

146 FERC ¶ 61,007  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern States Power Company, a Minnesota  
corporation

Docket Nos. ER13-1065-001  
ER13-1066-001  
ER13-1067-001

ORDER GRANTING IN PART AND DISMISSING IN PART REHEARING

(Issued January 8, 2014)

1. On June 7, 2013, Northern States Power Company, a Minnesota corporation (Northern States), filed a request for clarification or, in the alternative, rehearing of the May 8 Letter Order that accepted a Construction Management Agreement, an Operation and Maintenance Agreement, and a Transmission Capacity Exchange Agreement (collectively, Agreements).<sup>1</sup> For the reasons discussed below, we grant in part and dismiss in part Northern States' request.

**I. Background**

2. On March 11, 2013, Northern States filed executed versions of the Agreements for the CapX2020 Brookings Project dated January 13, 2012, by and among Northern States, Great River Energy (Great River), Central Minnesota Municipal Power Agency (Central Minnesota), Otter Tail Power Company (Otter Tail), and Western Minnesota Municipal Power Agency (Western Minnesota) (collectively, Owners).<sup>2</sup> The Construction

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<sup>1</sup> *Northern States Power Company, a Minnesota corporation*, Docket No. ER13-1065-000, *et al.*, at 1 (May 8, 2013) (delegated letter order) (May 8 Letter Order).

<sup>2</sup> Northern States states that the CapX2020 Initiative is a joint initiative for regional planning, construction, ownership, and operation of transmission facilities in the Upper Midwest, which includes the Brookings Project. Northern States describes the Brookings Project as an approximately 255-mile transmission line that will consist of (1) a 250-mile, 345 kV transmission line to be constructed from the existing Northern

(continued...)

Management Agreement states that Great River will provide construction management services associated with the construction of the Brookings Project; the Operation and Maintenance Agreement sets forth the terms and conditions for the performance of maintenance, repair, restoration, and certain other services for the assets being constructed; and the Transmission Capacity Exchange Agreement aligns the transmission capacity rights of the Owners with their respective overall investments in the Brookings Project. Northern States requested waiver of the Commission's 60-day prior notice requirement in order to allow the Agreements to become effective on the date of execution by the Owners, January 13, 2012.

3. Pursuant to delegated authority, the Commission accepted Northern States' submittals in the May 8 Letter Order, effective May 10, 2013, 60 days from the date of filing. While the Agreements were executed on January 13, 2012, Northern States did not file them with the Commission until nearly 14 months later. Because Northern States had not made a showing of extraordinary circumstances for why it did not timely file, the Commission denied waiver of its prior notice requirements.<sup>3</sup> The Commission found that, "[f]or any monies collected before the effective date, Northern States must refund the time value of the monies actually collected for the time period during which the rates were charged without Commission authorization, with the refunds limited so as not to cause [Northern States] to suffer a loss."<sup>4</sup> The Commission directed Northern States to make time value refunds and file a refund report.

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States Brookings County Substation near Brookings, South Dakota, to the new Northern States Hampton Substation in Hampton, Minnesota; and (2) a five-mile, 115 kV transmission line to be constructed from a new substation to be located near Franklin, Minnesota, to an existing substation also located near Franklin, Minnesota. Northern States explains that the Brookings Project is being constructed in three distinct segments with a projected cost of \$650 million to \$750 million. Northern States notes that in-service dates for the three segments are projected to occur in late 2013, summer 2014, and spring 2015. *See, e.g.,* Northern States June 7, 2013 Rehearing Request at 1-3.

<sup>3</sup> May 8 Letter Order at 2 (citing *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992) (*Central Hudson*); *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,083 (1993) (*Prior Notice*)).

<sup>4</sup> *Id.* (citing, *e.g., El Paso Electric Company*, 101 FERC ¶ 61,276, *reh'g denied*, 105 FERC ¶ 61,131 (2003)).

4. On July 9, 2013, to comply with the requirements of the May 8 Letter Order, Northern States submitted a refund report.<sup>5</sup> In that filing, Northern States explains that, under the Construction Management Agreement, it is participating only in its capacity as a project owner and, as such, does not collect any monies from the project owners. Northern States asserts that, under the Operation and Maintenance Agreement and Transmission Capacity Exchange Agreement, it has collected no monies, as the Operation and Maintenance Agreement does not contemplate any exchange of monies prior to the in-service date of the first segment of the Brookings Project later in 2013, and the Transmission Capacity Exchange Agreement does not contemplate any exchange of monies. Therefore, Northern States explains that there are no funds collected on which Northern States would pay time value interest refunds.

## **II. Request for Clarification and/or Rehearing**

5. On June 7, 2013, Northern States filed a request for clarification or, in the alternative, rehearing of the May 8 Letter Order. Northern States argues that the Commission erred in ordering Northern States to make time value refunds under the Construction Management Agreement. Northern States also argues that the Commission erred in finding the Operation and Maintenance Agreement and the Transmission Capacity Exchange Agreement to be late filed and ordering Northern States to make time value refunds under those agreements. In addition, Northern States requests that the Commission clarify the jurisdictional nature of the Construction Management Agreement.<sup>6</sup>

6. Northern States argues that the Commission erred in ordering Northern States to make time value refunds under the Construction Management Agreement. Northern States asserts that only construction services are provided under the Construction Management Agreement and no jurisdictional transmission or power sales service is provided. Northern States contends that it only filed the Construction Management Agreement to be consistent with past filings of Construction Management Agreements for other projects, even though Northern States is not the construction manager and is neither providing any services to, nor receiving any funds from, other Owners.<sup>7</sup> Northern States asserts that it has not collected any monies under the Construction Management

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<sup>5</sup> Northern States, Refund Report, Docket No. ER13-1065-000, *et al.*, (filed July 9, 2013).

<sup>6</sup> Northern States June 7, 2013 Rehearing Request at 5-7.

<sup>7</sup> *Id.* at 8-9.

Agreement and only made disbursements *to* the Brookings Project trust account to cover costs associated with Northern States' ownership share of the Brookings Project. Northern States further states that only Great River, the construction manager and agent of the Owners, can cause funds to be paid from the trust account based on monthly construction expenditures. Northern States requests that the Commission clarify that no time value refunds are applicable under the Construction Management Agreement or, in the alternative, grant rehearing.<sup>8</sup>

7. Northern States also claims that it filed the Construction Management Agreement out of an abundance of caution and requests that the Commission clarify whether the Construction Management Agreement is, in fact, jurisdictional because services under the Construction Management Agreement are being provided by Great River, a non-jurisdictional entity. If the Construction Management Agreement is not jurisdictional, Northern States requests that it be allowed to withdraw the Construction Management Agreement from its tariff.<sup>9</sup> Northern States adds that the jurisdictional nature of the Construction Management Agreement as a strictly stand-alone construction contract is also unclear even if such construction service is provided by a jurisdictional public utility such as Northern States. It claims that a Construction Management Agreement does not affect rates because it is a contract for construction management services that the CapX2020 Owners could instead have undertaken with a non-jurisdictional third-party engineering, planning and construction contractor. Northern States requests clarification as to whether other CapX2020 Construction Management Agreements must be filed with the Commission if the construction manager listed within the Construction Management Agreement is a jurisdictional entity and, if so, why.

8. Next, Northern States argues that the Operation and Maintenance Agreement and Transmission Capacity Exchange Agreement submissions were filed timely and that the Commission erred by ordering Northern States to make time value refunds under both agreements. Northern States argues that, under section 205(d) of the Federal Power Act (FPA), utilities must file agreements relating to a jurisdictional service or change in jurisdictional service at least 60 days before that service takes effect.<sup>10</sup> Northern States asserts that, although it sought an effective date of January 13, 2012 for the Operation and Maintenance Agreement, the services under the Operation and Maintenance Agreement will not take effect until the first segment of the Brookings Project is placed

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<sup>8</sup> *Id.* at 9-10.

<sup>9</sup> *Id.* at 14-15.

<sup>10</sup> 16 U.S.C. § 824d(d) (2012).

into service, which is not expected to occur until late 2013.<sup>11</sup> Northern States asserts that the terms and conditions of the Transmission Capacity Exchange Agreement became effective May 10, 2013, as granted by the Commission in the May 8 Letter Order, because the terms and conditions of the Transmission Capacity Exchange Agreement are not effective unless and until the Commission issues an order accepting the Transmission Capacity Exchange Agreement.<sup>12</sup> Accordingly, Northern States argues that the filing of the Operation and Maintenance Agreement and Transmission Capacity Exchange Agreement in March 2013 is compliant with the FPA and the Commission's notice rules. Additionally, Northern States argues that, because no Brookings Project facilities have been placed into service, it is not yet possible for any party to the Transmission Capacity Exchange Agreement to exercise its right under the Transmission Capacity Exchange Agreement to use the capacity associated with the facilities. Finally, Northern States asserts that no funds have been collected or exchanged by Northern States under the Operation and Maintenance Agreement and no monies are ever paid to any Owner under the Transmission Capacity Exchange Agreement. Northern States requests that the Commission grant clarification that the Operation and Maintenance Agreement and Transmission Capacity Exchange Agreement were timely filed and no time value refunds are applicable, or grant rehearing on this issue.

### **III. Discussion**

9. We will dismiss as moot Northern States' request for clarification, or in the alternative, rehearing of the Commission's directive to provide time value refunds of any monies collected before the effective date of the Construction Management Agreement. If no monies were collected, as Northern States asserts is the case here, then no refunds are necessary, and Northern States need only indicate that refunds are unnecessary in its

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<sup>11</sup> See Northern States June 7, 2013 Rehearing Request at 11 & n.36 (citing Northern States Power Company, a Minnesota corporation, FERC FPA Electric Tariff, Transmission Tariffs, [537-NSP, CAPX-BRKGS-OMA-AGMT, 0.0.0](#), Article 2, § 2.5.1 ("the Parties recognize that services to be provided under [the Operation and Maintenance Agreement] will not be needed until a reasonable time prior to energization of the first Phase Portion In-Service Date . . .")).

<sup>12</sup> *Id.* at 13 & n.42 (citing Northern States Power Company, a Minnesota corporation, FERC FPA Electric Tariff, Transmission Tariffs, [538-NSP, CAPX-BRKGS-TCEA-AGMT, 0.0.0](#), Article 2, § 2.1 ("[the Transmission Capacity Exchange Agreement] will commence as of the Effective Time; provided, however, that on or before the Effective Time, the [Commission] has issued an Order accepting this Agreement for filing.")).

refund report. In fact, Northern States has already made such a statement in its refund report in the instant proceeding, which was accepted.<sup>13</sup>

10. We will grant Northern States' request for rehearing of the Commission's finding that the Operation and Maintenance Agreement and Transmission Capacity Exchange Agreement were not timely filed based on Northern States' clarification in its rehearing request that Northern States filed these agreements at least 60 days prior to when service under the agreements would commence.<sup>14</sup> As Northern States explains, while the Operation and Maintenance Agreement was filed on March 11, 2013 the services under the Operation and Maintenance Agreement will not commence until late 2013, when the first segment of Brookings Project is expected to be placed into service. Similarly, Northern States explains, the terms and conditions of the Transmission Capacity Exchange Agreement were not effective until accepted by the Commission on May 10, 2013. As Northern States further explains, because no Brookings Project facilities have been placed into service, it is not yet possible for any party to the Transmission Capacity Exchange Agreement to exercise its right under that agreement to use the capacity associated with the facilities. Accordingly, we find that the Operation and Maintenance Agreement and Transmission Capacity Exchange Agreement were not filed late because they were filed at least 60 days prior to the date services under the Operation and Maintenance Agreement and the Transmission Capacity Exchange Agreement would commence.<sup>15</sup> On this basis, we also find that Northern States is not required to make time value refunds under the Operation and Maintenance Agreement or Transmission Capacity Exchange Agreement.

11. We will dismiss as moot Northern States' request for clarification on the jurisdictional nature of the Construction Management Agreement.<sup>16</sup> Northern States already filed the Construction Management Agreement with the Commission, and it was accepted.

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<sup>13</sup> *Northern States Power Co., a Minnesota Corp.*, Docket Nos. ER13-1065-000, *et al.* (December 23, 2013) (delegated letter order).

<sup>14</sup> *See* 16 U.S.C. § 824d(d) (2012); 18 C.F.R. § 35.3(a)(1) (2013).

<sup>15</sup> *See* 18 C.F.R. § 35.3(b) (2013).

<sup>16</sup> If Northern States chooses to file a petition for declaratory order, it must do so in accordance with 18 C.F.R. § 385.207 (2013), and pay the fee established in 18 C.F.R. § 381.302 (2013).

12. Additionally, we will dismiss Northern States' request for clarification of the jurisdictional nature of other CapX2020 Construction Management Agreements as being outside the scope of this proceeding.

The Commission orders:

Northern States' request for clarification or, in the alternative, rehearing is hereby granted in part and dismissed in part, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.