

145 FERC ¶ 61,293
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

DTE Electric Company

Docket No. ER14-275-000

ORDER ACCEPTING AND SUSPENDING PROPOSED RATE SCHEDULE AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued December 30, 2013)

1. On November 1, 2013, pursuant to section 205 of the Federal Power Act (FPA),¹ DTE Electric Company (DTE Electric)² filed an unexecuted limited transmission service agreement between Michigan South Central Power Agency (Michigan South)³ and DTE Electric (Revised Clinton Agreement). As discussed below, we accept the Revised Clinton Agreement for filing, suspend it for a nominal period, to become effective January 1, 2014, as requested, subject to refund, and establish hearing and settlement judge procedures.

I. Background

2. DTE Electric and Clinton originally entered into a limited term transmission service agreement (Clinton Agreement) in 1981,⁴ under which DTE Electric agreed to

¹ 16 U.S.C. § 824d (2012).

² DTE Electric, formerly known as The Detroit Edison Company, is a wholly-owned subsidiary of DTE Energy Company.

³ Michigan South's municipal members include the Village of Clinton, Michigan (Clinton).

⁴ The Clinton Agreement was designated as DTE Electric's FERC Electric Rate Schedule No. 28.

deliver up to 6 MW of energy procured by Clinton across DTE Electric's transmission and distribution facilities.⁵ Clinton subsequently assigned the Clinton Agreement to Michigan South in 1982.⁶

3. In 2000, DTE Electric transferred its integrated transmission system in the Midwest Independent Transmission System Operator, Inc. (MISO)⁷ region to its affiliate, International Transmission Company (ITC).⁸ In 2003, DTE Energy Company sold its interests in ITC to ITC Holdings Corporation (ITC Holdings), and ITC became an unaffiliated independent transmission company.⁹ DTE Electric further explains that, in connection with the 2003 disposition, DTE Electric entered into a letter agreement with Michigan South (2003 Letter Agreement), pursuant to which, in consideration of Michigan South's and Clinton's agreement not to file a protest in the FPA section 203 proceeding relating to the sale of ITC to ITC Holdings and the related rate application, DTE Electric agreed that: (1) the Clinton Agreement would remain in effect until Michigan South or Clinton serves notice of their intent to terminate the agreement; (2) DTE Electric would waive enforcement of the 6 MW limitation on transmission service set forth in the Clinton Agreement; and (3) DTE Electric would "be responsible for obtaining and paying for any transmission service needed from ITC to Clinton to enable [DTE Electric] to perform under the grandfathered Clinton [A]greement."¹⁰ As the Commission subsequently observed in *ITC Holdings Corp.*, DTE Electric also committed to honor its existing obligations under grandfathered agreements, such as the Clinton Agreement.¹¹ Thus, while, as a result of the 2003 divestiture, DTE Electric

⁵ DTE Electric Filing at 2.

⁶ In 1984, DTE Electric adopted a general transmission service schedule that revised the transmission rate for services under several agreements, including the Clinton Agreement. *Id.* at 3.

⁷ Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

⁸ DTE Electric Filing at 2 (citing *DTE Energy Co.*, 91 FERC ¶ 61,317 (2000)).

⁹ *Id.* (citing *ITC Holdings Corp.*, 102 FERC ¶ 61,182 (2003)).

¹⁰ *Id.* at 6. The 2003 Letter Agreement was filed as Attachment 5 to the DTE Electric Filing.

¹¹ DTE Electric Filing at 3 (citing *ITC Holdings Corp.*, 102 FERC ¶ 61,182 at P 13).

would no longer own physical transmission assets necessary to serve wholesale customers, DTE Electric committed to honor its obligations under grandfathered agreements (such as the Clinton Agreement) and to procure the requisite transmission service to continue serving customers under those agreements.¹²

II. Filing

4. In the Revised Clinton Agreement, DTE Electric proposes to increase the rate it charges Michigan South in order to fully recover the cost of procuring transmission service.¹³ DTE Electric states that it currently under-recovers its cost of providing service under the Clinton Agreement by \$97,000 each year.¹⁴ As indicated, the Revised Clinton Agreement is being filed unexecuted. DTE Electric explains that Michigan South has not agreed to the changes in the Revised Clinton Agreement that DTE Electric is proposing and has taken the position that the costs of procuring transmission service are for DTE Electric's account and, under the terms of the 2003 Letter Agreement, cannot be passed through to Michigan South.¹⁵

5. Under DTE Electric's proposal, the revised rate is the sum of a transmission component and a distribution component.¹⁶ According to DTE Electric, the transmission component derives from the actual MISO charges for transmission service and ancillary services that DTE Electric incurred to serve its network load in 2012.¹⁷ DTE further states that the distribution component of the proposed rate "is calculated based on the same 'Attachment O' approach that [the Commission] has authorized for use by [t]ransmission [o]wners (for transmission rates)."¹⁸ DTE Electric asserts that the

¹² *Id.*

¹³ *Id.* at 1.

¹⁴ *Id.*

¹⁵ *Id.* at 2, 6.

¹⁶ *Id.* at 5.

¹⁷ *Id.*

¹⁸ *Id.*

Commission has accepted this approach for calculating DTE Electric's wholesale distribution service rates in the past.¹⁹

6. DTE Electric calculates its proposed return for the distribution component of the proposed rate as the product of the requested overall rate of return and rate base.²⁰ DTE Electric requests a 7.88 percent overall rate of return, including a 10.5 percent rate of return on equity. DTE Electric states that its proposed rate of return on equity reflects the current rate of return on equity approved by the Michigan Public Service Commission (Michigan Commission).²¹

7. DTE Electric argues that neither the Clinton Agreement nor the 2003 Letter Agreement precludes DTE Electric's proposal.²² Under the 2003 Letter Agreement, DTE states that it committed to continue to procure the transmission service necessary to perform under the Clinton Agreement. However, while DTE Electric "agreed to 'obtain[] and pay[] for' transmission service necessary under the Clinton Agreement," DTE Electric maintains that "it did not agree to forego the ability to seek to charge [Michigan South] . . . an amount that would allow DTE Electric to recover its costs associated with 'obtaining and paying for' such transmission service."²³ Further, DTE Electric points out that the 2003 Letter Agreement did not waive enforcement of section 7.02 of the Clinton Agreement, which sets forth DTE Electric's right to unilaterally propose rate modifications.²⁴

III. Notice and Responsive Pleadings

8. Notice of DTE Electric's filing was published in the *Federal Register*, 78 Fed. Reg. 67,137 (2013), with interventions and protests due on or before November 22, 2013. Michigan South filed a motion to intervene and protest. DTE Electric filed an answer to Michigan South's protest. Michigan South filed an answer in response to DTE Electric's

¹⁹ *Id.* (citing *The Detroit Edison Co.*, Docket No. ER08-80-000 (Dec. 21, 2007) (delegated letter order)).

²⁰ *Id.* 5-6.

²¹ *Id.*, Att. 6.

²² DTE Electric Filing at 6.

²³ *Id.* at 6-7 (quoting 2003 Letter Agreement).

²⁴ *Id.* at 7.

answer (Michigan South Answer). DTE Electric filed an answer in response to the Michigan South Answer.

9. Michigan South argues that DTE Electric expressly agreed in the 2003 Letter Agreement to forego recovery of MISO-related transmission costs.²⁵ Specifically, Michigan South claims that DTE Electric agreed to “be responsible for obtaining and paying for any transmission service needed . . . to enable [DTE Electric] to perform under the grandfathered Clinton Agreement.”²⁶ Michigan South claims that DTE Electric previously acknowledged such responsibility in a 2003 email.²⁷

10. Michigan South further contends that DTE Electric’s proposal would deny Michigan South the benefit of the 2003 Letter Agreement.²⁸ Michigan South suggests that, in DTE Electric’s view, the 2003 Letter Agreement merely committed DTE Electric to serve as a purchasing agent; however, Michigan South contends that it has no need for such an agent. Consequently, Michigan South asserts that DTE Electric’s interpretation of the 2003 Letter Agreement would mean that Michigan South waived its right to protest the sale of DTE Energy Company’s interests in ITC and “got nothing meaningful . . . in return.”²⁹ Moreover, Michigan South states that DTE Electric has not passed through the costs of procuring transmission service from MISO, and thus reasons that DTE Electric’s course of performance over the past 10 years belies its proposed interpretation of the 2003 Letter Agreement.³⁰

11. In addition, Michigan South posits that the 2003 Letter Agreement’s use of the term “grandfathered” to describe the Clinton Agreement invokes the specific meaning associated with that term in the MISO region.³¹ In particular, Michigan South states that

²⁵ Michigan South Protest at 5.

²⁶ *Id.* at 5-6. Michigan South states that the Commission has previously recognized this commitment. *Id.* at 5 (citing *ITC Holdings Corp.*, 102 FERC ¶ 61,182 at P 13).

²⁷ *Id.* at 6 (citing Ex. MSC-1).

²⁸ *Id.* at 6-8.

²⁹ *Id.* at 6-7.

³⁰ *Id.*

³¹ *Id.* at 7.

DTE Electric, “acting in the role of [t]ransmission [o]wner,” agreed to acquire the transmission service needed to perform its obligations under the Clinton Agreement.³² Michigan South states that any difference between the contract rate paid by the customer and the rate paid by the transmission owner is to be absorbed by the transmission owner. Furthermore, Michigan South claims that by describing the Clinton Agreement as “grandfathered,” in the 2003 Letter Agreement, DTE Electric forfeited its rights under section 205 of the FPA to propose unilateral rate modifications.³³

12. Michigan South argues that DTE Electric’s proposal seemingly ignores the 2003 Letter Agreement by retaining the 6 MW cap on transmission service. Michigan South points out that, in the 2003 Letter Agreement, DTE Electric waived enforcement of the 6 MW limitation set forth in the Clinton Agreement.³⁴ Consequently, Michigan South asserts that the Commission should reject this aspect of the Revised Clinton Agreement.

13. Michigan South further asserts that DTE Electric’s proposed rate of return on equity is unsupported and that DTE Electric’s reliance on the current rate authorized by the Michigan Commission is inappropriate.³⁵ Michigan South states that DTE Electric has not demonstrated why the Commission should rely on the Michigan Commission’s decision to authorize a 10.5 percent rate of return on equity. Additionally, Michigan South contends that a rate of return on equity of 10.5 percent would be inappropriate in this case.³⁶

IV. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), Michigan South’s timely, unopposed motion to intervene serves to make it a party to this proceeding.

³² *Id.*

³³ *Id.* at 8. Michigan South concedes that DTE Electric retains the right to unilaterally propose modifications to its wholesale distribution rate. *Id.*

³⁴ *Id.* at 8-9.

³⁵ *Id.* at 9-10.

³⁶ *Id.* at 10.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers of DTE Electric and Michigan South and will, therefore, reject them.

B. Substantive Matters

16. The Revised Clinton Agreement, as proposed by DTE Electric, raises issues of material fact that cannot be resolved based on the record before us and are more appropriately addressed in the hearing and settlement judge procedures we order below. Our preliminary analysis indicates that the Revised Clinton Agreement has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we accept the Revised Clinton Agreement for filing, suspend it for a nominal period to become effective January 1, 2014, subject to refund, and establish hearing and settlement judge procedures.

17. While we are setting the Revised Clinton Agreement for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before the hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.³⁷ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding, otherwise the Chief Judge will select a judge for this purpose.³⁸

18. The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

³⁷ 18. C.F.R. § 385.603 (2013).

³⁸ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of the date of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

The Commission orders:

(A) The Revised Clinton Agreement is hereby accepted for filing, and suspended for a nominal period, to become effective January 1, 2014, as requested, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the Revised Clinton Agreement. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2013), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of

establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.