

145 FERC ¶ 61,301
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midcontinent Independent System Operator, Inc.

Docket No. ER14-279-000

ORDER ACCEPTING AND SUSPENDING PROPOSED AGREEMENTS AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued December 30, 2013)

1. On November 1, 2013, Midcontinent Independent System Operator, Inc. (MISO) on behalf of Interstate Power and Light Company (Interstate Power) filed, pursuant to section 205 of the Federal Power Act (FPA),¹ two unexecuted agreements for wholesale distribution service to the City of Guttenberg, Iowa (Guttenberg). In this order, we accept the proposed agreements for filing and suspend them for a nominal period, to become effective January 1, 2014, as requested, subject to refund, and establish hearing and settlement judge procedures.

I. Filing

2. Interstate Power provides wholesale electric service to customers purchasing their full requirements for capacity and energy from Interstate Power under its Tariff RES-5. Interstate Power explains that transmission facilities previously owned by Interstate Power were sold to ITC Midwest LLC (ITC Midwest), an independent, stand-alone transmission company, and operational control over these facilities has been transferred by ITC Midwest to MISO. Transmission service needed by Interstate Power is acquired from MISO pursuant to the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (MISO Tariff).

3. Interstate Power explains that Guttenberg, one of Interstate Power's current full requirements customers under Tariff RES-5, elected to discontinue purchasing its wholesale electric supply from Interstate Power and, instead, beginning January 1, 2014, will purchase its wholesale electric supply from a supplier that is not affiliated with Interstate Power. Beginning on that date, electricity purchased by Guttenberg will be transmitted under the MISO Tariff, and delivered to Guttenberg over Interstate Power's distribution facilities pursuant to a wholesale distribution service agreement under Schedule 11 of the MISO Tariff.

¹ 16 U.S.C. § 824d (2012).

4. In its filing, Interstate Power has submitted two unexecuted agreements, an Interconnection Facilities Agreement at Guttenberg Substation for City of Guttenberg and a Service Agreement for Direct Assignment Facilities Charges (collectively, the Agreements), which set forth the proposed rates, terms, and conditions of wholesale distribution service to Guttenberg. Interstate Power states that the Agreements are standard form agreements adopted by Interstate Power for wholesale delivery service needed to facilitate deliveries of electricity across the Interstate Power distribution system to wholesale purchasers connected to that system.

5. Interstate Power states that the parties have not yet reached agreement on all issues addressed in the Agreements. Interstate Power identifies three issues in the Agreements that remain to be resolved: First, Interstate Power states that Guttenberg objects to the obligation specified in the proposed interconnection agreement to install, own, and operate certain metering equipment at the Guttenberg substation. Second, Guttenberg objects to the direct assignment of costs for the use of Guttenberg substation, arguing that, after it is no longer taking service under Interstate Power's Tariff RES-5, the rates for wholesale delivery service should still be similar to charges under Interstate Power's Tariff RES-5. Finally, Interstate Power indicates that Guttenberg disagrees with Interstate Power's use of a leveled fixed charge methodology for the calculation of distribution rates.

6. Interstate Power requests that the Commission accept the Agreements for filing and permit them to become effective without suspension or refund obligation as of January 1, 2014.

II. Notice, Interventions and Responsive Pleadings

7. Notice of Interstate Power'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. Guttenberg submitted a timely motion to intervene and protest. The Midwest Municipal Transmission Group (Midwest Municipal) also filed a motion to intervene and comment in support of Guttenberg's protest. American Electric Power Service Corporation filed a timely motion to intervene. On December 6, 2013, Interstate Power filed an answer to the protest, and on December 16, 2013, Guttenberg filed a response to Interstate Power's answer.

8. In its protest, Guttenberg asserts that the rates, terms, and conditions of the proposed Agreements are unjust, unreasonable, and unduly discriminatory. Guttenberg states that Interstate Power's filing would harm Guttenberg's ratepayers, disadvantage generators other than Interstate Power, and violate the FPA by penalizing Guttenberg for its decision to buy wholesale power from another supplier. Specifically, Guttenberg states that the rates, terms, and conditions under the Agreements would lead to an annual

charge of \$81,376 for wholesale distribution service, an increase of 253 percent compared to its current distribution costs under Tariff RES-5.²

9. Guttenberg disputes Interstate Power's contention that, once it begins taking wholesale service from another supplier, it will no longer be entitled to distribution service rates equal to those under Interstate Power's Tariff RES-5. Guttenberg acknowledges that, if a change in its service created a change in applicable costs, its rate could be affected, but points out that, in this case, the delivery service at issue will be exactly the same, and will use exactly the same facilities, as if Interstate Power were selling the power. Guttenberg further asserts that Interstate Power has not justified the significant difference between its proposed direct assignment facilities charge and the rate Interstate Power charges under Tariff RES-5. Accordingly, Guttenberg states that Interstate Power has failed to carry its burden of proof supporting the proposed change.³

10. Guttenberg further argues that Interstate Power's proposed application of levelized rates is not justified and would impose a significant hardship on Guttenberg, which has purchased full requirements power from Interstate Power for many years using a standard non-levelized rate. In this regard, Guttenberg notes that the Commission does not permit companies to "switch to levelized rates in midstream . . . absent compelling justification."⁴ Guttenberg states that it agrees with Interstate Power's assertion that the use of a levelized fixed charge rate can produce reasonable results under appropriate circumstances.⁵ However, Guttenberg maintains that, because it has purchased full requirements power from Interstate Power for many years using a standard non-levelized rate, it has already paid for facilities through rate of return and depreciation charges. Guttenberg states that, given its previous payments for facilities through rate of return and depreciation charges, switching to levelization has the potential for the double recovery of costs and is contrary to Commission precedent.⁶

11. Further, Guttenberg asserts that Interstate Power's proposal would penalize Guttenberg by imposing new, unnecessary and unjustified metering costs. Guttenberg contends that the existing metering equipment already permits Interstate Power to make

² Guttenberg Protest at 3-4.

³ *Id.* at 5 (citing *Anaheim v. FERC*, 669 F.2d 799, 803 (D.C. Cir. 1981)).

⁴ *Id.* at 8 (citing *Am. Elec. Power Serv. Corp.*, 88 FERC ¶ 61,141, at 61,442 (1999)).

⁵ *Id.*

⁶ *Id.* at 8-9 (citing *Entergy Servs., Inc.*, 109 FERC ¶ 61,095, at P 55 (2004) (In light of "basic fairness, which lies at the heart of what is just and reasonable," a utility "cannot be allowed to unjustly enrich itself by recovering depreciation expenses that it has already charged to the service of other ratepayers.")).

any calculations needed by MISO to perform its operational and billing activities, and it would be unreasonable for Interstate Power to impose further metering requirements for the small amount of load that is at issue in this case.⁷

12. Additionally, Guttenberg identifies a number of other rates, terms, and conditions in the proposed Agreements it believes are unsupported. Guttenberg disputes Interstate Power's attempt to style its filing as an initial rate filing under 18 C.F.R. § 35.12, and states that the filing should be viewed as a change in rates pursuant to 18 C.F.R. § 35.13. Guttenberg also argues that Interstate Power has failed to provide cost support for the proposed delivery charges. Guttenberg asserts that Interstate Power has not justified the proposed return on equity of 10.97 percent, and that Interstate Power has failed to support its claim that the proposed 1.5 percent "standard" loss factor for the Guttenberg substation "represents a recognized standard."⁸ Furthermore, Guttenberg argues that the power factor clause in the Agreements is vague and unreasonable.

13. Guttenberg requests that the Commission reject the proposed rate change for Interstate Power delivery service and that the currently applicable Tariff RES-5 be continued in effect. In the alternative, Guttenberg requests that the Commission set the Agreements for hearing and settlement judge procedures with the maximum five-month statutory suspension period, and grant any other relief that may be just.

14. Midwest Municipal filed comments in support of Guttenberg's protest. Midwest Municipal alleges that Interstate Power is proposing a change in rate methodology because Guttenberg has decided to buy its wholesale power from a new supplier instead of from Interstate Power. Midwest Municipal argues that it is inappropriate for Interstate Power to charge for the same deliveries over the same facilities differently depending upon the source of the power and states that such conduct "flies in the face" of the FPA's just and reasonable and no undue discrimination and preference provisions, as well as in the face of comparability.⁹ Midwest Municipal believes that Interstate Power should continue providing wholesale distribution service at the current rates contained in Tariff RES-5.¹⁰ Midwest Municipal also states that it is difficult for cities of Guttenberg's size to take advantage of open access by changing long-time suppliers to obtain competitive

⁷ *Id.* at 12-15.

⁸ *Id.* at 15-19.

⁹ Midwest Municipal Comments at 3-4.

¹⁰ *Id.* at 5. Midwest Municipal notes that if Interstate Power believes the distribution rates in Tariff RES-5 are inappropriate, Interstate Power can file to make whatever changes to that rate are appropriate. *Id.* at 3.

power supply and that it is difficult for such cities to finance litigation before this and other commissions even though such challenges would be necessary and justified.¹¹

15. In its response, Interstate Power argues that the increase in rates under the proposed direct cost assignment methodology is justified because the distribution charge under Tariff RES-5 was not designed to recover the costs of distribution assets providing service to Guttenberg, i.e., the Guttenberg substation. Interstate Power explains that, because Guttenberg began purchasing service under Tariff RES-5 from Interstate Power in 2006, after the close of the test year used to establish the rates contained in Tariff RES-5, the cost-of-service studies used to establish the rates in Tariff RES-5 were not designed to recover the costs of the facilities providing service to Guttenberg. Interstate Power argues that the disparity between the proposed distribution charge and current rates for wholesale distribution service simply reflects the extent to which the distribution charge in Tariff RES-5 failed to recover the full cost of the distribution service provided to Guttenberg.¹²

16. Interstate Power disagrees with Guttenberg's argument that the application of levelized rates represents a change in the methodology previously used for the recovery of costs for facilities used to provide distribution service to Guttenberg and that levelized rates may result in a double recovery of certain costs. Interstate Power reiterates that the distribution charge under Tariff RES-5 was not designed to recover the costs of the distribution assets used to serve Guttenberg and reasons that, "[b]ecause Guttenberg has not been paying for the costs of the Guttenberg substation, there is no risk that the use of the levelized cost methodology will result in double-charging of Guttenberg for the cost of those facilities."¹³

17. Interstate Power also responds to other issues raised by Guttenberg in its protest. Interstate Power argues that additional metering equipment will be necessary for MISO to identify the portion of the load within the Alliant Energy West Local Balancing Authority that is attributable to Guttenberg, once Guttenberg begins purchasing its electric supply from its new supplier.¹⁴ Interstate Power also argues that the cost support it provided is comparable to that submitted in other Commission proceedings involving charges for wholesale delivery service.¹⁵ Additionally, Interstate Power disputes assertions made by Guttenberg that the proposed standard loss factor for the Guttenberg substation is

¹¹ *Id.* at 4.

¹² Interstate Power Answer at 4, 6.

¹³ *Id.* at 10.

¹⁴ *Id.* at 11-12.

¹⁵ *Id.* at 15.

unreasonable, that its proposed use of a 10.97 percent return on equity is unreasonable, and that the power factor clause in the agreements is vague and unreasonable.¹⁶

18. In its response, Guttenberg notes that Interstate Power has not challenged several key facts underlying Guttenberg's claim of undue discrimination and preference, including the claim that Interstate Power is increasing the charges for power delivery service solely because Guttenberg is changing power suppliers.¹⁷ Further, Guttenberg argues that there is no merit to Interstate Power's two justifications for the proposed change in delivery rate, specifically, that, as a matter of classification, Guttenberg no longer qualifies for service under Tariff RES-5 and that the Tariff RES-5 rates do not include substation costs to serve Guttenberg. As to the former, Guttenberg argues that Interstate Power cannot justify the application of different rates and service terms without additional evidence to show that Guttenberg's change in status, i.e., its decision to purchase power from another supplier, causes a change in Interstate Power's delivery service costs, facilities, or service use.¹⁸ With regard to Interstate Power's claim that it has not been recovering its costs for service to Guttenberg, Guttenberg states that, if this were the case, Interstate Power should have made a generally applicable rate increase filing.¹⁹ Guttenberg further argues that, even if Guttenberg's delivery costs were not included in Interstate Power's Tariff RES-5 rates, a claimed past rate recovery inadequacy does not justify charging a future discriminatory rate.²⁰

19. Guttenberg also disputes Interstate Power's assertion that it has not paid the costs associated with Guttenberg substation, arguing that the rates under Tariff RES-5 were developed on a non-levelized basis and include all costs, including depreciation and return on investment and certainly include the costs of delivery facilities. Because Guttenberg has paid these costs for years, it argues levelization would result in double-counting "to restart the clock by levelizing rates as if Guttenberg had not been paying for

¹⁶ *Id.* at 15-18.

¹⁷ Guttenberg Answer at 3.

¹⁸ *Id.* at 3-4.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 6 (citing *Pub. Serv. Co. of N.H. v. FERC*, 600 F.2d 944, 957 (1979) (quoting *Nader v. FCC*, 520 F.2d 182, 202 (1975)) (reciting the "cardinal principle of ratemaking that a utility may not set rates to recoup past losses, nor may the Commission prescribe rates on that principle").

these facilities.”²¹ Guttenberg also argues that Interstate Power’s answer did not justify consideration of the filing as an initial rate, provide evidence to substantiate its proposed metering requirements, and justify its proposed costs.

III. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission’s Rules and Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceeding. 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 an answer to an answer unless otherwise ordered by the decisional authority. We will accept answers from Interstate Power and Guttenberg because they have provided information that assisted us in our decision-making process.

B. Hearing and Settlement Judge Procedures

21. Our preliminary analysis indicates that the proposed Agreements have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept the Agreements for filing and suspend them for a nominal period, to become effective on January 1, 2014, as requested, subject to refund, and set them for hearing and settlement judge procedures discussed below.

22. Interstate Power’s filing 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.

23. We note that, in its answer, Interstate Power asserts that Guttenberg has not been paying for the costs of the Guttenberg substation, and therefore, switching to levelized rates poses no risk of double-charging of costs. However, this assertion ignores the fact that Guttenberg has paid for distribution service under Tariff RES-5 since 2006, which may have provided for recovery of some, if not all, of the Guttenberg substation costs. Therefore, among the issues to be addressed in the hearing and settlement judge procedures we order below, Interstate Power should address whether the proposed switch to levelized rates would result in double recovery given the contribution toward the capital costs of the Guttenberg substation received by Interstate Power through the revenues for distribution service under Tariff RES-5 since 2006.

²¹ *Id.* at 8-9. Guttenberg also notes that by the time Interstate Power signed a black box settlement regarding Tariff RES-5, Guttenberg was a known customer of Interstate and both parties were signatories to the settlement. Therefore, Guttenberg argues there is no basis for Interstate Power to argue that the Tariff RES-5 rate did not provide adequate compensation.

24. The Commission's policy regarding rate suspensions is that rate filings generally should be suspended for the maximum period permitted by the statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or unduly discriminatory, or that it may be inconsistent with other statutory standards.²² In this instance, however, we agree with Interstate Power that, because Guttenberg has already terminated its full requirements service under Tariff RES-5, subjecting the Agreements to suspension for more than a nominal period as requested would leave Guttenberg without wholesale distribution service beginning January 1, 2014.²³ Accordingly, we will accept the proposed Agreements for filing, suspend them for a nominal period, to become effective on January 1, 2014, subject to refund, and set them for hearing and settlement judge procedures.

25. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before 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.²⁴ 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.²⁵

26. 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 the 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, as appropriate.

The Commission orders:

(A) The proposed Agreements are hereby accepted for filing and suspended for a nominal period, to become effective January 1, 2014, as requested, subject to refund, and subject to hearing and settlement judge procedures, as discussed in the body of this order.

²² See, e.g., *Boston Edison Co.*, 12 FERC ¶ 61,211 (1980).

²³ Interstate Power Answer at 20.

²⁴ 18 C.F.R. § 385.603 (2013).

²⁵ 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 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>).

(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 Interstate Power's proposed rates, terms and conditions, under the Agreements. 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.