumers Energy's transmission system. The Facilities Agreement also describes the facilities required to complete the interconnection, allocates to the parties responsibility for the cost of those facilities, and provides for the conveyance of ownership of certain facilities provided by Midland to

termination of the Facilities Agreement. The September 17 Order conditionally accepted the new GIA and required certain minor revisions. It left to Midland the decision whether to increase the Midland Plant's capacity, so that the new GIA, not the Facilities Agreement, governs interconnection terms and conditions, or to retain the Midland Plant's existing capacity and the terms and conditions of the Facilities Agreement. September 17 Order, 132 FERC ¶ 61,241 at PP 34-35. In a June 9, 2011, filing in Docket No. ER11-3764-000, MISO filed a revised GIA, which the Commission accepted on July 20, 2011, under delegated authority, subject to termination or amendment of the Facilities Agreement. On November 15, 2011, Consumers Energy filed a Notice of Cancellation of the Facilities Agreement in Docket No. ER12-420-000. That filing is pending.

³ The Commission initially certified the Midland Plant as a qualifying cogeneration facility in Docket No. QF87-237-000 on March 12, 1987. *CMS Midland, Inc.*, 38 FERC ¶ 61,244 (1987).

⁴ 16 U.S.C. § 796 (2006).

⁵ Midland also has contractual arrangements for the sale of steam and electric capacity and energy to an on-site customer, Dow Chemical Company (Dow Chemical). Those arrangements are not subject to any dispute in these proceedings.

Consumers Energy. In addition, section 3.1 of the Facilities Agreement obligates Consumers Energy to operate and maintain the interconnection facilities and obligates Midland to reimburse Consumers Energy for all direct and indirect costs and expenses (including property taxes) incurred by Consumers Energy in owning and operating the interconnection facilities.

4. In 2001, Consumers Energy transferred all of its transmission facilities, including the interconnection facilities that are the subject of the Facilities Agreement, to a predecessor of Michigan Electric, which was then a subsidiary of Consumers Energy.⁶ As part of that transaction, Consumers Energy and Michigan Electric entered into an agency agreement (Agency Agreement) pursuant to which Consumers Energy delegated to Michigan Electric, as its agent, operating authority with respect to the transferred interconnection facilities.⁷ Until 2004, in accordance with section 10 of the Facilities Agreement, Midland reimbursed Consumers Energy, and then Michigan Electric, for the costs incurred by those companies in operating and owning the interconnection facilities. Since 2004, however, Midland has not paid the amounts invoiced by Michigan Electric for the operations and maintenance (O&M) services provided for in the Facilities Agreement.

5. As discussed more fully below, QF interconnection agreements, such as the Facilities Agreement, are not jurisdictional if the entire output of the QF must be sold to the directly interconnected utility (or to an on-site customer).⁸ However, at some point –

⁶ Subsequently, in 2002, Michigan Electric was transferred to an unaffiliated entity. *See Trans-Elect, Inc.* 98 FERC ¶ 61,142 (2002).

⁷ In the September 17 Order, 132 FERC ¶ 61,241 at P 27, the Commission clarified that Consumer Energy's filing of the Facilities Agreement did not relieve Michigan Electric of its responsibility to file the Agency Agreement. Subsequently, Michigan Electric filed the Agency Agreement with the Commission in Docket No. ER11-136-000. Midland protested the Agency Agreement arguing that the rates contained in the Facilities Agreement are not just and reasonable. The Commission accepted the Agency Agreement, finding that the rates contained in the Facilities Agreement were not at issue in Docket No. ER11-136-000. *Mich. Elec. Transmission Co.*, 133 FERC ¶ 61,238 (2010) (Agency Agreement Order). Midland has sought rehearing of the Agency Agreement Order. The Commission is addressing the rehearing of the Agency Agreement Order in an order issued concurrently with this order. *Mich. Elec. Transmission Co.*, 138 FERC ¶ 61,203 (2012).

⁸ The Commission's PURPA regulations provide for QFs to bear interconnection costs that are subject to state jurisdiction. 18 C.F.R. § 292.306 (2011). When the Commission initially adopted its PURPA regulations, most QFs could sell only to the

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that point being the central issue in Consumer Energy's rehearing request – the Midland/Consumers Energy interconnection became jurisdictional. In its filing in Docket No. ER10-2156-000, Consumers Energy conceded that the interconnection facilities became jurisdictional in 2006, some four years before the Facilities Agreement was filed. In the September 17 Order, however, the Commission determined that the Facilities Agreement was jurisdictional when it was executed in 1988 since the related Power Purchase Agreement gave Midland the right to make third-party sales under certain circumstances.

6. In the September 17 Order, the Commission reviewed its policy concerning when it exercises jurisdiction over interconnection agreements that connect QFs to the grid. Citing Order No. 2003,⁹ *Western Massachusetts Electric Company*,¹⁰ and *Niagara Mohawk Power Corporation*,¹¹ the Commission stated that its jurisdiction over a QF's interconnection to a transmission system starts when the QF's owner first obtains the right to sell any of the QF's output to a third party (other than to an on-site customer).¹² An agreement releasing the interconnecting utility from its obligation to purchase the QF's full output establishes the right to sell output to a third party.¹³

7. Based on these precedents, the Commission determined that its jurisdiction over the Facilities Agreement arose when Midland was first authorized, by contract or otherwise, to make sales to entities other than Consumers Energy or Dow Chemical. Specifically, because the original Power Purchase Agreement, which antedates the

directly interconnected utility; the Commission's PURPA regulations accordingly governed most QF interconnections.

⁹ *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 F.3d 1277 (D.C. Cir. 2007).

¹⁰ 61 FERC ¶ 61,182 (1992) (*Western Massachusetts*), *aff'd sub nom. Western Massachusetts Elec. Co. v. FERC*, 165 F.3d 922 (D.C. Cir. 1999) (*WMECO v. FERC*).

¹¹ 121 FERC ¶ 61,183 (2007), *reh'g denied*, 123 FERC ¶ 61,061 (2008) (*Niagara Mohawk*).

¹² September 17 Order, 132 FERC ¶ 61,241 at P 24-26.

¹³ *Id.* P 25 & n. 34 (citing *Niagara Mohawk*, 121 FERC ¶ 61,183).

Facilities Agreement, gave Midland the right to make sales of residual capacity and energy (that is, the portion of the Midland Plant's output not committed to Consumers Energy under the Power Purchase Agreement) to third parties, the Commission found that the Facilities Agreement became jurisdictional at the time of execution in 1988. The Commission ordered Consumers Energy to refund the time value of revenues collected under the Facilities Agreement for the entire period during which it collected revenues without Commission approval.¹⁴

II. Consumers Energy's Rehearing Request

A. Commission Jurisdiction over Facilities Agreement

8. On rehearing, Consumers Energy argues that the Commission erroneously held that the Facilities Agreement became jurisdictional at the time of its execution. Consumers Energy also argues that the Commission's imposition of time-value refunds is inconsistent with Commission precedent. Consumers Energy urges that the earliest the Facilities Agreement could have come under the Commission's jurisdiction was 1998, when the open access provisions of Order No. 888¹⁵ enabled Midland to start making sales to third-party purchasers.¹⁶ Accordingly, Consumers Energy asserts that the

¹⁴ *Id.* P 26. On December 16, 2010, Consumers Energy submitted a refund report in Docket No. ER10-2156-002, concluding that it owed no time-value refunds. Midland filed a protest of the December 16, 2010 refund report. On October 28, 2011, Consumers Energy filed a revised refund report indicating its agreement to pay \$250,000 to Midland in settlement of all disputed amounts under the Facilities Agreement, and, on November 2, 2011, Midland withdrew its protest. As discussed below, since the information in the two refund reports appears to be incomplete, we are directing Consumers Energy to file a further revised refund report within 30 days of the date of this order that itemizes all amounts billed to Midland by Consumers Energy (or by Michigan Electric as its agent) under the Facilities Agreement, the amounts that have been paid by Midland, and the amounts billed to Midland that remain unpaid.

¹⁵ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁶ In this regard, Consumers Energy refers to documentation filed by Midland of sales of 200 MWH and 30 MWH, on May 29, 1998, to Engage Energy U.S., LP.

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Commission should not have found the Facilities Agreement to be jurisdictional before the date that Midland began making actual third-party sales in 1998, and that the Commission erred in concluding otherwise based on orders issued after 1998 in which it clarified its policy concerning its jurisdiction over QF interconnection agreements.

9. More particularly, Consumers Energy maintains that the Commission erred in finding that the original Power Purchase Agreement between Midland and Consumers Energy authorized Midland to make third-party sales, given that section 3(c) of the original Power Purchase Agreement gave Consumers Energy the right of first refusal to purchase any residual capacity and energy from the Midland Plant.¹⁷ In this regard, Consumers Energy states that it never waived its right of first refusal, even when Midland's residual capacity and energy was unneeded for Consumers Energy's own load. Instead, according to Consumers Energy, it always bought and then resold any unneeded residual capacity and energy under a "buy-sell" arrangement that the Commission

Midland, Motion to Intervene and Comments, Ex. J, Docket No. ER10-2156-000 (filed Aug. 27, 2010).

¹⁷ Section 3(c) of the original (1986) Power Purchase Agreement, Attachment A to Consumers Energy's Rehearing Request, provided, until amendment in 1989:

Consumers shall have the right of first refusal with respect to the purchase of any part or all of such Residual Capacity and Energy. Prior to Seller [i.e., Midland] committing to sell any part or all of such Residual Capacity and Energy to any other electric utility, Seller shall offer to Consumers the right to purchase such Residual Capacity and Energy on the same terms and conditions as are available to Seller. . . . If Consumers decides not to purchase part or all of any Residual Capacity and Energy available, the Seller shall be free to sell such part or all . . . to another electric utility. At the request of such utility, Consumers shall assist in the delivery of Residual Capacity and Energy upon terms and condition customary for similar transactions by Consumers for other utilities.

Residual Capacity and Energy was defined as: "Available Capacity and its associated energy at the MC-Facility in excess of the Contract Capacity and its associated energy."

recognized, in a 1991 order, was not grounds for denying recertification of the Midland Plant as a QF.¹⁸

10. Moreover, although Consumers Energy acknowledges that Amendment No. 3 of the Power Purchase Agreement, dated August 28, 1989, gives Midland a contractual right to make limited third-party sales,¹⁹ that right could not effectively be exercised prior to Order No. 888, which was issued in 1996, since sales from the Midland Plant to third parties requires transmission across the American Electric Power and the Northern Indiana Public Service Company systems, and this transmission service was not available to Midland prior to Order No. 888.²⁰ Thus, prior to Order No. 888, Midland sold residual energy not needed by Consumers Energy by using the buy-sell arrangement previously reviewed by the Commission.²¹

11. Consumers Energy also argues that, prior to 1998, when Midland first made third-party wholesale sales, there was no Commission precedent to support the Commission's conclusion that the Facilities Agreement was jurisdictional from its date of execution in 1988.²² In this regard, Consumers Energy points out that, in 1988, the Commission had not yet stated that the mere ability to make third-party wholesale sales triggered jurisdiction over a QF's interconnection agreement. Only the 1992 *Western Massachusetts* order, which was upheld on appeal in 1999, antedates Midland's 1998 third-party wholesale sales. Order No. 2003 was issued in 2003, five years after

¹⁸ Consumers Energy Rehearing Request at 6 (citing *Midland Cogeneration Venture Ltd. P'ship.*, 56 FERC ¶ 61,361, at 62,397 (1991)).

¹⁹ Amendment No. 3 of the Power Purchase Agreement modified Consumer Energy's first right of refusal to purchase residual power as follows: "This Agreement does not obligate Seller to sell or Consumers to purchase, any capacity or energy other than Commercial Energy, and Seller shall have the right, other than with respect to Commercial Energy, to sell any and all capacity and energy that might be available from the MC-Facility to any third party or into any market." Commercial Energy is defined as: "The maximum amount of electric energy determined hourly which could be generated by the lower of Contract Capacity and Available Capacity, whether delivered or not."

²⁰ Consumers Energy Rehearing Request at 7-8.

²¹ *Id.* at 7. Consumers Energy states that it had established a generally available, buy-resale service in Docket No. ER92-198-000. *Consumers Power Co.*, 58 FERC ¶ 61,323, *order on clarification*, 59 FERC ¶ 61,276 (1992).

²² *Id.* at 8.

Midland's first third-party wholesale sales, and the Commission decided *Niagara Mohawk* nearly a decade after the first third-party sales.

12. Furthermore, Consumers Energy argues that *Western Massachusetts* is distinguishable, in that it involved interconnection agreements established for the express purpose of facilitating third-party sales. The holding in *Western Massachusetts*, therefore, should not be applied to a QF owner (such as Midland) that merely had the potential right to make third-party wholesale sales, especially where, as already noted, Consumers Energy had the right of first refusal to purchase any residual capacity and energy.

13. Similarly, Consumers Energy points out that, in Order No. 2003, the Commission focused only on actual wholesale sales as the jurisdictional trigger over third-party QF sales.²³ Thus, Consumers Energy argues that Order No. 2003 does not give clear notice that a QF's theoretical ability to make third-party wholesale sales would make interconnection agreements, such as the Facilities Agreement, jurisdictional. Finally, although recognizing that, in the *Niagara Mohawk* orders issued in 2007, the Commission found jurisdiction over a QF's interconnection even before the start of third-party, wholesale sales, by that time, according to Consumers Energy, Midland had already been making actual third-party sales for nine years. Consumers Energy concludes, therefore, that those orders could not have played any role in establishing when the Facilities Agreement became jurisdictional.²⁴

B. Time-Value Refunds

14. Consumers Energy urges that the Commission erred in applying its *Niagara Mohawk* policy retroactively to require time-value refunds for the entire period that the Facilities Agreement has been in effect. Consumers Energy argues that, prior to *Niagara Mohawk*, the Commission exercised jurisdiction over QF interconnection agreements only when a QF made actual wholesale sales to third parties. Consumers Energy argues that only after the issuance of *Niagara Mohawk* in 2007 was the industry on notice that a QF's mere ability to make wholesale sales, before the start of actual sales, triggered

²³ *Id.* at 10-11 (citing Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 813-14).

²⁴ *Id.* at 12.

Commission jurisdiction.²⁵ Accordingly, the Commission should apply the “ability to sell” standard only prospectively and not prior to its announcement in 2007.²⁶

15. To apply the “ability to sell” standard before issuance of *Niagara Mohawk*, according to Consumers Energy, is retroactive application of a new policy. Consumers Energy cites the Commission’s three-prong test for deciding whether to apply a new policy retroactively:

(1) whether the rule is actually a departure from clear prior policy or instead a new policy for a new situation (or a clarification of a prior policy); (2) whether retroactive application will be more likely to hinder than to further the operation of the new rule; and (3) whether retroactive application would produce substantial inequitable results, with particular reference to whether parties relied on the old standard.²⁷

16. Consumers Energy further argues that *Niagara Mohawk* was wrongly decided in that it purports to expand the Commission’s jurisdiction beyond the limits of the Federal Power Act (FPA).²⁸ Section 205 of the FPA requires public utilities to file all contracts that in any manner affect or relate to rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and classifications, practices and services affecting such rates and charges.²⁹ The statute does not require public utilities to file any agreement that may facilitate a potential Commission-jurisdictional sale or service at some unknown future date. The statute instead requires public utilities to file contracts 60 days before engaging in Commission-jurisdictional sales and permits the Commission to waive the 60-day notice requirement for good cause.³⁰ Under the FPA, the Commission’s jurisdiction to require utilities to file contracts or unilateral rates for

²⁵ *Id.*

²⁶ *Id.* at 13-14. Consumers Energy also states that the Commission should be “judicious in applying the actual sales jurisdictional standard approved in *WMECO v. FERC*, in 1999, and generically stated in Order No. 2003 to sales made before then.”

²⁷ *Id.* at 14-15 (citing *Southern Co. Energy Mktg., LP*, 86 FERC ¶ 61,131, at 61,457-58 (1999)).

²⁸ 16 U.S.C. § 791a *et seq.* (2006).

²⁹ 16 U.S.C. § 824d(c) (2006).

³⁰ 16 U.S.C. § 824d(d) (2006).

wholesale sales of energy or capacity or transmission of energy in interstate commerce is not triggered by the mere possibility of a jurisdictional transaction. In this case, even the possibility that Midland might have engaged in a jurisdictional transaction with a third party was completely within Consumers Energy's control, under the original Power Purchase Agreement, because of its right of first refusal.

17. In any event, even if the Commission's holding in *Niagara Mohawk* were found to be consistent with the FPA, retroactive application of *Niagara Mohawk* would violate the fair notice doctrine³¹ and the Due Process Clause, according to Consumers Energy, since Consumers Energy would be required to pay refunds relating to a period before it could reasonably have been expected to have known that the Facilities Agreement was jurisdictional. Consumers Energy states that it is not alone in objecting that, in *Niagara Mohawk*, the Commission retroactively expanded its jurisdiction over a narrow category of interconnection agreements years, and even decades, after those agreements were executed.³² In this connection, Consumers Energy states that it was first alerted to the new jurisdictional rule announced in *Niagara Mohawk* when Florida Power & Light Company, concerned by the potential consequences of *Niagara Mohawk* on its own QF interconnection agreements, filed a petition for a declaratory order, in Docket No. EL10-43-000, requesting the Commission either to reverse its new jurisdictional policy or at least clarify that it would be applied only on a prospective basis.³³

18. Consumers Energy concludes its arguments by stating that the "ability to sell" doctrine of *Niagara Mohawk* creates uncertainty as to when and whether to file interconnection agreements, and that the retroactive award of substantial time-value refunds in this case is inequitable and may result in confiscatory rates.³⁴

³¹ Under the fair notice doctrine, "application of a rule may be successfully challenged if it does not give fair warning that the allegedly violative conduct was prohibited." *United States v. Chrysler Corp.*, 158 F.3d 1350, 1355 (D.C. Cir. 1998).

³² Consumers Energy Rehearing Request at 17.

³³ In *Florida Power & Light Co.*, 133 FERC ¶ 61,121, at P 21 (2010) (*Florida Power*), (discussing *Western Massachusetts*, Order No. 2003, and *Niagara Mohawk*), the Commission denied the petition, stating that "if a QF avails itself of its PURPA privileges, . . . Commission jurisdiction will attach (thereby requiring that the interconnection agreement be filed) as soon as and only if the QF is provided with an express right to sell output to third parties rather than on the date that sales to third parties occur."

³⁴ Consumers Energy Rehearing Request at 17-18.

III. Michigan Electric's Request for Rehearing

19. In its request for rehearing, Michigan Electric asks the Commission to clarify that failure to file the Facilities and Agency Agreements with the Commission in timely fashion does not affect the validity and enforceability of these agreements during the period before they were filed, and that the September 17 Order does not establish or suggest that these agreements were invalid or unenforceable prior to the effective date of their acceptance for filing by the Commission.³⁵

20. Michigan Electric also asks the Commission to clarify that the September 17 Order was not intended to modify the Commission's policy regarding late-filed agreements and to confirm that time-value refunds will not be assessed if the result is that the utility will have operated at a loss.³⁶

21. To the extent that the Commission does not clarify the September 17 Order, as requested, Michigan Electric seeks rehearing.

IV. Additional Pleadings

22. On November 2, 2010, Midland filed an answer to Michigan Electric's request for rehearing. On November 17, 2010, Michigan Electric filed an answer to Midland's answer. On December 2, 2010, Midland filed a reply to Michigan Electric's answer.

V. Discussion

A. Procedural Matters

23. Rule 713(d) of the Commission's Rules of Practice and Procedure³⁷ prohibits an answer to a request for rehearing. Accordingly, we will reject Midland's answer to Michigan Electric's request for rehearing, as well as the subsequent answers filed in this proceeding, i.e., Michigan Electric's answer to Midland's answer to the request for rehearing, and Midland's reply to Michigan Electric's answer.

³⁵ Michigan Electric Rehearing Request at 3-7.

³⁶ *Id.* at 7-8. Michigan Electric cites *Carolina Power & Light Co.*, 84 FERC ¶ 61,103, at 61,522 (1998), *order on reh'g*, 87 FERC ¶ 61,083, at 61,357 (1999) (*Carolina Power*).

³⁷ 18 C.F.R. § 385.713(d) (2011).

B. Substantive Matters

24. The requests for rehearing raise the following issues: (1) at what point did the Facilities Agreement first become subject to Commission jurisdiction; (2) what is the effect of the late-filing of the Facilities Agreement on Consumers Energy's right to collect the rates provided for in the Facilities Agreement; and (3) what are the rates that Consumers Energy, and Michigan Electric, as Consumers Energy's agent, may recover, under the Facilities Agreement, and how are time-value refunds calculated.

1. Commission Jurisdiction over the Facilities Agreement

25. In the *Prior Notice Order*,³⁸ the Commission reviewed its earlier decision in *Western Massachusetts*, in which it had addressed the boundary between state and federal jurisdiction over agreements pursuant to which QFs interconnect with the grid. The Commission noted that, in *Western Massachusetts*, it held that the states have exclusive jurisdiction over direct interconnections between a QF and the public utility that purchases the QF's power, and that, conversely, the Commission alone exercises authority over QF interconnections with utilities standing between the QF and its purchaser. The Commission declined to reconsider that holding and leave the issue of QF interconnections entirely to the states, or to apply the ruling in *Western Massachusetts* prospectively, as several commenters had requested. Finding no reason to overturn its precedent, the Commission noted that it had always had jurisdiction over interconnections that permit third-party sales.³⁹ The Commission concluded that "even if the QF or the utility customer does not actually take transmission service as soon as the line enters the grid, the interconnection agreement 'facilitates' future service and falls within our section 205 jurisdiction."⁴⁰ In light of the foregoing, we reject Consumers Energy's argument that, prior to *Niagara Mohawk*, Commission precedent was not clear that QF interconnections that may facilitate future service were subject to the Commission's jurisdiction. Moreover, as noted, the Commission, in the *Prior Notice Order*, already has rejected requests that the *Western Massachusetts* ruling should be

³⁸ *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*).

³⁹ Consumers Energy's reliance upon the Commission's recognition of the "buy-sell" arrangement under the Power Purchase Agreement in *Midland Cogeneration Venture Ltd. P'ship*, 56 FERC ¶ 61,361, supra n.18, is misplaced. That case did not concern the jurisdictional status of the Facilities Agreement. Rather, at issue in that case was whether the "buy-sell" arrangement between Midland and Consumers Energy was grounds for denying recertification of the Midland Plant as a QF.

⁴⁰ *Prior Notice Order*, 64 FERC at 61,991-92.

applied only prospectively. Accordingly, as decided previously, and as recently confirmed in *Florida Power*,⁴¹ (discussing *Western Massachusetts*, Order No. 2003, and *Niagara Mohawk*), we deny Consumers Energy's request that the Commission apply its policy on jurisdiction over QF interconnections prospectively from the Commission's 2007 *Niagara Mohawk* decision.

2. The Effect of the Late-Filing of the Facilities and Agency Agreements on the Right to Collect the Rates Provided for in those Agreements

26. Michigan Electric requests the Commission to clarify that its acceptance of the late-filed Facilities Agreement, with an effective date of October 5, 2010, and the late-filed Agency Agreement, with an effective date of December 17, 2010, does not affect the validity and enforceability of those agreements during the period of non-filing, and that nothing in the September 17 Order was intended to modify the Commission's precedent regarding time-value refunds. We grant Michigan Electric's requested clarifications.

27. The Commission has recognized that assuring compliance with the prior notice and filing requirements of section 205 of the FPA⁴² and the Commission's implementing regulations, 18 C.F.R. Part 35 (2011), pursuant to which public utilities must file rates and charges for jurisdictional service, and all contracts and agreements relating to such service, at least 60 days in advance of the commencement of jurisdictional service, is an important goal.⁴³ The Commission has also recognized that a policy that gives no effect to late-filed agreements prior to the stated effective date of the order accepting the filing, which, without a waiver of the 60-day prior notice requirement, would follow 60 days from the date a rate was filed, could be unjust.⁴⁴ The Commission thus has developed a policy that both encourages compliance with the prior notice and filing requirements while still ensuring that a utility may collect bargained-for rates prior to the filing of those rates.

28. In the *Prior Notice Order*, the Commission stated that, if a utility files an otherwise just and reasonable rate after new service has commenced, the rate is

⁴¹ *Florida Power*, 133 FERC ¶ 61,121 at P 19-20.

⁴² 16 U.S.C. § 824d (2006).

⁴³ *El Paso Elec. Co.*, 105 FERC ¶ 61,131, at P 13-15, 18 (2003) (*El Paso*).

⁴⁴ *Id.* at P 19; *cf. Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Washington*, 554 U.S. 527, 545 (2008) (*Morgan Stanley*).

collectible, but the Commission will require the utility to refund the time value of the revenues collected for the entire period that the rate was collected without Commission authorization.⁴⁵ Thus, as the rate is collectible, the Commission will grant the requested clarification.

29. However, that the Commission has also provided for refund of the time value of revenues collected pursuant to a late-filed agreement does not mean there is no limit to time-value refunds to be ordered pursuant to the policy announced in the *Prior Notice Order*. The Commission, recognizing that refunds will result in a harsh result if payment of such refunds would result in a loss, has limited time value refunds to an amount that will permit a utility to recover variable costs.⁴⁶ This matter is addressed below.

3. Recoverable Rates and Refunds

30. Based on the refund policy announced in the *Prior Notice Order* and as implemented in subsequent orders, Consumers Energy is entitled to collect the rates authorized by the Facilities Agreement for the entire period that the Facilities Agreement was jurisdictional. Midland, in fact, paid the rate, as originally billed by Consumers Energy, and later by Michigan Electric, as agent, until November 2004. Midland then stopped paying the contractual rate. We see no provision in the Facilities Agreement that permits Midland to simply stop paying the contractual rate contained in the Facilities Agreement, especially where, as here, Midland has not asserted non-performance under the Facilities Agreement by Consumers Energy or refused to accept performance by Consumers Energy's agent, Michigan Electric.⁴⁷ We will accordingly order Midland to pay the charges provided for in the Facilities Agreement, which, in the Facilities Agreement Order, we have already determined to be a just and reasonable rate.

⁴⁵ *Prior Notice Order*, 64 FERC at 61,979-80.

⁴⁶ See *Carolina Power*, 84 FERC ¶ 61,103, at 61,522 (1998), *order on reh'g*, 87 FERC ¶ 61,083, at 61,357 (1999); *El Paso* 105 FERC ¶ 61,131, at P 41 & n.59; *Florida Power & Light Co.*, 98 FERC ¶ 61,276, at 62,150-51 (2002); *Florida Power & Light Co.*, 133 FERC ¶ 61,120, at P 5 (2010); *Florida Power*, 133 FERC ¶ 61,121 at P 23 n.39

⁴⁷ *Morgan Stanley*, 554 U.S. at 551 (The FPA recognizes that contract stability ultimately benefits consumers . . . which is why it permits rates to be set by contract and not just by tariff.); *Permian Basin Are Rate Cases*, 390 U.S. 747, 822 (1968) (“The regulatory system created by the [FPA] is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal necessity.”).

31. Section 3.6 of the Facilities Agreement sets forth the terms of invoicing and payment of invoices for the O&M services provided by Consumers Energy, and section 8 (which incorporates by reference a provision in the Power Purchase Agreement) governs the resolution of disputes under the Facilities Agreement. While not expressly stated, we assume that this would include resolution of any dispute over amounts invoiced. In turn, section 4 of the Agency Agreement obligates Consumers Energy and Michigan Electric to cooperate with one another in the preparation of invoices for the O&M services. We expect the parties to comply with their respective obligations under these agreements.

32. As noted above,⁴⁸ in accordance with the September 17 Order, Consumers Energy filed on December 16, 2010, in Docket No. ER10-2156-002, a refund report disclosing the amounts collected under the Facilities Agreement from when Consumers Energy first received revenues under the Facilities Agreement.⁴⁹ In that filing, Consumers Energy asserted that it does not have any obligation to pay refunds since the amounts collected simply reimbursed Consumers Energy for actual costs (including property taxes) incurred to construct, operate and maintain the interconnection facilities.⁵⁰ However, on preliminary review of that report, it does not appear that the amounts shown on the attached schedule include any of the amounts billed after 2004 by Michigan Electric in its capacity as Consumers Energy's agent, which remain unpaid. Also, it is unclear whether the amounts billed between 2001 (the year in which the interconnection facilities were conveyed to Michigan Electric) and 2004 (the year in which Midland stopped making payments) include only the costs incurred directly by Consumers Energy (for which full payment was made) or include, as well, costs incurred by Michigan Electric, in its capacity as Consumers Energy's agent. Accordingly, we direct Consumers Energy to file a revised refund report within 30 days of the date of this order that itemizes all amounts billed to Midland by Consumers Energy (or by Michigan Electric as its agent) under the Facilities Agreement, the amounts that have been paid by Midland, and the amounts billed to Midland that remain unpaid.

⁴⁸ *Supra* note 14.

⁴⁹ September 17 Order, 132 FERC ¶ 61,241 at P 26, Ordering Paragraph (C).

⁵⁰ We note that, in its protest to Michigan Electric's request for declaratory order in Docket No. EL11-2-000, as well as in its protest, filed on January 6, 2011, to Consumers Energy's refund report in Docket No. ER10-2156-002, Midland argues that personal property taxes assessed on the interconnection facilities are a fixed, not variable, cost and are therefore not recoverable under the Commission's time value refund policy. On October 28, 2011, Consumers Energy filed a revised refund report indicating that it has agreed to pay Midland \$250,000 in settlement of their dispute over the amount refunded, without resolving any of the underlying issues.

The Commission orders:

(A) The requests for rehearing filed by Consumers Energy and Michigan Electric in this proceeding are hereby denied as discussed in the body of this order.

(B) The requests for clarification by Michigan Electric are hereby granted, as discussed in the body of this order.

(C) Consumers Energy is hereby directed to file a revised report showing all amounts collected (including amounts collected by Michigan Electric as its agent) under the Facilities Agreement within 30 days of the date of this order that itemizes all amounts billed to Midland by Consumers Energy (or by Michigan Electric as its agent) under the Facilities Agreement, the amounts that have been paid by Midland, and the amounts billed to Midland that remain unpaid.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.