146 FERC ¶ 61,008
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System Operator, Inc. Consumers Energy Company	Docket Nos.	ER10-1814-002 ER10-2156-003 (not consolidated)
Michigan Electric Transmission Company, LLC		EL11-2-001

ORDER DENYING REHEARING AND GRANTING CLARIFICATION

(Issued January 8, 2014)

1. Midland Cogeneration Venture Limited Partnership (Midland) has requested rehearing and clarification of the Commission's March 20, 2012 order issued in Docket Nos. ER10-1814-001, ER10-2156-001, and ER10-2156-002.[1] In that order, the Commission denied the request by Consumers Energy Company (Consumers Energy) for rehearing of the order issued in these proceedings on September 17, 2010,[2] in which the Commission accepted a late-filed interconnection agreement, conditionally accepted a new generator interconnection agreement, and, as pertinent here, granted a request by Michigan Electric Transmission Company, LLC (Michigan Electric) for clarification of the Facilities Agreement Order. Midland requests rehearing and further clarification of the Facilities Agreement Rehearing Order, stating that the Commission's clarification granted new relief to Michigan Electric, which newly aggrieves Midland.

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[1] *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,204 (2012) (Facilities Agreement Rehearing Order), *appeal filed sub nom. Midland Cogeneration Venture Ltd. P'ship v. FERC*, No. 12-1224 (D.C. Cir. filed May 18, 2012).

[2] *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,241 (2010) (Facilities Agreement Order).

2. Additionally, Midland requests rehearing of an order, also issued on March 20, 2012, in Docket No. EL11-2-000, in which the Commission granted in part and denied in part Michigan Electric's October 18, 2010 petition for declaratory order.[3] Michigan Electric had petitioned the Commission to determine the respective rights and obligations between itself and Midland under two agreements (as more fully described below) relating to the interconnection of Midland's cogeneration facility (Midland Plant), located in Midland, Michigan, to the grid.

3. For the reasons discussed below, we deny Midland's request for rehearing of the Facilities Agreement Rehearing Order but grant its request for clarification. We also deny Midland's request for rehearing of the Declaratory Petition Order. The Facilities Agreement Rehearing Order and the Declaratory Petition Order are referred to together as the "March 20 Orders."[4]

I. Background

A. The Facilities and Agency Agreements

4. The March 20 Orders provide a fuller description of the background of these related proceedings and of the ongoing dispute between Midland and Michigan Electric. In summary, however, the dispute arises under a 1988 interconnection agreement (Facilities Agreement) governing the interconnection of the Midland Plant to the transmission facilities previously owned by Consumers Energy and, since 2001, by Michigan Electric.[5] Beginning in 2004, Midland refused to reimburse Michigan Electric

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[3] *Mich. Elec. Transmission Co. LLC*, 138 FERC ¶ 61,202 (2012) (Declaratory Petition Order).

[4] In a third order, also issued on March 20, 2012, in Docket No. ER11-136-000, the Commission denied Midland's request for clarification, or, in the alternative, rehearing of the Commission's December 17, 2010 order that accepted a late-filed agency agreement between Consumers Energy and Michigan Electric (Agency Agreement). *See Mich. Elec. Transmission Co. LLC*, 133 FERC ¶ 61,238 (2010), *reh'g denied*, 138 FERC ¶ 61,203 (2012), *appeal filed sub nom. Midland Cogeneration Venture L'td. P'ship v. FERC*, No. 12-1224 (D.C. Cir. filed May 18, 2012).

[5] The Midland Plant is a qualifying co-generation facility under section 3(18)(B) of the Federal Power Act (FPA), 16 U.S.C. § 796(18)(B) (2012). The Midland Plant provides steam and electric power to Dow Chemical Co. (Dow Chemical), and electric power to Consumers Energy. Midland also sells electric power to third parties. Until 2006, Midland was a limited partnership owned by Consumers Energy, Dow Chemical and their affiliates. Until 2001, Consumers Energy owned the bulk transmission system

(continued…)

for costs (including property taxes) incurred by Michigan Electric to operate and maintain the Midland Plant interconnection facilities (Midland Interconnection Facilities).[6]

5. On July 8, 1988, Midland and Consumers Energy entered into the Facilities Agreement (subsequently amended on June 9, 2008, and May 28, 2009) to govern the construction, ownership, and operation of the Midland Interconnection Facilities.[7] During 2010, Midland, Michigan Electric, and Midwest Independent Transmission System Operator, Inc. (MISO)[8] discussed, without coming to agreement, amending the Facilities Agreement or replacing it with a new generator interconnection agreement, under MISO's tariff.[9] MISO had determined that such amendment or replacement was necessary to accommodate Midland's desire to increase the generating capacity of the Midland Plant. Consumers Energy did not file the Facilities Agreement with the Commission until August 6, 2010, in Docket No. ER10-2156-000, shortly after MISO filed, in Docket No. ER10-1814-000, a partially executed generator interconnection agreement (GIA) among itself, Midland, and Michigan Electric. In filing the Facilities Agreement, Consumers Energy asked the Commission to accept it, effective 60 days after filing, and to find that it came under the Commission's jurisdiction on July 6, 2006, the date of the Commission's order granting Midland market-based rate authority for wholesale sales.[10]

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to which the Midland Plant interconnects. In 2001, Consumers Energy transferred its transmission assets to a predecessor of Michigan Electric. In 2002, Michigan Electric became a stand-alone transmission company, owned by an entity unaffiliated with Consumers Energy. In 2007, Michigan Electric was acquired by ITC Holdings Corp.

[6] Related Docket Nos. ER12-420-000 and ER12-420-001 concern cancellation of the Facilities Agreement. *See Consumers Energy Co.*, 139 FERC ¶ 61,014 (2012), *order on reh'g*, 142 FERC ¶ 61,193 (2013) (Cancellation Rehearing Order). In the Cancellation Rehearing Order, the Commission also set for hearing and settlement judge procedures, in Docket No. ER10-2156-002, issues relating to Consumers Energy's May 25, 2012 refund report filed in that proceeding.

[7] Consumers Energy, Tariff Filing, Docket No. ER10-2156-000, at Attachment A, "Facilities Agreement" (filed Aug. 6, 2010).

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

[9] MISO FERC Electric Tariff, Fourth Revised Vol. No. 1.

[10] *See Midland Cogeneration Venture Ltd. P'ship*, 116 FERC ¶ 61,011 (2006).

6. In early 2001, in connection with the transfer of its transmission facilities to Michigan Electric,[11] Consumers Energy sought Midland's consent to an assignment of the Facilities Agreement to Michigan Electric, but Midland withheld consent to such assignment.[12] For this reason, Consumers Energy and Michigan Electric instead executed, on April 1, 2001, the Agency Agreement, under which Consumers Energy delegated to Michigan Electric, as its agent, certain of its transmission-related obligations under the Facilities Agreement. On October 18, 2010, Michigan Electric filed the Agency Agreement, in Docket No. ER11-136-000, asking for an effective date of December 17, 2010. The Commission accepted the late-filed Agency Agreement, effective as requested.[13]

7. Until 2004, Midland paid, originally to Consumers Energy and later to Michigan Electric, invoices submitted to Midland for interconnection service. However, beginning in 2004, Midland stopped paying any invoices submitted by Michigan Electric, although Michigan Electric, as Consumers Energy's agent, continued to provide Midland with the interconnection service required by the Facilities Agreement.

8. On October 18, 2010, in Docket No. EL11-2-000, Michigan Electric petitioned the Commission to find that Midland must reimburse Michigan Electric for the unpaid costs that Michigan Electric incurred, plus interest, in operating and maintaining the Midland Interconnection Facilities, as agent for Consumers Energy, pursuant to the Facilities Agreement. Michigan Electric also petitioned the Commission to find that the late filing of the Facilities Agreement and Agency Agreement did not render these agreements null and void, and that Michigan Electric's sole obligation resulting from the late filing of the Agency Agreement was to make time-value refunds of the monthly agency fees that Consumers Energy paid to Michigan Electric.[14]

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[11] *See supra* note 4.

[12] Section 10 of the Facilities Agreement provides: "This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the respective Parties hereto. This Agreement shall not be transferred or otherwise alienated without the other Party's written consent, which consent shall not unreasonably be withheld."

[13] *See supra* note 4.

[14] *See* Declaratory Petition Order, 138 FERC ¶ 61,202 at PP 2, 12-14. Michigan Electric filed both the Agency Agreement and its petition for declaratory order on October 18, 2010.

B. The Facilities Agreement Order

9. In the Facilities Agreement Order, the Commission accepted the late-filed Facilities Agreement, effective October 5, 2010, and also conditionally accepted the partially executed GIA, subject to the amendment or termination of the Facilities Agreement.[15] Midland intervened in both proceedings and protested both filings.

10. In Docket No. ER10-1814-000, Midland argued that the Commission should not condition its approval of the GIA on termination or amendment of the Facilities Agreement. Rather, Midland argued, the GIA should permit Midland to continue certain provisions of the Facilities Agreement, and Midland should not have to choose between all the provisions of one agreement or the other agreement.[16] More specifically, Midland protested its obligation under the GIA to pay for new meters, and Michigan Electric's refusal to guarantee that Midland could supply increased power into the grid at existing meters without additional charge. Midland also protested the GIA's conditions for reactive power supply.[17] Lastly, Midland stated that it had never consented to the Agency Agreement or to assignment by Consumers Energy to Michigan Electric of any of its obligations under the Facilities Agreement.[18]

11. In Docket No. ER10-2156-000, Midland argued that the Facilities Agreement came under the Commission's jurisdiction when it was entered into, in 1988, and not in 2006, as Consumers Energy argued, when Midland was granted market-based rate authority. Midland urged the Commission to accept the Facilities Agreement only to the extent that it does not relate to interconnection service, and only with prospective effect. Midland added that the Agency Agreement should have been filed with the Commission, and characterized the Agency Agreement as an attempt by Consumers Energy and Michigan Electric to circumvent the anti-assignment provision contained in section 10 of the Facilities Agreement.[19]

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[15] *See supra* note 2.

[16] Midland Aug. 9, 2010 Intervention and Protest at 7-9.

[17] *Id*. at 9-14.

[18] *Id.* at 14.

[19] *See supra* note 12. Midland Aug. 27, 2010 Intervention and Comments at 11-13 (citing, in support of a prospective effective date, *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *order on reh'g*, 65 FERC ¶ 61,108 (1993) (*Prior Notice Order*)).

12. In the Facilities Agreement Order, the Commission determined that its jurisdiction over the Facilities Agreement arose when Midland was first authorized, by contract or otherwise, to make sales to third parties, i.e., entities other than Consumers Energy and Dow Chemical. Since the existing power purchase agreement between Midland and Consumers Energy, as originally executed in 1986, gave Midland the right to make third-party sales of residual capacity and energy, the Commission found that the Facilities Agreement became jurisdictional at the time of its execution, in 1988. Accordingly, the Commission directed Consumers Energy to refund to Midland the time-value of revenues collected by Consumers Energy (or Michigan Electric as its agent) under the Facilities Agreement for the entire period during which revenues were collected without Commission approval, i.e., from the date the Facilities Agreement came under the Commission's jurisdiction until the effective date of Commission acceptance of the Facilities Agreement.[20]

13. The Commission also held that increased generation required a new interconnection agreement and new meters, and that Midland could choose between continuing its existing generating capacity with existing meters under the Facilities Agreement or increasing the generating capacity of the Midland Plant and installing new meters in accordance with the new GIA. The Commission also approved the reactive power requirements of the GIA. Lastly, the Commission held that any new interconnection agreement would be governed by the provisions of MISO's *pro forma* generator interconnection agreement.[21]

II. <u>The March 20 Orders</u>

A. <u>The Facilities Agreement Rehearing Order</u>

14. Consumers Energy requested rehearing of the Facilities Agreement Order, and Michigan Electric requested clarification or, in the alternative, rehearing of the Facilities Agreement Order.[22] Consumers Energy argued that the Facilities Agreement became

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[20] Facilities Agreement Order, 132 FERC ¶ 61,241 at PP 24-26.

[21] *Id.* PP 34-36, 43-44, 50.

[22] Although Midland did not request rehearing or clarification of the Facilities Agreement Order, it filed an answer to Michigan Electric's request for rehearing, to which Michigan Electric filed an answer. Midland filed a reply to Michigan Electric's answer. The Commission rejected all three pleadings as prohibited answers to requests for rehearing. Facilities Agreement Rehearing Order, 138 FERC ¶ 61,204 at P 23 (citing Rule 713(b) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(b) (2011)).

subject to the Commission's jurisdiction, with accompanying refund liability, only upon occurrence, other than isolated instances, of actual sales to third-party utilities at a given time, quantity, and price, not upon permission to make FERC-jurisdictional transactions under future contingent events,[23] an argument that the Commission rejected.[24] However, relying on the *Prior Notice Order* and discussion in *El Paso Electric Co.*, the Commission granted the clarification, requested by Michigan Electric, that 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 these agreements during the period of non-filing, and that nothing in the Facilities Agreement Order was intended to modify the Commission's precedent regarding time-value refunds.[25]

15. Additionally, the Commission observed that the Agency Agreement obligates Consumers Energy and Michigan Electric to cooperate with one another in the preparation of invoices for the operation and maintenance services described in the Facilities Agreement, and that the December 16, 2010 refund report that Consumers Energy had filed, in Docket No. ER10-2156-002, did not include any amounts billed by Michigan Electric in its capacity as Consumers Energy's agent. Therefore, the Commission ordered Consumers Energy to file a revised refund report that itemizes all amounts billed to Midland by both Consumers Energy and Michigan Electric, and also the amounts that Midland has paid and the amounts billed to Midland that remain unpaid.[26]

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[23] Consumers Energy Oct. 18, 2010 Request for Rehearing at 2-3.

[24] Facilities Agreement Rehearing Order, 138 FERC ¶ 61,204 at P 25. The Commission relied on *Western Mass. Elec. Co.*, 59 FERC ¶ 61,091, *reh'g denied*, 61 FERC ¶ 61,182 (1992), *aff'd sub nom. Western Mass. Elec. Co. v. FERC*, 165 F.3d 922 (D.C. Cir. 1999), and *Fla. Power & Light Co.*, 133 FERC ¶ 61,121 (2010).

[25] Facilities Agreement Rehearing Order, 138 FERC ¶ 61,204 at PP 26-28. The Commission relied on the *Prior Notice Order*, *supra* note 19, and *El Paso Elec. Co.*, 105 FERC ¶ 61,131, at PP 13-15, 18 (2003) (*El Paso*).

[26] *Id.* PP 31-32. Consumers Energy submitted the required revised refund report on April 19, 2012, later corrected on May 26, 2012 (May 26, 2012 Refund Report). Midland, which had earlier settled its differences with Consumers Energy over the amount to be refunded to it, protested these refund reports. On March 21, 2013, the Commission set the May 26, 2012 Refund Report for hearing and settlement judge procedures to determine the time-value refunds that Consumers Energy owes to Midland and other matters. Cancellation Rehearing Order, 142 FERC ¶ 61,193 at PP 37-38. *See*

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B. Declaratory Petition Order

16. In the Declaratory Petition Order, the Commission concluded that Consumers Energy was entitled to recover, during the entire period that the Facilities Agreement was jurisdictional, the rates authorized in the Facilities Agreement. It concluded, reciprocally, that, for this entire period, Midland was obligated to reimburse Consumers Energy for the costs (including property taxes) properly incurred under the Facilities Agreement. However, noting that Michigan Electric was not a party to the Facilities Agreement, the Commission concluded that there was no contractual basis to order Midland to pay Michigan Electric directly for the unreimbursed costs incurred by Michigan Electric.[27] Accordingly, the Commission denied the specific relief requested by Michigan Electric.

III. Midland's Rehearing/Clarification Requests

17. Midland contends, in the instant request for rehearing and clarification of the Facilities Agreement Rehearing Order, that the Commission granted new relief when it clarified that the Facilities Agreement was enforceable prior to its October 5, 2010 effective date. Therefore, in Midland's view, rehearing of the Facilities Agreement Rehearing Order is appropriate. On rehearing, Midland lists four grounds for error, which we discuss below. In its request for rehearing of the Declaratory Petition Order, in Docket No. EL11-2-001, Midland makes essentially the same four arguments. In addition, in its request for rehearing of the Facilities Agreement Rehearing Order, Midland requests clarification on the issue of Michigan Electric's claim for reimbursement of property taxes. As explained below, we will deny rehearing, but will grant clarification.

A. Effective Date and Enforceable Date

18. Midland contends that the Commission erred when it found that the Facilities Agreement and the Agency Agreement were effective prior to their filing. Midland

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supra note 6. On September 20, 2013, the Settlement Judge reported that the parties had reached an impasse. On September 25, 2013, the Chief Administrative Law Judge appointed a presiding administrative law judge and, in Docket No. ER10-2156-004, established a procedural schedule for the hearing previously ordered by the Commission.

[27] Declaratory Petition Order, 138 FERC ¶ 61,202 at PP 20-22. The Commission's further conclusions found unpersuasive Midland's additional arguments about why it should not be required to pay the rates authorized by the Facilities Agreement for the service it took under that agreement and observed that Midland had failed to seek rehearing of the Facilities Agreement Order. *Id*. PP 23-25.

argues that the Commission violated the FPA and Commission regulations by allowing an unfiled agreement to be enforceable from inception, without a showing of "extraordinary circumstances" or a finding of good cause.[28] In this regard, Midland notes that section 205(d) of the FPA[29] provides that the Commission may, for good cause shown, allow tariff changes to take effect without requiring sixty days' notice. Midland also relies on section 35.11 of the Commission's rules and regulations, "Waiver of notice requirement,"[30] which provides that the Commission "may, by order, provide that a rate schedule, tariff, or service agreement, or part thereof, shall be effective as of the date of filing . . . ." Midland argues that Consumers Energy did not request waiver when it filed the Facilities Agreement.

19. We find that Midland has confused the effective date for Commission acceptance of a rate filing with the enforceable date of a jurisdictional agreement. The effective date is the date, under FPA section 205 and the Commission's regulations, that the Commission accepts the rate filing and thus makes it "effective." As relevant here, it establishes the ending date for time-value refunds ordered due to the late filing of a jurisdictional agreement.[31] The Commission's establishing such an effective date is *not* a finding, however, that, prior to this date, the rate filing was not just and reasonable. In contrast, the enforceable date of a jurisdictional agreement is simply the date that the parties to such an agreement agree to perform their identified obligations to each other.

20. In granting Michigan Electric's request for clarification – i.e., concluding that the late filing of the Facilities Agreement and the Agency Agreement did not affect the validity and enforceability of these agreements before they were filed, and that nothing in the Facilities Agreement Rehearing Order modified the Commission's precedent regarding the limitations on time-value refunds – the Commission hewed to its long

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[28] Facilities Agreement Rehearing Order Rehearing Request at 4-9; Petition Order Rehearing Request at 4-9.

[29] 16 U.S.C. § 824d (2012).

[30] 18 C.F.R. § 35.11 (2013).

[31] Waiver of the Commission's prior notice and filing requirements so as to receive an effective date prior to the date otherwise established by FPA section 205 and the Commission's regulations, which has the effect of shortening the period of time-value refunds, requires the filing entity to show good cause for its untimely filing before the Commission will grant an early effective date.

standing precedent. The Commission referred to the *Prior Notice Order*[32] and *El Paso*,[33] which held that the approach proposed by Midland could be unjust if it gives no substantive effect to late-filed agreements prior to the effective date established by the Commission in the order accepting the filing, which would follow 60 days from the date a rate is filed.[34] The Commission stated that its policy is to encourage compliance with the prior notice and filing requirements while still ensuring that a utility may collect bargained-for rates, even prior to the filing of those rates, when the utility has, in fact, rendered service. Therefore, the Commission held that Consumers Energy is entitled to collect the rates authorized by the Facilities Agreement for the entire period that the Facilities Agreement was jurisdictional, and that the Commission saw 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 neither asserted non-performance under the Facilities Agreement by Consumers Energy nor refused to accept performance by Consumers Energy's agent, Michigan Electric. The Commission thus appropriately ordered Midland to pay the charges provided for in the Facilities Agreement, which the Commission had determined, in the Facilities Agreement Order, to be just and reasonable.[35]

21. Midland argues that the Commission's reliance, in the March 20 Orders,[36] on *El Paso* and the *Prior Notice Order* is misplaced because "nothing in the cited paragraph of [*El Paso*] or the cited pages from the *Prior Notice Order* stands for "the proposition that the rates in a late-filed agreement are 'collectible' regardless of the effective date of the filing."[37]

22. As explained plainly, in PP 27-28 of the Facilities Agreement Rehearing Order, however, and as the Commission also indicated in the *Prior Notice Order*, to give no effect to late-filed agreements prior to the Commission-established effective date could

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[32] *See supra* note 19.

[33] *See supra* note 25.

[34] The Commission referred also to its precedent that time-value refunds are not without limit, and that a utility is permitted to recover its variable costs.

[35] Facilities Agreement Rehearing Order, 138 FERC ¶ 61,204 at PP 27-30.

[36] Facilities Agreement Rehearing Order, 138 FERC ¶ 61,204 at PP 27-28; Declaratory Petition Order, 138 FERC ¶ 61,202 at PP 22-23.

[37] Facilities Agreement Rehearing Order Rehearing Request at 4.

be unjust, and the Commission's policy, rather, is to encourage compliance with the prior notice and filing requirements while still ensuring that a utility is not treated unjustly when it files an otherwise just and reasonable rate belatedly after service has commenced. In such cases, the Commission will require the utility to refund the time value of the revenues collected, but the rate is nevertheless collectible.[38] The Commission followed this policy in the Facilities Agreement Order in which it accepted the Facilities Agreement, but also ordered Consumers Energy to refund to Midland the time-value of the rates that had been collected under the Facilities Agreement**.**

B. Consistency with Recent Decisions

23. Midland argues that the Commission's holdings in the March 20 Orders are inconsistent with the position that the Commission has taken in other cases in which, according to Midland, the Commission has held that an agreement was not enforceable absent waiver of the prior notice requirement.[39] In support of this argument, Midland cites the Commission's brief in *Xcel Energy Services, Inc. v. FERC*, 510 F.3d. 314 (D.C. Cir. 2007) (*Xcel*).[40] In that case, Xcel Energy Services, Inc. (Xcel) filed four interconnection agreements several years after commencement of service and asked the Commission to grant waiver of the prior notice and filing requirements of the FPA, so as to set effective dates for acceptance of the agreements four to five years prior to their

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[38] Facilities Agreement Rehearing Order, 138 FERC ¶ 61,204 at PP 27-28; 8 n.17 (in the *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,979, "the Commission stated that if a utility files an otherwise just and reasonable cost-based rate after new service has commenced, the Commission requires the utility to refund to its customers the time value of the revenues collected, calculated pursuant to section 35.19a of the Commission's regulations").

[39] Facilities Agreement Rehearing Order Rehearing Request at 10-13; Petition Order Rehearing Request at 9-13.

[40] Commission precedent, we caution, is established in Commission-issued orders. *See, e.g., Indianapolis Power & Light Co.*, 48 FERC ¶ 61,040, at 61,203 ("The Commission speaks through its orders."), *order on reh'g*, 48 FERC ¶ 61,328 (1989); *cf. N.C. Utilities Comm'n v. FERC***,** 42 F.3d 659 (D.C. Cir. 1994) ("[T]his court cannot accept appellate counsel's post hoc rationalization of an agency decision. The Commission's decision 'must be upheld. . . on the basis articulated by the agency.'" (citations omitted)); 18 C.F.R. § 388.104 (2013) (providing that, in the normal course of Commission operations, "[o]pinions expressed by the staff do not represent the official views of the Commission").

filing.[41] Midland also cites *BP West Coast Products, LLC v. FERC*, 374 F.3d. 1263 (D.C. Cir. 2004) (*BP*), which concerns shippers' challenges to oil pipeline rates under the Energy Policy Act of 1992.[42]

24. Neither of the cited cases is on point. The issue in *Xcel* was whether contracts under which Xcel had never charged the otherwise agreed-upon rates for interconnection services (because of lengthy, related proceedings) should receive backdated effective dates, and whether the required showing of good cause was satisfied by the fact that Xcel had not yet invoiced its customers for the interconnection services that it had provided for several years. The issue in *BP*, under a very different statute and regulatory regime, was whether revisions to oil pipeline rates were new rates and as a result ineligible for grandfathering under EPAct 1992. In contrast, the issue in the instant proceedings is not whether the effective dates for acceptance of the Facilities and Agency Agreements were correct or whether the Commission should have waived its prior notice and filing requirements. Rather, the issue in the instant proceedings is whether the Commission erred in finding that the two late-filed agreements were enforceable as of the dates of their execution. Moreover, the instant proceedings are further distinguished from *Xcel*, in particular, by the fact that Consumers Energy, and later, Michigan Electric, had invoiced Midland for the services rendered under the Facilities Agreement, and that Midland for a period of several years paid those invoices.

C. <u>Midland's Reimbursement Obligation</u>

25. Midland characterizes the Commission's holding that Midland is obligated to pay Consumers Energy the amount incurred by Michigan Electric under the Facilities Agreement as "an attempt to sidestep the lack of contract privity" between Midland and Michigan Electric, and as arbitrary and capricious because Consumers Energy incurred no costs and made no demand for payment of costs incurred by Michigan Electric.

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[41] The court, we note, upheld the Commission, finding that the Commission was within its discretion in deciding not to waive the prior notice requirement where Xcel filed the interconnection agreements more than four years after the effective dates agreed to by the customers and failed to show extraordinary circumstances warranting waiver.

[42] Pub. L. No. 102-486, 106 Stat. 2776, *codified at* 42 U.S.C. §§ 1320-556 (2012) (EPAct 1992).

Midland adds that Michigan Electric, as an agent, has no standing, under Michigan law, to make demands that its principal, Consumers Energy, has not chosen to assert.[43]

26. Again, we see no need to further explain the Commission's reasoning in the Facilities Agreement Rehearing Order.[44] As we noted in that order, the Facilities Agreement provides reciprocal duties of providing interconnection services and then paying for those interconnection services, and names Consumers Energy as the provider to be paid by Midland. Not claiming non-performance, Midland has no valid reason to withhold payment for services rendered and received under the Facilities Agreement, a jurisdictional agreement that the Commission has since accepted.

D. Waiver of Anti-Assignment Clause

27. Midland states that the Commission erred in making an "implicit finding" that Midland waived the protection of the anti-assignment clause in section 10 of the Facilities Agreement against unilateral assignment of the Facilities Agreement by Midland's not suing Consumers Energy and by Midland's not unilaterally disconnecting the Midland Plant from the grid.[45] Midland further argues that Consumers Energy's attempt to delegate its rights and duties under the Facilities Agreement to Michigan Electric represented a violation of section 10, contrary to Michigan law.

28. Midland's premise is incorrect. Neither in the March 20 Orders, nor in the underlying Facilities Agreement Order, nor in the orders in the Docket No. ER11-136 proceedings (accepting the Agency Agreement and denying rehearing) did the Commission find that Midland waived its right to withhold written consent to assignment of the Facilities Agreement. Rather, the Commission merely determined that, under the Facilities Agreement, Midland was entitled to service from Consumers Energy, and Midland indeed received service from Consumers Energy. Thus, Midland was and is

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[43] Facilities Agreement Rehearing Order Rehearing Request at 15-17; Petition Order Rehearing Request at 14-16.

[44] Facilities Agreement Rehearing Order, 138 FERC ¶ 61,204 at PP 30-31.

[45] *See supra* note 12. Clarification Order Rehearing at 16-17; Petition Order Rehearing Request at 16-18.

obligated to pay for that service.[46] In fact, in the recital clauses to the Agency Agreement, Consumers Energy acknowledges its ongoing transmission-related obligations to Midland under the Facilities Agreement.[47] Also, we note that the Facilities Agreement appears to expressly contemplate that Consumers Energy may engage agents to assist in performing its obligations.[48]

E. Clarification

29. Lastly, Midland cites footnote 50 of the Facilities Agreement Rehearing Order, in which the Commission, refers to a Midland objection in its protests to Michigan Electric's petition for declaratory order (Docket No. EL11-2-000) and to Consumers Energy's refund report (Docket No. ER10-2156-002), and states:

> 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 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* (emphasis added).[49]

30. Midland states that that settlement did not involve Michigan Electric and so did not resolve the dispute. Midland argues that no evidence in the record supports a finding that that settlement was intended to resolve the refund issue relating to Michigan

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[46] In the Facilities Agreement Rehearing Order, 138 FERC ¶ 61,204, at P 30, the Commission stated explicitly that it was Consumers Energy that was "entitled to collect the rates authorized by the Facilities Agreement, and the Commission similarly explicitly referred to the fact that Midland "has not asserted non-performance . . . by Consumers Energy."

[47] In the Facilities Agreement Rehearing Order, 138 FERC ¶ 61,204 at P 31, the Commission referenced the operation and maintenance services provided by Consumers Energy under the Facilities Agreement and stated its expectation that the parties would comply with their respective obligations under the agreement.

[48] Section 4 of the Facilities Agreement, "Access," provides that "Consumers, *its agents* and employees, shall have full right and authority of ingress and egress at all reasonable times on and across the premises of [Midland] for the purpose of installing, operating, maintaining and removing the Connection Facilities." [Emphasis added.]

[49] Facilities Agreement Rehearing Order, 138 FERC ¶ 61,204 at P 32 n.50.

Electric's claims. Midland asks the Commission to clarify that footnote 50 did not resolve the fixed cost issues as it relates to Michigan Electric, and that the settlement between Consumers Energy and Midland did not reach the issue of fixed costs and variable costs between Midland and Michigan Electric. Midland also asks that the Commission address Michigan Electric's right, or lack thereof, to recover fixed costs after Consumers Energy submits a revised refund report, as instructed by the Commission.[50]

31. The Commission did not decide, in that footnote 50, quoted above, that the settlement between Midland and Consumers Energy resolved Midland's issue of whether property taxes on the Midland Interconnection Facilities are fixed or variable costs. What time-value refunds, if any, are owing to Midland for revenues collected under the Facilities Agreement is an issue in the currently on-going hearing.[51]

The Commission orders:

(A) Midland's request for rehearing of the Facilities Agreement Rehearing Order and the Declaratory Petition Order is hereby denied, as discussed in the body of this order.

(B) Midland's request for clarification of the Facilities Agreement Rehearing Order is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[50] Facilities Agreement Rehearing Order Rehearing Request at 18-19.

[51] *See supra* note 26. On November 12, 2013, the Presiding Administrative Law Judge issued an order clarifying the issues set for hearing by the Cancellation Rehearing Order, *supra* note 6. *Consumers Energy Co.*, Docket No. ER10-2156-004 (Nov. 12, 2013) (unpublished presiding officer order).