

152 FERC ¶ 61,235
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Detroit Edison Company

Docket No. ER13-398-000

ORDER ACCEPTING TIME VALUE REFUND REPORT

(Issued September 28, 2015)

1. In this order, we accept a time value refund report filed by Detroit Edison Company (Detroit Edison) on November 9, 2012. With an exception discussed below, we find that requiring Detroit Edison to make time value refunds to Michigan Public Power Agency (MPPA) on amounts that Detroit Edison billed to and collected from MPPA pursuant to the terms of the Belle River Transmission Ownership and Operating Agreement (Belle River Agreement) would cause Detroit Edison to operate at a loss. The Belle River Agreement, which was originally entered into in 1982 between Detroit Edison and MPPA, was assigned by Detroit Edison to International Transmission Company (ITC) in 2001 in conjunction with ITC's acquisition of Detroit Edison's transmission assets. ITC filed the agreement with the Commission in Docket No. ER12-2170-000 on June 29, 2012, and the Commission conditionally accepted the filing in an order in that proceeding issued on August 28, 2012.¹

I. Background

2. Detroit Edison states that, on December 1, 1982, Detroit Edison and MPPA entered into an agreement (Participation Agreement) that set forth the terms and conditions of MPPA's purchase of an ownership interest in Detroit Edison's Belle River electric generating facility, as well as the terms of back-up power sales by Detroit Edison to MPPA. The Belle River Agreement, which is a companion agreement to the Participation Agreement, sets forth the transmission ownership and operating

¹ See *International Transmission Co.*, 140 FERC ¶ 61,151 (2012) (*ITC Belle River Order*), *reh'g granted in part and denied in part*, 152 FERC ¶ 61,043 (2015) (*ITC Belle River Rehearing Order*).

arrangements through which MPPA acquired a partial, undivided ownership interest in specified high-voltage transmission lines (Designated Transmission Lines) necessary to transmit electricity from the portion of the Belle River generating facility owned by MPPA and also to transmit the back-up power provided under the Participation Agreement for delivery to MPPA. The Belle River Agreement also provides for the sharing of certain costs between Detroit Edison and MPPA as co-owners of the Designated Transmission Lines.²

3. Detroit Edison states that, under the terms of the Belle River Agreement, MPPA agreed to pay Detroit Edison (and, as of January 1, 2001, when the transfer to ITC was effective, to pay ITC) capital improvement costs and various operation and maintenance costs in accordance with MPPA's ownership interest in the Designated Transmission Lines. Section 3.6 of the Belle River Agreement provides that the parties shall share the costs of capital improvements made to the Designated Transmission Lines in proportion to their respective percentage ownership interests in the Designated Transmission Lines. Section 8.2 provides that MPPA shall pay specified expenses allocable to MPPA's ownership interest in the Designated Transmission Lines based on the percentage of MPPA's investment in Detroit Edison's transmission system. These expenses include "operation and maintenance expenses and taxes, other than income taxes, associated with the Bulk Transmission System, as properly recordable in accordance with the instructions and in appropriate accounts as set forth in the Uniform System of Accounts. Such expenses shall include supervision, engineering, employee pensions and benefits and payroll, sales and use taxes. . . ." The allocated expenses also include "administrative and general expenses associated with the Bulk Transmission System." Section 10.2 provides that Detroit Edison and MPPA shall share certain taxes in proportion to their respective percentage ownership interests in the Designated Transmission Lines. Similarly, Section 11.1 provides that Detroit Edison and MPPA shall share insurance costs in proportion to their respective ownership interests in the Designated Transmission Lines.³

4. Detroit Edison states that, under Section 8.3 of the Belle River Agreement, MPPA was invoiced each month based on an estimate of the costs and expenses incurred in that month, and the estimate was trued up to reflect actual costs and expenses three months

² November 9 Filing at 2-3.

³ *Id.* at 3-4. A copy of the Belle River Agreement was included as Attachment A to Detroit Edison's November 9 Filing. Detroit Edison requests a waiver of the requirement to file the Belle River Agreement through the Commission's eTariff system, noting that, because the agreement was transferred to ITC effective January 1, 2001, it is no longer a Detroit Edison agreement, and that ITC has already filed the Belle River Agreement in Docket No. ER12-2170-000, and that the Commission has accepted ITC's filing. November 9 Filing at 7-8 n.40.

later, with a further true up to capture any year-end adjustments. Detroit Edison further states that amounts invoiced to MPPA included no mark up, return or profit, and that Detroit Edison charged MPPA no interest when estimated payments did not fully recover actual costs for a given month.⁴

5. Detroit Edison states that invoices were not issued to MPPA until the summer of 1984, when the Belle River generating station commenced operations, and continued until the end of 2000, after which ITC assumed Detroit Edison's obligations under the Belle River Agreement. However, Detroit Edison explains that, because the period covered by these invoices is outside its normal records retention policy, it was not able to recover invoices for all of the months in that period. Detroit Edison also acknowledges that it identified one invoice in which it appears MPPA was credited \$5,000 less than the amount by which the estimated payment for a month (April 1987) exceeded the actual costs amount for that month after true up. Detroit Edison states that it was unable to find any documentation verifying the status of the credit and offers to refund the \$5,000 to MPPA if the ITC Belle River Order becomes final and non-appealable.⁵

6. Detroit Edison's filing includes an affidavit of a company official that explains the billing and true up process under the Belle River Agreement, and the scope of review of the invoices that were found. Attachment B-6 to the affidavit is a summary of the estimated and actual charges to MPPA, showing the true up adjustments, as derived from the invoices that Detroit Edison was able to locate. Detroit Edison did not calculate the time value of the amounts collected from MPPA. Detroit Edison states that amounts billed included operation and maintenance expenses (O&M) and administrative and general expenses recovered from MPPA pursuant to Section 8.2 of the agreement and tax expenses shared pursuant to Section 10.2, but do not include costs of any capital improvements or insurance costs.⁶ Detroit Edison argues that the kinds of expenses and costs included under the Belle River Agreement are the kinds of "variable out-of-pocket costs" that the Commission has previously accepted in refund reports demonstrating that

⁴ *Id.* at 4.

⁵ *Id.* at 6.

⁶ *Id.* at 5. Detroit Edison also included, as Attachments B-1 through B-5 of its witness's affidavit, original invoices under the Belle River Agreement. Detroit Edison requested privileged treatment of these attachments.

a public utility would be operating at a loss as a result of providing time value refunds.⁷ In this regard, according to Detroit Edison, the Belle River Agreement is “akin” to cost-based facilities construction agreements filed in other proceedings in which the Commission concluded that no time value refunds were due because any refund would cause the utility to operate at a loss.⁸

II. Notice of Filing and Responsive Pleadings

7. Notice of the November 9 Filing was published in the *Federal Register*, 77 Fed. Reg. 70427 (2012), with interventions and protests due on or before November 30, 2012. On November 30, 2012, MPPA filed a motion to intervene and protest and ITC filed a motion to intervene and limited protest. On December 14, 2012, Detroit Edison filed an answer to the protests, and on December 21, 2012, MPPA filed an answer to Detroit Edison’s answer.⁹

8. In its protest, MPPA argues that Detroit Edison has not demonstrated that costs incurred to provide service under the Belle River Agreement are variable costs that Detroit Edison would not have incurred but for service to MPPA. In fact, according to MPPA, the costs Detroit Edison identified in its refund report are system costs that Detroit Edison would have incurred without service to MPPA, and that such costs do not vary as a function of the service to MPPA.¹⁰ MPPA asks the Commission to order Detroit Edison to submit a compliance filing consistent with the Commission’s holding in the *ITC Belle River Order* showing the calculation of the total time value of the money it collected from MPPA from the inception of the Belle River Agreement until December 31, 2000, when Detroit Edison transferred the Belle River Agreement to ITC. MPPA also asks the Commission to order Detroit Edison to make available to MPPA

⁷ *Id.* n.23, citing delegated letter orders accepting compliance filings by Florida Power & Light Company (FP&L) in various proceedings in which FP&L made late filings of generator interconnection construction agreements.

⁸ *Id.* at 7.

⁹ ITC’s limited protest and Detroit Edison’s answer, to the extent that it relates to the issue raised in ITC’s limited protest, concern a dispute between those two parties as to which of them should be found responsible for any time value refunds that may be ordered on amounts collected from MPPA during the approximately two-year period between 2001 and 2003. That issue has been fully addressed in Docket No. ER12-2170-001 and, therefore, need not be further addressed in the instant proceeding. *See ITC Belle River Rehearing Order*, 152 FERC ¶ 61,043 at PP 22-23.

¹⁰ MPPA Protest at 2.

Attachments B-1 through B-5, for which Detroit Edison has claimed privileged treatment.¹¹

9. MPPA disputes Detroit Edison's argument that this proceeding is "akin" to proceedings in which the Commission determined that a public utility would operate at a loss if it did not recover the costs under a facilities construction agreement. In those cases, MPPA notes that the public utilities undertook construction of facilities at the specific request of their customers and would not have constructed those facilities but for their customers' requests.¹² In this case, in contrast, Detroit Edison did not build the Belle River generating station or the Designated Transmission Lines at MPPA's request; rather, MPPA simply acquired an interest in facilities that Detroit Edison had already constructed.¹³

10. MPPA also points out that, contrary to the Commission's requirements, Detroit Edison did not calculate the time value of the money that MPPA paid pursuant to the Belle River Agreement and, therefore, cannot show that making time-value refunds will cause it to operate at a loss. Accordingly, MPPA argues that the Commission should order Detroit Edison to make a compliance filing with the correct time value refund calculation.¹⁴

11. Finally, MPPA disputes Detroit Edison's claim that the invoices included as Attachments B-1 through B-5 contain sensitive commercial information, given how old they are. In addition, MPPA argues that it is "ludicrous" for Detroit Edison to contend that MPPA cannot have access to invoices that Detroit Edison sent to MPPA as the counterparty under the Belle River Agreement.¹⁵

12. In its answer, Detroit Edison challenges MPPA's assertion that Detroit Edison has not demonstrated that it would operate at a loss if required to make time value refunds with respect to amounts collected from MPPA through the end of 2000. In this regard, Detroit Edison asserts that the costs allocated to MPPA under the Belle River Agreement were not recoverable from any other source. According to Detroit Edison, the parties

¹¹ *Id.* at 3, 5.

¹² *Id.* at 9, citing *Southern California Edison Co.*, 98 FERC ¶ 61,304, at 62,300-01 (2002) (*Southern California*), and *Florida Power & Light Co.*, 98 FERC ¶ 61,276, at 62,144 (2002) (*Florida Power*).

¹³ *Id.* at 10.

¹⁴ *Id.* at 10-11.

¹⁵ *Id.* at 11.

memorialized their understanding in the Belle River Agreement that costs related to MPPA's ownership share of the Designated Transmission Lines would be allocated to MPPA and would therefore not be allocated to Detroit Edison's customers so as to avoid double recovery. Thus, if the Commission were to require Detroit Edison to make time value refunds, Detroit Edison alone would ultimately bear the costs incurred with respect to MPPA's ownership share of the Designated Transmission Lines to the extent of the refund amount. Detroit Edison would thus operate at a loss contrary to Commission policy.¹⁶ According to Detroit Edison, this would only result in MPPA's unjust enrichment, because MPPA would receive all the benefits of ownership of the Designated Transmission Lines without the agreed-upon cost responsibility.¹⁷

13. Detroit Edison explains that its request for privileged treatment of Attachments B-1 through B-5 was intended only to protect from public disclosure sensitive information contained in those invoices regarding the charges associated with the Belle River Agreement and the Participation Agreement that provided the terms and conditions of MPPA's purchase of an ownership interest in Detroit Edison's Belle River generating facility, as well as for certain back-up power sales from Detroit Edison to MPPA. Detroit Edison also asserts that, upon receipt of MPPA's protest, Detroit Edison contacted MPPA's counsel to coordinate sharing of the privileged material subject to the Commission's model protective order. Detroit Edison states that it will provide MPPA with the requested material promptly either upon receipt of an executed protective order signature page or upon MPPA's affirmative request that Detroit Edison no longer maintain the confidentiality of the invoices. Accordingly, Detroit Edison argues that there is no need for the Commission to order Detroit Edison to make available to MPPA the privileged material.¹⁸

14. In its answer, MPPA reiterates the main points made in its protest, including its assertions that Detroit Edison's costs under the Belle River Agreement are system-wide costs that are not attributable to a customer, and that Detroit Edison did not construct the Designated Transmission Lines at the request of any customer and cannot trace any of its costs of owning and operating the facilities to a specific customer. Further, MPPA reiterates its claim that Detroit Edison would bear the costs allocated to MPPA even if

¹⁶ Detroit Edison Answer at 5, citing *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,357 (1999) (*Carolina Power*).

¹⁷ *Id.*

¹⁸ *Id.* at 6-7.

MPPA did not receive service from Detroit Edison. Therefore, MPPA concludes, the costs are not the same types of costs that were involved in *Florida Power*.¹⁹

III. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), MPPA's and ITC's timely, unopposed motions to intervene serve to make MPPA and ITC parties to this proceeding.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We accept the answers filed by Detroit Edison and MPPA because they have provided information that assisted us in our decision-making process.²⁰

B. Substantive Matters

17. The issues raised by Detroit Edison's filing in this proceeding and the issues raised by ITC's compliance filing in Docket No. ER12-2170-000 are the same. The only difference is that Detroit Edison's refund report covers collections from MPPA through the end of 2000, while ITC's revised refund report in Docket No. ER12-2170-000 covers collections from MPPA beginning in 2001, when ITC assumed Detroit Edison's obligations under the Belle River Agreement. In all other respects, the types of costs billed to and recovered from MPPA by Detroit Edison and ITC are the same. And, MPPA does not dispute Detroit Edison's claim that the amounts billed to MPPA included no profit or return.

18. In the *ITC Belle River Rehearing Order*, the Commission reviewed its time value refund policy as applied in cases involving collections under late-filed agreements (particularly generator interconnection agreements) between a utility and a customer for the construction, ownership and operation of transmission facilities to serve the requirements of a single customer. Citing *Florida Power* and *Southern California*, among other cases, the Commission noted that it has not required late-filing utilities to refund the time value of amounts collected under such agreements, whether characterized

¹⁹ MPPA Answer at 3.

²⁰ However, as previously noted (*see supra* note 9), ITC's limited protest and Detroit Edison's answer, to the extent it relates to the issue raised by ITC, has already been fully addressed in the *ITC Belle River Rehearing Order*.

as fixed or variable, if the amounts represent reimbursements of actual costs, including properly allocated costs, with no profit component, associated with transmission facilities to serve a single customer. Finding, in this respect, that the Belle River Agreement was “analogous” to the interconnection/construction agreements involved in those cases, the Commission determined that the “floor” for purposes of determining ITC’s liability for time value refunds under the Belle River Agreement was not the variable cost “floor” articulated in *Carolina Power*, which is more appropriately applicable to power sales. Rather, the Commission agreed that the floor for purposes of determining time value refunds included ITC’s costs, without any profit or return, including allocated system O&M and administrative and general costs, in providing service under the agreement.²¹ There is no basis for reaching a different conclusion here since the types of costs billed by Detroit Edison and recovered from MPPA are identical to those billed by ITC and collected from MPPA.

19. As noted above, Detroit Edison’s refund report did not account for all charges to MPPA during the period after 1982 through the end of 2000, due to destruction of invoices for a part of that period in accordance with Detroit Edison’s document retention policy. Moreover, as MPPA points out, Detroit Edison did not calculate the time value of payments received from MPPA through the end of 2000. However, having concluded in the *ITC Belle River Rehearing Order* that time value refunds are not required with respect to payments received from MPPA, there is no reason to direct Detroit Edison to make a compliance filing to correct those omissions. Rather, we direct Detroit Edison to refund the uncredited \$5,000 overpayment it has identified, together with interest thereon calculated in accordance with section 35.19a of the Commission’s regulations (18 C.F.R. § 35.19a), within 30 days of the date of this order and to submit confirmation to the Commission that the refund and time value payment has been made within 45 days of the date of this order.

20. Detroit Edison has committed to provide MPPA with copies of Attachments B-1 through B-5 upon receipt of either an executed protective order signature page or upon MPPA’s affirmative request that Detroit Edison no longer maintain the confidentiality of the invoices. To the extent it has not yet done so, we expect Detroit Edison to honor that commitment.

21. Accordingly, we accept Detroit Edison’s refund report and, with the exception of Detroit Edison’s obligation as to the \$5,000 overpayment, together with interest, we find that no other time value refunds are warranted here.

²¹ *ITC Belle River Rehearing Order*, 152 FERC ¶ 61,043 at PP 29, 37.

The Commission orders:

(A) Detroit Edison's November 9, 2012 refund report is hereby accepted, as discussed in the body of this order.

(B) Detroit Edison is directed to refund the uncredited \$5,000 overpayment it has identified, together with interest thereon calculated in accordance with section 35.19a of the Commission's regulations (18 C.F.R. § 35.19a), within 30 days of the date of this order and to submit confirmation to the Commission that the refund and time value payment has been made within 45 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.