

139 FERC ¶ 61,014
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Consumers Energy Company

Docket No. ER12-420-000

ORDER ACCEPTING CANCELLATION OF RATE SCHEDULE
AND DENYING MOTION

(Issued April 6, 2012)

1. On November 15, 2011, Consumers Energy Company (Consumers Energy) filed a notice of cancellation of its Facilities Agreement¹ with Midland Cogeneration Venture, Limited Partnership (Midland) (Cancellation Filing). The Facilities Agreement governs the facilities that connect Midland's cogeneration facility located in Midland, Michigan (Midland Plant), to the transmission network owned currently by Michigan Electric Transmission Company, LLC (Michigan Electric) and owned formerly by Consumers Energy. For the reasons described below, we will accept the Cancellation Filing, effective January 15, 2012.

I. Background

2. Consumers Energy and Midland executed the Facilities Agreement on July 8, 1988, when Consumers Energy owned the host transmission system. The Facilities Agreement effectuated a July 17, 1986 power purchase agreement between the two companies. In 2001, Consumers Energy transferred its transmission assets, including the interconnection facilities that are subject to the Facilities Agreement, to Michigan

¹ On August 6, 2010, in Docket No. ER10-2156-000, Consumers Energy filed the Facilities Agreement, designated as Consumers Rate Schedule No. 119, which the Commission accepted on September 17, 2010. *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,241 (2010) (Facilities Agreement Order), *reh'g denied*, 138 FERC ¶ 61,204 (2012) (Facilities Agreement Rehearing Order). The Facilities Agreement Order also addressed an unexecuted generation interconnection agreement (GIA), Docket No. ER10-1814-000. *See infra* PP 3-4.

Electric,² and concurrently entered into an agency agreement (Agency Agreement) with Michigan Electric, pursuant to which Consumers Energy delegated to Michigan Electric, as its agent, operating authority under the Facilities Agreement over the transferred interconnection facilities.³

3. On July 19, 2010, the Midwest Independent Transmission System Operator, Inc. (MISO) filed an unexecuted GIA (2010 GIA), in Docket No. ER10-1814-000, among itself, Midland, and Michigan Electric. The filing of the 2010 GIA was prompted by Midland's request to increase the electrical output from the Midland Plant. The 2010 GIA adopted the provisions of MISO's *pro forma* GIA.

4. In the Facilities Agreement Order, the Commission conditionally accepted the 2010 GIA.⁴ The Commission gave Midland the choice of increasing generating capacity under the conditionally accepted 2010 GIA or having its interconnection continue to be governed by the Facilities Agreement.⁵ On November 16, 2010, MISO filed a revised, partially executed GIA, which the Commission accepted, under delegated authority, stating that, consistent with the Facilities Agreement Order, the revised GIA would not be effective to govern Midland's interconnection service until Midland became a party to it and the Facilities Agreement was amended or terminated.⁶ On June 9, 2011, MISO filed a revised, fully executed GIA (Revised GIA) to satisfy the Commission's conditions.⁷

² *Consumers Energy Co.*, 94 FERC ¶ 61,018 (2001).

³ On October 18, 2010, in Docket No. ER11-136-000, Michigan Electric filed the Agency Agreement, which the Commission accepted on December 17, 2010. *Michigan Elec. Transmission Co.*, 133 FERC ¶ 61,238 (2010), *reh'g denied*, 138 FERC ¶ 61,203 (2012).

⁴ The conditions concerned conforming certain definitions to MISO's *pro forma* GIA and new metering equipment.

⁵ Facilities Agreement Order, 132 FERC ¶ 61,241 at PP 33-37.

⁶ *Midwest Indep. Transmission Sys., Inc.*, Docket No. ER11-2137-000, January 28, 2011 (delegated letter order).

⁷ The Commission considers that Midland's execution of the Revised GIA signals its choice to increase the electrical output of the Midland Plant.

The Commission accepted the Revised GIA, under delegated authority, and conditioned the acceptance on termination or amendment of the Facilities Agreement.⁸

5. Midland's obligations under the Facilities Agreement are the subject of an ongoing dispute between Midland and Michigan Electric. The history of that dispute is described in full in the Facilities Agreement Order. The essential facts are that, beginning in 2004, Midland ceased paying the invoices that Michigan Electric, as Consumers Energy's agent, submitted to Midland for reimbursement of costs, including property taxes, incurred by Michigan Electric in fulfilling Consumers Energy's obligations under the Facilities Agreement. Michigan Electric sued Midland in state court. The proceeding was subsequently removed to the U.S. District Court for the Eastern District of Michigan (District Court). On October 18, 2010, Michigan Electric filed a petition for a declaratory order (Petition), asking the Commission to determine the respective rights and obligations of the parties to the Facilities Agreement and the Agency Agreement, and to order Midland to reimburse it for its unreimbursed costs in fulfilling Consumers Electric's obligations under the Facilities Agreement.⁹ On March 20, 2012, the Commission granted the Petition in part and denied it in part.¹⁰

II. Cancellation Filing

6. In the Cancellation Filing, Consumers Energy proposes to cancel the Facilities Agreement without any conditions. It requests waiver of the prior notice requirements of section 35.15 of the Commission's Regulations, 18 C.F.R. § 35.15 (2011), to permit the

⁸ *Midwest Indep. Transmission Sys., Inc.*, Docket No. ER11-3764-000, July 20, 2011 (delegated letter order).

⁹ The history of the litigation between Michigan Electric and Midland is summarized in the Commission's recent order on the Petition. As noted in that order, the District Court has held its proceedings in abeyance pending Commission action on the Petition. See *Michigan Elec. Transmission Co., LLC*, 138 FERC ¶ 61,202 (2012) (Petition Order) at PP 8-9.

¹⁰ In the Petition Order, the Commission denied Michigan Electric's request for an order directing Midland to pay Michigan Electric directly for the unreimbursed costs because the two companies were not parties to any agreement. It noted that the Agency Agreement requires Consumers Energy and Michigan Electric to cooperate on billing and collection matters. Referring to the Facilities Agreement Rehearing Order, the Commission stated that Midland is obligated to reimburse Consumers Energy for properly incurred costs of operation and maintenance for the entire period that the Facilities Agreement has been jurisdictional. Petition Order, 138 FERC ¶ 61,202 at P 20.

cancellation to be effective as of October 1, 2011. Consumers Energy states that this date is consistent with Midland's desire to transition as soon as possible to the Revised GIA, and is appropriate because the Commission has already accepted the Revised GIA, subject to termination of the Facilities Agreement.¹¹

7. The Cancellation Filing includes an agreement between Consumers Energy and Midland, dated November 14, 2011, to terminate the Facilities Agreement (Termination Agreement). The recitals of the Termination Agreement state that the parties also entered into a settlement agreement, dated August 12, 2011 (Settlement Agreement), to resolve various disputes between them.¹² However, the Settlement Agreement itself was not included in the Cancellation Filing. The Termination Agreement provides, in part, that neither Midland nor Consumers Energy will have "any right to enforce, and neither will attempt to enforce, any right, obligation, or undertaking that may have previously arisen or accrued under the Facilities Agreement, except as provided in paragraph 3(C) of the Settlement Agreement."

8. On January 12, 2012, Commission staff issued a deficiency letter directing Consumers Energy to file the Settlement Agreement within thirty days of the date thereof.¹³

9. On February 8, 2012, Consumers Energy complied with the deficiency letter by filing a copy of the Settlement Agreement, together with a request, pursuant to Rule 388.112 of the Commission's Regulations, 18 C.F.R. ¶ 388.112 (2011), for confidential treatment of the Settlement Agreement. Consumers Energy states that the Settlement Agreement addresses certain commercial terms between itself and Midland that extend beyond the matters addressed in the Termination Agreement, and that certain provisions pertain to entities that are not parties to the Termination Agreement. Additionally, it states, certain provisions relate to privileged settlement discussions and contain

¹¹ Cancellation Filing, cover letter at 1.

¹² The Termination Agreement identifies these other disputes as having arisen in conjunction with the proceedings in Docket No. ER10-2156-000 (refunds from Consumers Energy due Midland because of the late filing of the Facilities Agreement) and Docket No. ER 11-3035-000 (Midland's eligibility to provide MISO with reactive power and calculation of the reactive power requirement). *See* Facilities Agreement Order, 132 FERC ¶ 61,241 at P 26, Ordering Paragraph (C); *Midland Cogeneration Venture Ltd. P'ship.*, 135 FERC ¶ 61,200 (2011), 138 FERC ¶ 61,206 (2012).

¹³ *Consumers Energy Co.*, Docket No. ER12-420-000, January 12, 2012 (deficiency letter).

privileged, commercially sensitive, trade secret information the disclosure of which could cause competitive harm to Consumers Energy, Midland, and the other entities named in the Settlement Agreement.

III. Notices and Responsive Filings

10. Notice of the Cancellation Filing was published in the *Federal Register*, 76 Fed. Reg. 72,402 (2011) with interventions or protests due on or before December 7, 2011. On December 7, 2011, Michigan Electric filed a motion to intervene and protest (Michigan Electric December 7 Protest). On December 14, 2011, Midland filed a motion to intervene out-of-time and an answer to Michigan Electric's protest. On December 21, 2011, Consumers Energy filed a request for leave to answer and an answer to Michigan Electric's protest. On December 27, 2011, Michigan Electric filed a response to Midland's and Consumers Energy's answers.

11. Notice of the response to the deficiency letter was published in the *Federal Register*, 77 Fed. Reg. 9914 (2012), with interventions or protests due on or before February 29, 2012. On February 16, 2012, pursuant to Rule 212 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2011), Michigan Electric filed a motion asking the Commission to order Consumers Energy to provide it with a complete copy of the Settlement Agreement (Michigan Electric Motion).¹⁴ Michigan Electric also filed, on February 29, 2012, comments and a protest to Consumers Energy's response to the deficiency letter, which included, and incorporated by reference, the previously filed Michigan Electric Motion (Michigan Electric February 29 Protest). On March 2, 2012, Midland and Consumers Energy each filed an answer opposing the Michigan Electric Motion (Midland March 2 Answer and Consumers Energy March 2 Answer). On March 12, 2012, Michigan Electric filed a response to those answers.

IV. Discussion

A. Procedural Matters

12. Pursuant to Rule 214(c) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(c) (2011), Michigan Electric's timely, unopposed motion to intervene serves to make it a party to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2011), the Commission will grant Midland's late-filed motion to intervene, given its interest in the

¹⁴ In an errata filed February 17, 2012, Michigan Electric made minor corrections to its February 16, 2012, motion.

proceeding, the early stages of the proceeding, and the absence of undue prejudice or delay.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Midland's or Consumers Energy's answers to Michigan Electric's December 7, 2011 protest to the Cancellation Filing or Michigan Electric's response to such answers, and will, therefore, reject them. Similarly, we are not persuaded to accept Michigan Electric's March 12, 2012, answer to the March 2, 2012 answers of Midland and Consumers Energy that opposed the Michigan Electric Motion, and will, therefore, reject it also.

B. Substantive Matters

1. Protest; Michigan Electric Motion and Answers

14. In its protest to the Cancellation Filing, Michigan Electric argues that, before accepting the notice of cancellation of the Facilities Agreement, the Commission should first direct Consumers Energy to file and serve on all parties a complete copy of the Settlement Agreement. Michigan Electric asserts that access to and review of the Settlement Agreement is "(a) essential to understanding and evaluating the merits of the [Consumers Energy/Midland] Termination Agreement, (b) essential to [Michigan Electric's] ability to protect its rights, and (c) essential to the Commission's ability to carry out its statutory responsibilities." In this regard, Michigan Electric expresses concern that the Termination and Settlement Agreements compromise its rights to reimbursement from Midland for costs it has incurred in connection with the services that it has performed, as agent for Consumers Energy, under the Facilities Agreement, the matter currently under abeyance in District Court. The basis for this concern is Paragraph 1 of the Termination Agreement, which, as previously noted, provides that: "Neither [Midland] nor Consumers [Energy] will have any right to enforce, and neither will attempt to enforce, any right, obligation or undertaking that may have previously arisen or accrued under such Facilities Agreement except as provided in paragraph 3(C) of the Settlement Agreement."

15. Michigan Electric further argues that Consumers Energy's agreement to terminate the Facilities Agreement is inconsistent with Consumers Energy's obligations to Michigan Electric under the Agency Agreement. Michigan Electric points out that termination of the Facilities Agreement obviates the need for, and therefore effectively terminates, the Agency Agreement. It cites Article V of the Agency Agreement, which requires Consumers Energy to give 30 days notice of the impending termination of the Facilities Agreement and, consequently, the effective termination of the Agency

Agreement.¹⁵ Michigan Electric also notes that Article II of the Agency Agreement entitles Michigan Electric, should the Facilities Agreement be terminated, to provide Consumers Energy with a list of the unpaid costs incurred by Michigan Electric in performing work on Consumers Energy's behalf under the Facilities Agreement, and that Consumers Energy is thereafter obligated to seek to collect those amounts from Midland.¹⁶ Michigan Electric states that, on December 7, 2011, it provided Consumers Energy with a list of unpaid costs and asked Consumers Energy to promptly commence to take all appropriate steps to collect the unpaid amounts from Midland for the benefit of Michigan Electric.¹⁷ Michigan Electric adds that until Consumers Energy does so, the latter is in breach of the Agency Agreement.¹⁸

16. Lastly, Michigan Electric objects to a retroactive effective date for the notice of cancellation. Citing *PPL Montana, LLC*,¹⁹ it asks the Commission to provide that the cancellation of the Facilities Agreement will not be effective until the Commission has

¹⁵ Article V, "Term," states: "This Agency Agreement shall . . . continue as long as the [Facilities] Agreement remains in effect. . . . Further, if the [Facilities] Agreement is amended in such a fashion to remove, in the sole judgment of Consumers [Energy], the need for this Agency Agreement . . . then Consumers [Energy] shall have the right to terminate this Agency Agreement by giving 30 days notice to [Michigan Electric]."

¹⁶ Article II, "Scope of Delegation to [Michigan Electric]," at Paragraph 17, first references Section 12 of the Facilities Agreement, which states, "In the event that this Agreement is terminated, [Midland] shall reimburse Consumers [Energy] for any costs which are unpaid at the time of termination which were incurred by Consumers [Energy] in . . . operating and maintaining the Connection Facilities." Paragraph 17 then states, "[Michigan Electric] shall compile a list of any such unpaid costs at the time of termination and provide it to Consumers [Energy]. Consumers [Energy] will seek to collect those from [Midland] for the benefit of [Michigan Electric]."

¹⁷ Michigan Electric has attached to its December 7, 2011 protest a copy of a letter to Consumers Energy, dated December 7, 2011, which includes a list of the unpaid costs (including property taxes, operations and maintenance expenses, and interest) incurred by Michigan Electric in performing work on behalf of Consumers Energy under the Facilities Agreement. Michigan Electric asserts that the total amount of unpaid costs that it has incurred through the date of the letter is \$2,036,736.80.

¹⁸ Michigan Electric December 7 Protest at 6-7.

¹⁹ *PPL Montana, LLC*, 96 FERC ¶ 61,313 (2001) (Commission rejected notice of cancellation without prejudice to refile after conclusion of court proceedings).

ruled on the merits and terms of the cancellation, and Consumers Energy has complied with any conditions to the cancellation prescribed by the Commission.²⁰

17. In the Michigan Electric Motion, Michigan Electric repeats its request that the Commission direct Consumers Energy to file and serve on all parties a copy of the Settlement Agreement. It references the Commission's general policy that exemptions from disclosure requirements are narrowly construed, and that requests for privileged treatment of documents must be supported with specificity.²¹ It argues that Consumers Energy has provided only vague, conclusory statements that the information is "commercially sensitive and confidential" to support its request that the Settlement Agreement be privileged. Should the Commission decide against making the Settlement Agreement public, Michigan Electric asks that it nevertheless be provided a copy for its use in this proceeding.²²

18. In its answer opposing the Michigan Electric Motion, Midland points out that Michigan Electric is not now, and never has been, a customer under the Facilities Agreement, and that Midland is the only customer of Consumers Energy that is affected by the Termination Agreement. It argues that Michigan Electric's sole interest in the Facilities Agreement is to use it as a foundation for its contractual payment claims under the Agency Agreement, claims that Michigan Electric is pursuing in other forums.²³ Midland asserts that Michigan Electric does not require discovery in this termination proceeding in order to protect its interest in its other litigation.²⁴ It adds that the Settlement Agreement resolves outstanding disputes between it and Consumers Energy that are none of Michigan Electric's concern.²⁵

19. In its answer opposing the Michigan Electric Motion, Consumers Energy states that while Michigan Electric expresses concern that the Settlement Agreement could affect issues in the pending litigation, Michigan Electric gives no reason why the Facilities Agreement should not be terminated. Furthermore, Consumers Energy states

²⁰ Michigan Electric December 7 Protest at 7.

²¹ Michigan Electric Motion at 5, (citing *New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,103, at P 27 (2009), *order on reh'g*, 130 FERC ¶ 61,029 (2010)).

²² *Id.* at 6-7.

²³ Midland March 2 Answer at 2-3.

²⁴ *Id.* at 5.

²⁵ *Id.* at 8.

that the Termination Agreement was included in the Cancellation Filing not as a rate schedule but only to show that Midland, the customer under the Facilities Agreement, consents to its termination, a termination that Michigan Electric is on record as requesting. Finally, Consumers Energy argues that Michigan Electric's purposes in obtaining a copy of the Settlement Agreement do not fall within the proper scope of this proceeding, whose focus is on protecting Midland's expectation of continued service, which will continue under the Revised GIA.²⁶

2. Commission Determination

20. We will accept Consumers Energy's notice of cancellation of the Facilities Agreement. Termination of the Facilities Agreement is consistent with the Commission's acceptance of the Revised GIA, which is conditioned upon termination or amendment of the Facilities Agreement.²⁷ However, we will deny Consumers Energy's request for waiver of the Commission's 60-day prior notice requirement, and will make January 15, 2012, the effective date for our acceptance of the notice of cancellation. We find that Consumers Energy has not demonstrated good cause to justify waiver of the prior notice requirement for an effective date of October 1, 2011.

21. We do not share Michigan Electric's concern that cancellation of the Facilities Agreement will prejudice Michigan Electric in pursuing its claims for reimbursement of unpaid costs incurred by it, as Consumers Energy's agent, in providing Midland with interconnection services under the Facilities Agreement. We note that, in three recent orders concerning the Facilities and Agency Agreements, the Commission has addressed the respective rights and obligations of the parties to these agreements. Importantly, in the recent order on rehearing of the Facilities Agreement Order, the Commission confirmed that Midland is obligated to pay the contractual rate under the Facilities Agreement for the full period in which the Facilities Agreement was jurisdictional, noting that 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.²⁸ We also noted the obligations of Consumers Energy and Michigan Electric under the Agency Agreement with respect to invoicing Midland for amounts due under the Facilities Agreement.²⁹ In its protest to the Cancellation Filing, Michigan

²⁶ Consumers Energy March 2 Answer at 2-3; Answer Attachment at 7.

²⁷ *See supra* P 4.

²⁸ Facilities Agreement Rehearing Order, 138 FERC ¶ 61,204, at P 30 (2012).

²⁹ *Id.* at P 31.

Electric also refers to a provision of the Agency Agreement that, according to Michigan Electric, requires Consumers Energy, in the event the Facilities Agreement is terminated, to collect from Midland the costs incurred by Michigan Electric in carrying out Consumers Energy's obligations under the Facilities Agreement, which are unpaid at the time of termination.³⁰

22. Our acceptance of Consumers Energy's notice of cancellation of the Facilities Agreement in no way affects Midland's monetary obligations for costs incurred by Michigan Electric, as Consumers Energy's agent, in providing services under the Facilities Agreement prior to the effective date of its termination. Neither does the concomitant termination of the Agency Agreement affect Consumers Energy's obligations to Michigan Electric for performance prior to the effective date of termination.

23. We also find it unnecessary to require Consumers Energy to serve on all parties a copy of the Settlement Agreement. As previously described, Michigan Electric asserts that, without access to the Settlement Agreement, it is impossible to understand or evaluate how the provisions of the Termination Agreement may compromise Michigan Electric's claims against Midland for reimbursement of past due costs incurred by Michigan Electric in performing Consumers Energy's obligations under the Facilities Agreement. However, it is not clear how an agreement between Consumers Energy and Midland could affect Michigan Electric's claim for reimbursement of past due costs incurred under the Facilities Agreement or, for that matter, the Agency Agreement. Moreover, our acceptance of Consumers Energy's notice of cancellation of the Facilities Agreement does not constitute acceptance or approval of the Termination Agreement or Settlement Agreement. There is nothing in the Cancellation Filing that suggests that Consumers Energy is seeking approval of the Termination Agreement or Settlement Agreement. As Consumers Energy has stated, it submitted the Termination Agreement with the Cancellation Filing merely to demonstrate that the only customer under the Facilities Agreement – Midland – has consented to the termination.³¹ For these reasons, we deny the Michigan Electric Motion.

³⁰ See *supra* P 15, n.16.

³¹ Consumers Energy March 2 Answer, Answer Attachment at 5.

The Commission orders:

(A) The Notice of Cancellation of the Facilities Agreement is hereby accepted, effective January 15, 2012, as discussed in the body of this order.

(B) Michigan Electric's Motion is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.