

153 FERC ¶ 61,165
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ITC Midwest LLC

Docket No. ER11-4298-000

ORDER ACCEPTING COMPLIANCE FILING

(Issued November 12, 2015)

1. On November 1, 2011, in compliance with a Commission directive,¹ ITC Midwest LLC (ITC Midwest) filed a refund report² regarding payments that ITC Midwest received from Southern Minnesota Municipal Power Agency (Southern Minnesota) pursuant to a late-filed Operations and Maintenance Agreement (O&M Agreement). As discussed below, we accept ITC Midwest's Compliance Filing.

I. Background

2. ITC Midwest was founded in 2007 when Interstate Power and Light Company (IPL) sold its transmission assets to ITC Midwest, then a newly-formed subsidiary of ITC Holdings Corp (ITC Holdings). ITC Midwest stated that it and the other operating company subsidiaries of ITC Holdings have undertaken a comprehensive review of all of their contracts to ensure compliance with the Commission's prior notice requirements under section 205 of the Federal Power Act (FPA).³ ITC Midwest stated that, as a result of this review, it had identified agreements that should have been, but are not, on file with the Commission or that should have been, but were not, identified as ITC Midwest rate schedules. In order to fully comply with the Commission's requirements, ITC Midwest began filing these agreements. The O&M Agreement, which Southern Minnesota and

¹ *ITC Midwest LLC*, Docket No. ER11-4298-000, at 2 (Sept. 29, 2011) (delegated letter order) (September 2011 Letter).

² *ITC Midwest, Compliance Filing*, Docket No. ER11-4298-000 (filed Nov. 1, 2011) (Compliance Filing).

³ 16 U.S.C. § 824d (2012).

one of IPL's predecessor companies entered into on June 21, 1993, is one such agreement.⁴

3. On August 12, 2011, pursuant to section 205 of the FPA⁵ and Part 35 of the Commission's Regulations,⁶ ITC Midwest filed the O&M Agreement with the Commission. Under the O&M Agreement, ITC Midwest operates and maintains transmission facilities, including transmission lines and substations, owned by Southern Minnesota. ITC Midwest acknowledged that the O&M Agreement was not filed with the Commission before service commenced and that, consistent with Commission precedent, a utility must provide its customers with time-value refunds of any monies it has received under the late-filed agreement.⁷ ITC Midwest claimed, however, that it charged the actual costs to operate and maintain Southern Minnesota's transmission facilities, without any mark-up, and that it would be operating at a loss if the Commission required it to make time-value refunds of revenues received. Under such circumstances, ITC Midwest observed, Commission precedent provides that the operation of this time-value policy does not require the utility to operate at a loss. ITC Midwest requested an effective date of October 12, 2011 for the O&M Agreement.⁸

4. The Commission accepted the O&M Agreement effective October 12, 2011 as requested, and, although it agreed with ITC Midwest's interpretation of the precedent, the Commission stated that ITC Midwest had failed to provide a refund report supporting its claim that it would operate at a loss if required to make time-value refunds. Accordingly, the Commission directed ITC Midwest to either make time-value refunds within 30 days and file a refund report with the Commission within 30 days thereafter, or demonstrate that the time-value refunds would result in a loss to ITC Midwest.⁹

⁴ ITC Midwest, Transmittal Letter at 1-2, 5 (filed Aug. 12, 2011).

⁵ 16 U.S.C. § 824d (2012).

⁶ 18 C.F.R. Part 35 (2015).

⁷ ITC Midwest, Transmittal Letter at 5 (filed Aug. 12, 2011) (citing *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,979, *clarified*, 65 FERC ¶ 61,081 (1993)).

⁸ *Id.* at 2, 5-6 (citing *Southern California Edison Co.*, 98 FERC ¶ 61,304 (2002); *Florida Power & Light Co.*, 98 FERC ¶ 61,276, *reh'g denied*, 99 FERC ¶ 61,320 (2002)).

⁹ September 2011 Letter at 2.

5. Consistent with the September 2011 Letter, ITC Midwest filed its refund report on November 1, 2011. In the refund report, ITC Midwest explains that under the O&M Agreement, Southern Minnesota pays ITC Midwest two categories of charges: a flat rate for performance of the Base Services, and the actual cost for performance of the Extra Services. With respect to the payments for Base Services, these payments are credited against certain O&M costs that are included in the calculation of ITC Midwest's revenue requirement under Attachment O. Thus, ITC Midwest argues, it is not only out its costs in performing the Base Services, but it also foregoes other revenue under Attachment O in an amount equal to Southern Minnesota's fixed payment. ITC Midwest further asserts that it is already providing Base Services to Southern Minnesota at a loss because the foregone revenue stream equals Southern Minnesota's fixed payments, so any additional costs in providing the Base Services places the company "in the red." According to ITC Midwest, if it is required to make time-value refunds since 2009¹⁰ of \$5,053.43 to Southern Minnesota, this will mean it has provided Southern Minnesota with Base Services at an even further loss. Accordingly, ITC Midwest requests a waiver of the Commission's time-value refund policy with regard to the payments for Base Services that ITC Midwest has received, to ensure that the company has not operated at a loss.¹¹

6. Under the O&M Agreement, ITC Midwest observes Extra Services include specific services for Southern Minnesota's transmission lines, substation, and substation equipment,¹² and the O&M Agreement also indicates the specific types of costs associated with such Extra Services that may be recovered.¹³ According to ITC Midwest,

¹⁰ ITC Midwest notes that IPL assigned the O&M Agreement to ITC Midwest as part of ITC Midwest's acquisition of IPL's transmission system, but IPL did not effectuate assignment of the O&M Agreement until late 2008. ITC Midwest states that, therefore, it did not begin charging Southern Minnesota for Base Services until 2009. Compliance Filing at 2.

¹¹ Compliance Filing at 3-4.

¹² Extra Services include: Aerial patrol performed when requested by Southern Minnesota; emergency land and aerial patrols; spot herbicide applications; repair, maintenance, and adjustment of the transmission lines; right-of-way clearing and management; herbicide application to the yard; lawn mowing; any repair, maintenance, or adjustment not identified as Preventative Maintenance (i.e. repairs other than those identified as Base Services); and other services that Southern Minnesota may request in writing. Compliance Filing at 4 (citing O&M Agreement at Sections I.A and I.B).

¹³ Costs and expenses associated with Extra Services include: Employees' wages and salaries; employee travel and living expenses; replacement cost of materials and

(continued ...)

it has incurred \$1,268,000.04 in costs in performing various Extra Services through August 2011, and has passed these costs through to Southern Minnesota, without any additional return or mark-up. ITC Midwest states that the time-value of the payments it received from Southern Minnesota for Extra Services is \$62,542.60. If ITC Midwest is required to make time-value refunds to Southern Minnesota with respect to such amounts, ITC Midwest states that it will have received less from Southern Minnesota than its costs in providing the Extra Services, resulting in a loss to the utility under the O&M Agreement. Accordingly, ITC Midwest requests a waiver of the Commission's time-value refund policy with regard to revenues collected under the O&M Agreement prior to its filing, to ensure that the company has not operated at a loss.¹⁴

II. Notice of Filing and Responsive Pleadings

7. Notice of the Refund Report was published in the *Federal Register*, 76 Fed. Reg. 69,263 (2011), with interventions and protests due on or before November 22, 2011. None was filed.

III. Discussion

8. As discussed, under the O&M Agreement, Southern Minnesota receives two types of services: (1) Base Services for which it pays a monthly fixed charge for routine maintenance of certain transmission lines and substation equipment, and (2) Extra Services assessed at actual costs for non-routine maintenance matters. Our review of the O&M Agreement and the submitted Compliance Filing indicates that ITC Midwest received only O&M labor and materials costs for the services it provided without profit. In this regard, the Commission has recently clarified in *International Transmission Co.*,¹⁵ that, in cases involving late-filed agreements governing the construction, ownership, operation, and maintenance of transmission facilities to serve a specific customer, where the utility's costs of providing the service are passed through with no profit component,

supplies; repair or replacement cost of equipment damaged or lost; charges for use of transportation, construction, or other equipment required; an allocation of administrative and general costs; and any federal, state, or local tax or license fee imposed by reason of ITC Midwest's performance of the services covered by the O&M Agreement. Compliance Filing at 5 (citing O&M Agreement at Section VII.B).

¹⁴ Compliance Filing at 5-6.

¹⁵ See *International Transmission Co.*, 152 FERC ¶ 61,043, at PP 34-38 (2015). See also *CED Corcoran Solar, LLC and CED Corcoran Solar 2, LLC*, 152 FERC ¶ 61,075, at P 10 (2015).

the utility would necessarily operate at a loss, contrary to Commission policy, if required to make time-value refunds. The Commission further clarified that, for purposes of determining the “floor” for time-value refunds, costs are not limited to usage-based variable O&M costs, but also include other costs, whether fixed and variable.¹⁶ The O&M Agreement falls within this category of agreement. Thus, because ITC Midwest only recovers its costs of providing service to Southern Minnesota, as those costs are incurred, without any profit, ITC Midwest would operate at a loss if required to refund time-value of amounts collected prior to filing the O&M Agreement. Accordingly, we will accept ITC Midwest’s Compliance Filing and find that no time-value refunds are warranted here.

The Commission orders:

ITC Midwest’s Compliance Filing is hereby accepted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁶ *International Transmission Co.*, 152 FERC ¶ 61,043 at P 29.