

153 FERC ¶ 61,080  
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.

Wisconsin Electric Power Company

Docket Nos. ER15-2510-000  
ER15-2511-000

ORDER ACCEPTING JURISDICTIONAL AGREEMENTS AND ORDERING  
REFUNDS

(Issued October 23, 2015)

1. On August 24, 2015, pursuant to section 205 of the Federal Power Act (FPA)<sup>1</sup> and section 35.13(a) of the Commission's regulations,<sup>2</sup> Wisconsin Electric Power Company (Wisconsin Electric) filed (1) in Docket No. ER15-2510-000 a Common Facilities Agreement between Wisconsin Electric and the American Transmission Company LLC (ATC)<sup>3</sup> and (2) in Docket No. ER15-2511-000 a Project Services Agreement between

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<sup>1</sup> 16 U.S.C. § 824d (2012).

<sup>2</sup> 18 C.F.R. § 35.13(a)(2) (2015).

<sup>3</sup> Wisconsin Electric notes that the Common Facilities Agreement was previously filed by the Midcontinent Independent System Operator, Inc. (MISO) on behalf of ATC in Docket No. ER15-1542-000. On June 1, 2015, in a delegated letter order, the Commission accepted the Common Facilities Agreement for filing effective June 21, 2015. The June 1, 2015 delegated letter order noted that ATC had acknowledged that the Common Facilities Agreement was not filed with the Commission before service commenced as required by the Commission's policy. Therefore, the June 1, 2015 delegated letter order required that ATC make time-value refunds and file a refund report demonstrating ATC's actual out-of-pocket costs incurred to provide service under the agreement or demonstrate that the time-value refunds would result in a loss to ATC. On June 9, 2015, ATC filed a refund report, asserting that, based on the balance of the payment made pursuant to the Common Facilities Agreement, no time-value refunds are owed.

Wisconsin Electric and ATC (collectively, the Agreements).<sup>4</sup> Wisconsin Electric asserts that it believes the Agreements are non-jurisdictional as to Wisconsin Electric, but that it is filing them out of an abundance of caution. In this order, we find that the Agreements are subject to the Commission's jurisdiction, and we accept them effective October 24, 2015.<sup>5</sup> In addition, the Commission directs Wisconsin Electric to refund the time-value of revenues collected under the Agreements and file a refund report with the Commission as discussed below.

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<sup>4</sup> Wisconsin Electric notes that the Project Services Agreement was previously filed by MISO on ATC's behalf in Docket No. ER15-981-000. On March 24, 2015, in a delegated letter order, the Commission accepted the Project Services Agreement for filing effective April 6, 2015. The March 24, 2015 delegated letter order noted that ATC had acknowledged that the Project Services Agreement was not filed with the Commission before service commenced as required by the Commission's policy. Therefore, the March 24, 2015 delegated letter order required that ATC make time-value refunds and file a refund report demonstrating ATC's actual out-of-pocket costs incurred to provide service under the agreement or demonstrate that the time-value refunds would result in a loss to ATC. On April 24, 2015, ATC filed a refund report and sought waiver of the requirement to pay time-value refunds to Wisconsin Electric. ATC explained that if ATC were required to render time-value refunds to Wisconsin Electric, ATC would have received less from Wisconsin Electric than its costs in providing the service, resulting in a loss to ATC in performing the work.

<sup>5</sup> Should the Commission not disavow jurisdiction over the Agreements, Wisconsin Electric has requested that they be accepted with an October 23, 2015 effective date. However, the 60-day notice period required by section 205(d) of the FPA and section 35.3 of the Commission's regulations, 18 C.F.R. § 35.3 (2015), starts to run on the first day after the date of filing. Thus, absent a request for waiver of the Commission's notice requirements, the earliest date a filing may become effective is the day after the 60-day notice period has expired. Thus, since Wisconsin Electric made its filings in this proceeding on August 24, 2015, the 60th day of the notice period is October 23, 2015, and the earliest permissible effective date, without suspension, is October 24, 2015, rather than October 23, 2015, as proposed by Wisconsin Electric. *See Utah Power & Light Co.*, 30 FERC ¶ 61,015, at 61,024 n.9 (1985).

## **I. Description of the Filings**

### **A. The Common Facilities Agreement**

2. Wisconsin Electric states that the Common Facilities Agreement governs the relationship between Wisconsin Electric and ATC with respect to jointly owned and used substations.<sup>6</sup> Wisconsin Electric explains that the Common Facilities Agreement describes the allocation of cost responsibility for operation and maintenance (O&M) of the Common Facilities at a Joint Use Substation and provides a method for either Wisconsin Electric or ATC to request or perform improvements or replacements of the Common Facilities.<sup>7</sup> Wisconsin Electric states that under the Common Facilities Agreement, ATC performs certain work on Transmission Facilities<sup>8</sup> or other assets, and in turn receives payment from Wisconsin Electric for such work. Wisconsin Electric states that conversely, it performs work on Distribution Facilities<sup>9</sup> and related assets, and in turn receives payment from ATC.

3. Wisconsin Electric asserts that should the Commission not disavow jurisdiction over the Common Facilities Agreement,<sup>10</sup> the rates under the Common Facilities

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<sup>6</sup> Wisconsin Electric Docket No. ER15-2510-000 Filing at 2.

<sup>7</sup> Under Section 1.2.2 of the Common Facilities Agreement, “‘Common Facilities’ are those facilities at a Joint Use Substation that are used and useful to both Parties. Common Facilities include, but are not limited to batteries, structures that house equipment, ground grids, fences, gravel areas, parking areas, landscaping, access roads, yard lighting, shielding, and screening. Common Facilities do not include land, land rights, Assignable Facilities, or those Common Facilities deemed to be of De minimis Use by the parties to [the Common Facilities Agreement].”

<sup>8</sup> Under Section 1.2.14 of the Common Facilities Agreement, “‘Transmission Facilities’ shall mean those Assignable Facilities owned by [ATC] and used by it for (i) the transmission of electric energy at voltages that are 50 kV and higher or (ii) the transmission of electricity regardless of the nominal voltage at which such facility is designed to operate or does operate, if the facilities are designated by the [Wisconsin Commission] as [T]ransmission [F]acilities.”

<sup>9</sup> Under Section 1.2.6 of the Common Facilities Agreement, “‘Distribution Facilities’ shall mean those Assignable Facilities owned by Distribution Utility that are used for the distribution of electricity at nominal voltages that are lower than 50 kV.”

<sup>10</sup> Wisconsin Electric’s request that the Commission disavow jurisdiction over the Agreements is discussed more fully below.

Agreement are just and reasonable and should be accepted by the Commission.<sup>11</sup> Wisconsin Electric explains that the rates are dependent on the service being performed and the entity that requires the service.

4. Wisconsin Electric explains that Sections 5.2 and 5.3 of the Common Facilities Agreement describe the responsibility of the parties for the capital costs to be incurred in connection with expansions, improvements or replacements to the Common Facilities.<sup>12</sup> Wisconsin Electric notes that pursuant to Section 5.2 (Common Facilities Expansions, Improvements, or Replacements Initiated by the Common Facilities Owner<sup>13</sup>) each “Joint Use Substation Tenant<sup>14</sup> shall pay its Joint Use Substation Tenant Allocable Share of the Common Facilities Owner’s Costs of the improvement or replacement to the Common Facilities Owner.” Wisconsin Electric explains that in Section 5.2, if the owner of the Common Facilities determines that a modification or addition is required, then the Common Facilities Owner shall complete and own that modification. Wisconsin Electric notes that each Joint Use Substation Tenant shall pay its Joint Use Substation Tenant Allocable Share of the Common Facilities Owner’s costs of the modification to the Common Facilities Owner.

5. Wisconsin Electric states that Section 5.3 of the Common Facilities Agreement addresses the situation in which changes are required by the Joint Use Substation Tenant to the Common Facilities.<sup>15</sup> Wisconsin Electric explains that under the Common Facilities Agreement, in the event the Joint Use Substation Tenant requires modifications or additions to the Common Facilities, then the Joint Use Substation Tenant will pay the entire amount of such capital costs, and the Common Facilities Owner will construct such

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<sup>11</sup> Wisconsin Electric Docket No. ER15-2510-000 Filing at 3.

<sup>12</sup> *Id.*

<sup>13</sup> Under Section 1.2.3 of the Common Facilities Agreement, “‘Common Facilities Owner’ means . . . the Party that owns the greater value (based on original installed cost) of Assignable Facilities at the Joint Use Substation as of the date Distribution Utility transferred its Transmission Facilities to [ATC], or the date the substation became a Joint Use Substation (whether by designation or completion of construction), whichever date is later.’”

<sup>14</sup> Under Section 1.2.9 of the Common Facilities Agreement, “‘Joint Use Substation Tenant’ means an entity who is not the Common Facilities Owner. There may be more than one Joint Use Substation Tenant associated with a Joint Use Substation.’”

<sup>15</sup> *Id.* at 4.

modifications or additions and will attribute an amount of zero on its books and records. Wisconsin Electric states that this is consistent with cost causation principles: the responsibility for incurring the capital costs for modifications or additions to the Common Facilities is borne by the entity that needed such change.

6. Wisconsin Electric states that under the Common Facilities Agreement, the Common Facilities Owner performs “all operation and maintenance of the Common Facilities as required by and in accordance with Good Utility Practice and any applicable mandatory reliability standards.”<sup>16</sup> Wisconsin Electric explains at the end of each year, the Common Facilities Owner calculates and bills each Joint Use Substation Tenant “the Joint Use Substation Tenant’s Allocable Share of the Common Facilities Owner’s Costs of operating and maintaining Common Facilities.”<sup>17</sup>

7. Wisconsin Electric requests that, should the Commission decline to disavow jurisdiction, the Commission find that the mutually agreed upon proportioning of the operating and maintenance costs is just and reasonable.<sup>18</sup> Wisconsin Electric notes that the Common Facilities Agreement cost allocation was approved by the Public Service Commission of Wisconsin (Wisconsin Commission).<sup>19</sup>

#### **B. The Project Services Agreement**

8. Wisconsin Electric states that under the Project Services Agreement, ATC performs certain activities including relocation or replacement of transmission facilities, or the expansion, improvement and replacement of Common Facilities owned at a Joint Use Substation.<sup>20</sup> Wisconsin explains that, additionally, the Project Services Agreement allows ATC and Wisconsin Electric to perform engineering and construction services for one another. Wisconsin Electric notes that these projects must have a value of \$4 million

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<sup>16</sup> *Id.* (quoting Common Facilities Agreement § 4.2).

<sup>17</sup> *Id.* (quoting Common Facilities Agreement § 4.2).

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.*

<sup>20</sup> Wisconsin Electric Docket No. ER15-2511-000 Filing at 2. Given that the Common Facilities Agreement and Project Services Agreement reference one another and that the Project Services Agreement does not define “Common Facilities,” we presume that the definition of “Common Facilities” in the Project Services Agreement is identical to that in the Common Facilities Agreement.

or less.<sup>21</sup> Wisconsin Electric states that pursuant to the Project Services Agreement, ATC pays for services by Wisconsin Electric and receives compensation from Wisconsin Electric for the services it provides in connection with ATC's work on transmission facilities.

9. Wisconsin Electric states that all work done under the Project Services Agreement is done at cost.<sup>22</sup> Wisconsin Electric explains that pursuant to Section 1.2.1 of the Project Services Agreement, Wisconsin Electric's costs shall be calculated using the rates and charges set forth on Schedule 1, Section A or Section B, of the Project Services Agreement. Wisconsin Electric explains that the rates and charges set forth on Schedule 1, Section A, apply to those instances when Wisconsin Electric is performing work on Distribution Facilities or other assets it owns, such as Common Facilities for which ATC is responsible to make payment to Wisconsin Electric, and the rates and charges set forth on Schedule 1, Section B, apply in those instances in which Wisconsin Electric performs work on Transmission Facilities or other assets owned by ATC, such as Common Facilities, for which ATC is responsible to make payment to Wisconsin Electric.<sup>23</sup> Wisconsin Electric states that ATC's costs under the Project Services Agreement shall be determined using the rates and charges set forth on Schedule 2, Section A or Section B.<sup>24</sup>

## **II. Request to Disavow Jurisdiction**

10. Wisconsin Electric requests that the Commission disavow jurisdiction with respect to the distribution facilities owned by Wisconsin Electric that are subsumed within the "[J]oint [U]se [Substation]" contemplated under the Common Facilities Agreement and

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<sup>21</sup> Wisconsin Electric explains that Section 4.1 of the Project Services Agreement states that any one request for service must be less than the amount determined in accordance with Wisconsin Administrative Code §112.05(3) to be the threshold for seeking authority from the Wisconsin Commission. Wisconsin Electric notes that in an order in Docket No. 5-AE-153 issued on September 1, 2009, the Wisconsin Commission clarified that "the stand-alone affiliated interest threshold is reduced from \$7.9 million to \$4 million." Wisconsin Electric explains that this level was continued by the order issued in the same docket on May 24, 2013. *Id.* at 2 n.4.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> The definitions of Transmission Facilities and Distribution Facilities under the Project Services Agreement are identical to those under the Common Facilities Agreement.

<sup>24</sup> Wisconsin Electric Docket No. ER15-2511-000 Filing at 3.

the Project Services Agreement. Wisconsin Electric states that because its ownership is of distribution facilities, and given the nature of the Common Facilities Agreement and the Project Services Agreement, Wisconsin Electric believes that the Common Facilities Agreement and Project Services Agreement are not subject to the Commission's jurisdiction for ratemaking purposes.<sup>25</sup> Wisconsin states that it has submitted the Common Facilities Agreement and the Project Services Agreement in an abundance of caution.

11. Alternatively, Wisconsin Electric requests acceptance of the Common Facilities Agreement and the Project Services Agreement effective October 23, 2015, 60 days after the date of its filing of these agreements

### **III. Notice of Filing and Responsive Pleadings**

12. Notice of Wisconsin Electric's filings in Docket Nos. ER15-2510-000 and ER15-2511-000 was published in the *Federal Register*, 80 Fed. Reg. 52,269 (2015), with interventions or protests due on or before September 24, 2015. ATC filed timely motions to intervene in both dockets.

### **IV. Discussion**

#### **A. Procedural Matters**

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), ATC's timely unopposed motions to intervene serve to make it a party to these proceedings.

#### **B. Substantive Matters**

14. We find that the Agreements are jurisdictional and accept them effective October 24, 2015, and order time-value refunds, as discussed more fully below.

15. In the Prior Notice Order, the Commission provided a brief analysis of the jurisdictional status of various types of agreements.<sup>26</sup> Because we view the Common Facilities Agreement and the Project Services Agreement as O&M agreements, we apply here the Prior Notice Order's jurisdictional test for O&M agreements. The Commission

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<sup>25</sup> Wisconsin Electric Docket No. ER15-2510-000 Filing at 1; Wisconsin Electric Docket No. ER15-2511-000 Filing at 1-2.

<sup>26</sup> *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081 (1993) (Prior Notice Order).

stated in the Prior Notice Order that two related inquiries must be answered in the affirmative to determine that the Commission has jurisdiction over an O&M agreement: (1) Does the agreement contain rates or charges for or in connection with transmission or sales for resale in interstate commerce, or does it in any manner affect or relate to jurisdictional rates or services?; and (2) Does a public utility provide the O&M service?<sup>27</sup> The Commission explained that the answer to the second question turns on who “owns” or “operates” a facility and that defining an “operator” depends on which entity has control and decision-making authority over major matters. The Commission stated “[i]f the entity performing the O&M service under the agreement acts merely as the agent of another party wielding authority to make main operational decisions, then it is not ‘operating’ the facility.”<sup>28</sup> The Commission added that where a utility’s discretion was limited only by a “prudent utility practice” standard, the Commission has held that that utility is an “operator” but, in contrast, where an entity has to have permission for all O&M actions beyond those that are routine or emergency in nature, the Commission has held that that entity is not the “operator” of the facility but rather is an agent of another party wielding authority to make main operational decisions.<sup>29</sup>

16. In this proceeding, we find that the Common Facilities Agreement and the Project Services Agreement satisfy both prongs of the Prior Notice Order test and therefore are jurisdictional and must be filed with the Commission. As to the first prong, we find that the Agreements contain rates and charges that affect or relate to jurisdictional rates or services. For example, under both the Common Facilities Agreement and the Project Services Agreement, Wisconsin Electric charges ATC for, *inter alia*, Wisconsin Electric’s work on ATC’s Transmission Facilities and on the Common Facilities,<sup>30</sup> which ATC uses to provide jurisdictional transmission service to customers. Specifically, Section 1.2.1 of the Project Services Agreement and Section 1.2.4 of the Common Facilities Agreement provide that, “The rates and charges set forth on Schedule 1, Section B, shall apply in those instances in which Distribution Utility [Wisconsin Electric] is performing work on the Transmission Facilities or other assets owned by

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<sup>27</sup> *Id.* at 61,993.

<sup>28</sup> *Id.* at 61,993-94.

<sup>29</sup> *Id.*

<sup>30</sup> Schedule 3 of the Common Facilities Agreement lists, *inter alia*, those Joint Use Substations for which Wisconsin Electric is the Common Facilities Owner. As the Common Facilities Owner, Wisconsin Electric provides all O&M of the Common Facilities at these Joint Use Substations “in accordance with Good Utility Practice and any applicable mandatory reliability standards.” Common Facilities Agreement § 4.2.

[ATC], such as Common Facilities, for which [ATC] is responsible to make payment to Distribution Utility [Wisconsin Electric].”

17. We also find that the Common Facilities Agreement and the Project Services Agreement satisfy the second prong of the Prior Notice Order test. Schedule 3 of the Common Facilities Agreement lists, *inter alia*, those Joint Use Substations for which Wisconsin Electric is the Common Facilities Owner. Under Section 4.2 of the Common Facilities Agreement, as the Common Facilities Owner, Wisconsin Electric provides all O&M of the Common Facilities at these Joint Use Substations “in accordance with Good Utility Practice and any applicable mandatory reliability standards.” Similarly, Section 4 of the Project Services Agreement provides Wisconsin Electric with discretion over requests for services over which the Commission has jurisdiction. Specifically, Section 4.3 provides that when ATC requests that Wisconsin Electric perform work on a Joint Use Substation, Wisconsin Electric may deny the request. Similar to the Commission’s previous decisions regarding substation service agreements and facility agreements,<sup>31</sup> we find that Wisconsin Electric exercises a considerable amount of control and decision-making authority under the Common Facilities Agreement and the Project Services Agreement.<sup>32</sup> Accordingly, we find that Wisconsin Electric is the operator of these facilities.<sup>33</sup> In addition, we also find that the Common Facilities Agreement and the Project Services Agreement satisfy the second prong of the Prior Notice Order test due to Wisconsin Electric’s status as owner of the Common Facilities at certain Joint Use Substations.

18. Last, because the Common Facilities Agreement and the Project Services Agreement were not filed with the Commission before service commenced as required by the Commission’s policy,<sup>34</sup> Wisconsin Electric must provide ATC with time-value refunds of any revenue it has received under the late-filed Common Facilities Agreement

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<sup>31</sup> See, e.g., *Niagara Mohawk Power Corporation*, 124 FERC ¶ 61,021, at P 38 (2008).

<sup>32</sup> See Prior Notice Order, 64 FERC ¶ 61,139 at 61,993-94.

<sup>33</sup> It is undisputed that Wisconsin Electric is a public utility.

<sup>34</sup> *Central Hudson Gas & Electric Company*, 60 FERC ¶ 61,106, *reh’g denied*, 61 FERC ¶ 61,089 (1992). It also appears that contrary to the requirements of section 35.3 of the Commission’s regulations, 18 C.F.R. § 35.3 (2015), Wisconsin Electric failed to timely file the Common Facilities Agreement and the Project Services Agreement. Wisconsin Electric is reminded that it must submit required filings on a timely basis or face possible sanctions by the Commission.

and Project Services Agreement for any jurisdictional services it provided under these agreements.<sup>35</sup> However, Commission precedent provides that the operation of this time-value refund policy does not require the utility to operate at a loss.<sup>36</sup> Accordingly, Wisconsin Electric must make time-value refunds within 30 days of the date of this order and within 30 days thereafter file a refund report demonstrating Wisconsin Electric's actual out-of-pocket costs (e.g., O&M expense and construction costs) that were incurred to provide jurisdictional service under the Common Facilities Agreement and under the Project Services Agreement or demonstrate that the time-value refunds would result in a loss to Wisconsin Electric.

The Commission orders:

(A) The Common Facilities Agreement and Project Services Agreement are jurisdictional and are accepted for filing, effective October 24, 2015, as discussed in the body of this order.

(B) Wisconsin Electric is directed to make time-value refunds within 30 days of the date of this order and file a refund report within 30 days thereafter, or demonstrate that the refunds would result in a loss to Wisconsin Electric, 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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<sup>35</sup> Prior Notice Order, 64 FERC ¶ 61,139 at 61,979. This revenue would appear to include that collected by Wisconsin Electric from ATC under Section 1.2.1 of the Project Services Agreement and Section 1.2.4 of the Common Facilities Agreement and set forth on Schedule 1, Section B of those Agreements.

<sup>36</sup> See *Carolina Power & Light Company*, 87 FERC ¶ 61,083 (1999); *Southern California Edison Co.*, 98 FERC ¶ 61,304 (2002); *Florida Power & Light Co.*, 98 FERC ¶ 61,276 (2002); *International Transmission Co.*, 152 FERC ¶ 61,043 (2015).