

153 FERC ¶ 61,164
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission
System Operator, Inc. and
Michigan Electric Transmission Company, LLC

Docket No. ER11-4197-000

ORDER ACCEPTING COMPLIANCE FILING

(Issued November 12, 2015)

1. On November 3, 2011, in compliance with a Commission directive,¹ Midwest Independent Transmission System Operator, Inc. (MISO)² and Michigan Electric Transmission Company, LLC (Michigan Electric) filed a refund report³ regarding payment from Lowell Light and Power (Lowell) pursuant to a late-filed Interconnection Facilities Agreement (Interconnection Agreement). As discussed below, we accept Michigan Electric's Compliance Filing.

I. Background

2. Michigan Electric is a wholly-owned subsidiary of ITC Holdings Corp. (ITC Holdings) and a transmission-owning member of the Midcontinent Independent System

¹ *Michigan Electric Transmission Company, LLC*, Docket No. ER11-4197-000, at 2 (Sept. 26, 2011) (delegated letter order) (September 2011 Letter).

² Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

³ Michigan Electric, Docket No. ER11-4197-000 (filed Nov. 3, 2011) (Compliance Filing). The Compliance Filing explains that, as the Administrator of the MISO Tariff on file with the Commission, MISO joins in this filing but takes no position on the substance of this filing.

Operator, Inc. (MISO). In 2001, Consumers Energy Company transferred its transmission assets into a newly-formed, wholly-owned affiliate company, Michigan Electric Transmission Company. In 2002, Consumers Energy Company sold Michigan Electric Transmission Company to Trans-Elect Inc. (Trans-Elect). Trans-Elect then converted Michigan Electric Transmission Company, through a series of transactions, into the limited liability company known as Michigan Electric. ITC Holdings acquired Michigan Electric in 2006.⁴

3. Michigan Electric 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).⁵ Michigan Electric stated that, as a result of this review, it identified agreements that should have been, but are not, on file with the Commission or that should have been, but were not, identified as Michigan Electric rate schedules. In order to fully comply with the Commission's requirements, Michigan Electric began filing these agreements. The Interconnection Agreement is one such agreement.⁶

4. On August 3, 2011, pursuant to section 205 of the FPA and Part 35 of the Commission's regulations,⁷ Michigan Electric filed the Interconnection Agreement between Michigan Electric and Lowell, dated March 6, 2003, with the Commission. The Interconnection Agreement outlines the terms and conditions for construction and operation and maintenance of interconnection facilities connecting the Michigan Electric 138 kV transmission system and Lowell's substations located in Kent County, Michigan. Michigan Electric acknowledged that when a utility files a jurisdictional agreement with the Commission after service has commenced, the utility is required to refund the time-value of monies it has received under the agreement.⁸ Michigan Electric claimed, however, that it only charged the actual cost to construct the facilities, and only receives reimbursement of its direct and indirect costs associated with its operation and

⁴ Michigan Electric, Docket No. ER11-4197-000, Transmittal Letter at 1-2 (filed Aug. 3, 2011).

⁵ 16 U.S.C. § 824d (2012).

⁶ Michigan Electric, Transmittal Letter at 2 (filed Aug. 3, 2011).

⁷ 18 C.F.R. pt. 35 (2015).

⁸ Michigan Electric, Transmittal Letter at 6 (filed Aug. 3, 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) (*Prior Notice Order*)).

maintenance obligations under the Interconnection Agreement, 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. As Michigan Electric noted, however, Commission precedent provides that the operation of this time-value policy does not require the utility to operate at a loss.⁹ Accordingly, Michigan Electric requested waiver of the Commission's requirement to issue time-value refunds and an effective date of October 3, 2011 for the Interconnection Agreement.¹⁰

5. The Commission accepted the Interconnection Agreement effective October 3, 2011 as requested, and, although it agreed with Michigan Electric's interpretation of the precedent, the Commission stated that Michigan Electric 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 Michigan Electric 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 Michigan Electric.¹¹

6. Consistent with the September 2011 Letter, Michigan Electric filed its refund report on November 1, 2011. In its Compliance Filing, Michigan Electric requests a waiver of the requirement to pay time-value refunds regarding payment from Lowell pursuant to the Interconnection Agreement because, according to Michigan Electric, it received only its actual costs in providing service. Michigan Electric's records show that its cost in providing the requested interconnection facilities came to \$168,913.36, and Lowell made an initial payment of \$120,000 on January 31, 2003, followed by a final payment of \$48,913.36 in November 2003. Michigan Electric states that it has calculated the time-value of Lowell's payments under the Interconnection Agreement to be \$75,440.49. Michigan Electric argues that if it is required to make time-value refunds to Lowell, it will have received less from Lowell than its costs in providing the service, resulting in a loss to the utility under the Interconnection Agreement.¹²

⁹ *Id.* at 2 (citing *Southern Cal. Edison Co.*, 98 FERC ¶ 61,304 (2002) (*Southern California*); *Florida Power & Light Co.*, 98 FERC ¶ 61,276, *reh'g denied*, 99 FERC ¶ 61,320 (2002) (*FP&L*)).

¹⁰ *Id.* at 2, 5-6.

¹¹ September 2011 Letter at 2.

¹² Compliance Filing at 2-3.

7. Michigan Electric further submits that it should not be required to pay time-value refunds under the Interconnection Agreement because all work was performed and payment was received prior to October 10, 2006, the date that ITC Holdings acquired Michigan Electric. Michigan Electric asserts that, before this date, the benefit of Lowell's payments accrued to a Trans-Elect subsidiary.¹³ According to Michigan Electric, requiring it to issue time-value refunds in this circumstance would essentially require Michigan Electric to pay for another entity's failure to file the Interconnection Agreement in the first instance. Michigan Electric asserts that the Interconnection Agreement contemplates that Michigan Electric will construct certain facilities at Lowell's expense and that this work was completed before ITC Holdings acquired Michigan Electric in October 2006. Thus, Michigan Electric avers, the construction was performed by, and payment was received by, a Trans-Elect subsidiary rather than an ITC Holdings subsidiary. To the extent the Interconnection Agreement contemplates ongoing payment from Lowell for operation and maintenance service on the interconnection facilities, Michigan Electric states that its accounting and billing records show that the company has not had occasion to bill Lowell for such service since October 10, 2006 at the latest.¹⁴

II. Notice of Filing and Responsive Pleadings

8. Notice of the Compliance Filing was published in the *Federal Register*, 76 Fed. Reg. 70,435 (2011), with interventions and protests due on or before November 24, 2011. On November 23, 2011, Lowell filed a protest and motion to intervene out-of-time. Michigan Electric filed an answer on December 7, 2011. Lowell filed an answer to Michigan Electric's answer on December 20, 2011.

9. In its protest, Lowell argues that the Commission should require Michigan Electric to make time-value refunds consistent with Commission policy and precedent. Lowell asserts that when the Commission announced the current Prior Notice policy to ensure timely filing of jurisdictional contracts and agreements, the Commission stated that it would "lessen the severity" of the refund policy by requiring a "utility to refund to its customers the time-value of the revenues collected" for the period during which the rate was collected without Commission authorization.¹⁵ Further, Lowell states that the Commission applies an "extraordinary circumstances" standard to waive the payment of a penalty under its Prior Notice policy for late-filed agreements, but the Commission

¹³ See *supra* P 2.

¹⁴ Compliance Filing at 3-4.

¹⁵ Lowell Protest at 4 (citing *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,979).

would “relax the grounds for finding waiver for service agreements implementing tariff service that are filed less than 60 days in advance of the proposed effective date.”¹⁶

10. Lowell observes that in *Carolina Power*, the Commission found that the utility submitted service agreements more than 30 days after sales, which were part of an ongoing contractual relationship between Carolina Power and its counterparties, commenced.¹⁷ Lowell states that on rehearing, the Commission limited “the application of the time-value formula to an amount that permits a public utility to recover its variable costs” and clarified that this would establish “a floor to protect the company from operating at a loss.”¹⁸ Applying these principles to interconnection construction-related agreements, Lowell states that the Commission in *Southern California* reiterated that these agreements must be filed on a timely basis, but that the Commission would reduce or eliminate time-value refunds if such a penalty would result in construction at a loss.¹⁹ Lowell asserts that, in *Southern California* and *FP&L*, the Commission applied “a floor to protect [public utilities] from constructing such facilities at a loss.”²⁰ Nonetheless, Lowell avers, the Commission still retains its “established discretion to remedy violations of the FPA.”²¹

11. Lowell argues that Michigan Electric should not benefit from its violation of the Commission’s Prior Notice policy. According to Lowell, the Commission accepted the Interconnection Agreement for filing with an effective date of October 3, 2011, 60 days after Michigan Electric gave notice by filing the Interconnection Agreement with the Commission. Lowell argues that since the Interconnection Agreement was not effective until October 3, 2011, Michigan Electric could not lawfully charge Lowell pursuant to

¹⁶ *Id.* at 4 (citing *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,983-61,984).

¹⁷ *Id.* at 4-5 (citing *Carolina Power & Light Co.*, 84 FERC ¶ 61,103, at 61,522 (1998) (*Carolina Power*), *order on reh’g*, 87 FERC ¶ 61,083 (1999) (*Carolina Power Rehearing*)).

¹⁸ *Id.* (citing *Carolina Power Rehearing*, 87 FERC ¶ 61,083 at 61,357).

¹⁹ *Id.* (citing *Southern California*, 98 FERC ¶ 61,304 at 62,302, n.10).

²⁰ *Id.* (citing *Southern California*, 98 FERC ¶ 61,304 at 62,302; *FP&L*, 98 FERC ¶ 61,276 at 62,151).

²¹ *Id.* (citing *Carolina Power Rehearing*, 87 FERC ¶ 61,083 at 61,357 (citing *Towns of Concord, Norwood & Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992))).

the Interconnection Agreement until October 3, 2011. Lowell continues, however, that Michigan Electric had already charged Lowell pursuant to the Interconnection Agreement, which is dated as of March 6, 2003, and under which the subject work was performed in 2003. Since Lowell made timely payment to Michigan Electric in 2003, Lowell asserts that Michigan Electric has benefitted from the time-value of the monies during this time.²²

12. When analyzing whether a time-value refund would result in a loss to Michigan Electric, Lowell states that the Commission must first account for the time-value Michigan Electric gained from all collections under the Interconnection Agreement. Lowell asserts that by accepting the Interconnection Agreement effective October 3, 2011, the Commission found that the Interconnection Agreement was worth \$168,913.36 to Michigan Electric on October 3, 2011. Since Michigan Electric collected and held monies prior to October 3, 2011, Lowell maintains that Michigan Electric also accrued \$75,440.49 in time-value of the monies, thus resulting in a total of \$244,353.85 that Michigan Electric collected as of October 3, 2011. Therefore, Lowell concludes, making a time-value refund would not result in a loss to Michigan Electric any greater than the time-value that it illegally gained as a result of its violation of the FPA, Commission regulations and Prior Notice policy.²³

13. In the alternative, Lowell argues that the Commission should exercise its discretion by requiring Michigan Electric to make time-value refunds as a remedial action for violating the Commission's Prior Notice policy. First, Lowell states that Michigan Electric admits that it neglected to file the Interconnection Agreement with Lowell and then tried to mitigate its negligence by suggesting that a change in ownership should excuse its delay in filing the Interconnection Agreement with the Commission. Lowell asserts that neither Michigan Electric nor the Commission have found that these would constitute "extraordinary circumstances" as contemplated in the Prior Notice policy, and adds that "the Commission has already ruled that administrative oversight does not constitute extraordinary circumstances."²⁴ Similarly, Lowell observes that, in *Southern California* and *FP&L*, the Commission found that neither public utility identified extraordinary circumstances that would justify waiving its Prior Notice requirement and

²² *Id.* at 6.

²³ *Id.* at 6-7.

²⁴ *Id.* at 8 (citing *Carolina Power*, 84 FERC ¶ 61,103 at 61,521 (citing *Illinois Power Co.*, 75 FERC ¶ 61,269 (1996))).

ordered the public utilities to make time-value refunds.²⁵ Lowell adds that the Commission should reject Michigan Electric's theory that the period for calculating time-value refunds begins with the most recent change in a public utility's ownership rather than with the 60-day prior notice period because utility ownership is not part of the analysis under the Prior Notice policy.²⁶

14. Second, although Michigan Electric cites to *Southern California* and *FP&L* to argue that the Commission should not require Michigan Electric to make time-value refunds because such refunds would cause Michigan Electric to operate at a loss, Lowell argues that Michigan Electric's Prior Notice policy violations are materially distinct from those cases. In those cases, the utilities' Prior Notice policy violations occurred for either less than three years²⁷ or less than one year,²⁸ whereas here, the violation occurred for over six years. According to Lowell, the Commission has held that a utility's failure to make a timely filing is not a "minor infraction,"²⁹ and Michigan Electric's failure to file was illegal "not only at the moment service commence[d] but every day thereafter."³⁰ Lowell further asserts that Michigan Electric inflicted "injury to 'the Commission's ability to ensure that all rates for jurisdictional service . . . are just and reasonable *at the time they are being charged.*"³¹ Lowell claims that allowing Michigan Electric to escape sanction would not encourage compliance with the FPA and Commission regulations and would undermine the goals of the Prior Notice policy.³²

²⁵ *Id.* at 9 (citing *Southern California*, 98 FERC ¶ 61,304 at 62,301; *FP&L*, 98 FERC ¶ 61,276 at 62,150-62,151).

²⁶ *Id.*

²⁷ *Id.* at 9-10 (citing *Carolina Power*, 84 FERC ¶ 61,103 at 61,522).

²⁸ *Id.* at 10 (citing *Southern California*, 98 FERC ¶ 61,304 at 62,301; *FP&L*, 98 FERC ¶ 61,276 at 62,150).

²⁹ *Id.* (citing *Carolina Power Rehearing*, 87 FERC ¶ 61,083 at 61,356).

³⁰ *Id.* (citing *Carolina Power Rehearing*, 87 FERC ¶ 61,083 at 61,356 (citing 16 U.S.C. § 824d (2006))).

³¹ *Id.* (citing *Carolina Power Rehearing*, 87 FERC ¶ 61,083 at 61,356 (emphasis in original) (quoting *PacifiCorp Electric Operations*, 60 FERC ¶ 61,292, at 62,039 (1992), *reh'g granted on other grounds*, 64 FERC ¶ 61,325 (1993))).

³² *Id.* at 11-12.

15. Finally, Lowell asserts that the Commission should accept its motion to intervene out-of-time because it has a direct and immediate interest in the proceeding that cannot be adequately represented by any other party. Lowell states that it did not intervene at the time of the filing because of the press of other business, and because it accepts the record, permitting it to intervene out of time will not prejudice Michigan Electric.³³

16. In its answer, Michigan Electric first asserts that it did not benefit from monies it received under the Interconnection Agreement. While the Prior Notice policy does require time-value refunds for late-filed agreements, Michigan Electric observes that the Commission has clarified on numerous occasions that the operation of its time-value refund policy does not require a utility to operate at a loss.³⁴ Michigan Electric maintains that it would be operating at a loss if it is required to pay Lowell a time-value refund because it only recovered its costs, without any net profit, for the work it performed pursuant to the Interconnection Agreement, and Michigan Electric notes that Lowell does not question the appropriateness of the costs. Without any net profit from Lowell, Michigan Electric states that there is no money from which it could earn any type of time-value benefit as alleged by Lowell. Accordingly, if Michigan Electric was required to pay time-value refunds based on the payments made by Lowell pursuant to the Interconnection Agreement, Michigan Electric will be forced to operate at a loss.³⁵

17. Michigan Electric adds that Lowell itself treated the Interconnection Agreement as effective in 2003. According to Michigan Electric, each party was expected to perform its obligations under the Interconnection Agreement in 2003, and Lowell's compensation under the Interconnection Agreement made Michigan Electric whole for the costs it had incurred pursuant to the Interconnection Agreement. Although the Interconnection Agreement was not on file at the Commission, Michigan Electric asserts that the contract is still binding and enforceable for all parties³⁶ and adds that requiring Michigan Electric to pay time-value refunds would allow Lowell to not adhere to the terms of the

³³ *Id.* at 12.

³⁴ Michigan Electric Answer at 5 (citing *Southern California*, 98 FERC ¶ 61,304; *FP&L*, 98 FERC ¶ 61,276; *PacifiCorp*, Docket No. ER10-440-000, at 1 (Jan. 26, 2010) (delegated letter order)).

³⁵ *Id.* at 5.

³⁶ *Id.* at 6 (citing *Lansdale v. Federal Power Com.*, 494 F.2d 1104 (D.C. Cir. 1974); *Compania de Gas de Nuevo Laredo, S.A. v. FERC*, 606 F.2d 1024 (D.C. Cir. 1979); *El Paso Electric Co.*, 105 FERC ¶ 61,131, at PP 39-40 (2003)).

Interconnection Agreement and be unjustly enriched at the expense of Michigan Electric.³⁷

18. Michigan Electric also observes that although the Interconnection Agreement contemplates ongoing payment from Lowell for operations and maintenance (O&M) expenses, Michigan Electric received all payments by November 2003, and it has not had occasion to bill Lowell for O&M costs since before October 2006 when ITC Holdings acquired Michigan Electric from Trans-Elect. Thus, Michigan Electric argues, the cost-based payments made by Lowell in 2003 benefitted, if anyone, Trans-Elect and its subsidiary; it did not benefit ITC Holdings or Michigan Electric in its current form. As such, Michigan Electric avers that it would be unjust and unreasonable to require it to make time-value refunds now.³⁸

19. Second, Michigan Electric argues that Lowell has not demonstrated why Michigan Electric should make time-value refunds even if it would do so at a loss. Michigan Electric asserts that Lowell misconstrues Commission precedent in ordering time-value refunds by arguing that only extraordinary circumstances can prevent the Commission from ordering time-value refunds. According to Michigan Electric, however, Commission precedent specifically states that, absent extraordinary circumstances, the Commission will not waive the 60-day prior notice requirement, and the utility may be required to pay time-value refunds.³⁹ Michigan Electric adds, however, that the Commission has a long-standing exception to this requirement when such a refund would require the utility to operate at a loss; therefore, the Commission does not have to find extraordinary circumstances to waive the payment of time-value refunds, but only has to find that requiring such time-value refunds would cause the utility to operate at a loss.⁴⁰

20. Michigan Electric also argues that in asserting that time-value refunds should be ordered based on the length of the violation alone, Lowell does not cite any Commission precedent describing how the Commission will weigh the time delay for failing to file a jurisdictional agreement, and Lowell also fails to note recent precedent where the Commission protected a utility from operating at a loss where the utility failed to file an

³⁷ *Id.*

³⁸ *Id.* at 6-7.

³⁹ *Id.* at 8 (citing *Carolina Power Light Co.* 84 FERC ¶ 61,103 (1998), *order on reh'g*, 87 FERC ¶ 61,083 (1999)).

⁴⁰ *Id.*

agreement with the Commission for approximately 11 years.⁴¹ Michigan Electric adds while ITC Holdings and Michigan Electric admittedly failed to file the Interconnection Agreement in a timely fashion, their actions do not amount to the continuous, irresponsible and illegal deeds that should automatically require time-value refunds regardless of having to operate at a loss.⁴²

21. Finally, Michigan Electric argues that the Commission should deny Lowell's motion to intervene out-of-time because Lowell has not shown good cause to grant the motion. In deciding whether to grant a late intervention, Michigan Electric states that under the Commission's rules and regulations, the filing party must show good cause for failing to file within a prescribed timeframe,⁴³ and that there is a high burden that a party must meet in seeking to intervene out-of-time after an order has been issued.⁴⁴ According to Michigan Electric, the only explanation that Lowell has provided was that Lowell "did not intervene at the time of the filing because of the press of other business."⁴⁵ Michigan Electric asserts that this cannot be sufficient to show good cause, and when Lowell failed to intervene in a timely fashion Lowell assumed the risk that this proceeding would end in a manner averse to Lowell's position.⁴⁶

22. In its answer, Lowell contends that neither the history nor the ownership of a public utility is part of the Commission's determination that a utility must make time-value refunds.⁴⁷ Accordingly, the Commission should reject Michigan Electric's recitation of corporate ownership and find that Michigan Electric improperly benefited from its premature collection.⁴⁸ Lowell also disagrees with Michigan Electric's assertion

⁴¹ *Id.* (citing *PacifiCorp*, 136 FERC ¶ 61,233, at P 19 (2011)).

⁴² *Id.* at 8-9.

⁴³ *Id.* at 9 (citing 18 C.F.R. § 385.214(d) (2015)).

⁴⁴ *Id.* (citing *EDF Development Inc.*, 127 FERC ¶ 61,204, at P 7 (2009)).

⁴⁵ *Id.* (citing Lowell Protest at 12).

⁴⁶ *Id.* at 9-10 (citing *Transok, L.L.C.*, 89 FERC ¶ 61,055, at 61,187 (1999)).

⁴⁷ Lowell Answer at 3 (citing *Southern California*, 98 FERC ¶ 61,304; *FP&L*, 98 FERC ¶ 61,276; *Carolina Power*, 84 FERC ¶ 61,103).

⁴⁸ *Id.* at 3.

that Lowell failed to note relevant Commission precedent (*PacificCorp*),⁴⁹ arguing that, contrary to Michigan Electric's claim, Lowell distinguished the instant proceeding from *PacifiCorp* and hereby reiterates that distinction.⁵⁰

23. Lowell argues that Michigan Electric, by asserting that Lowell challenges the validity of the Interconnection Agreement, incorrectly characterizes Lowell's stance on the Interconnection Agreement as relevant to Michigan Electric's failure to file it with the Commission. Rather, Lowell contends that the authority that Michigan Electric cites makes it clear that the Commission's imposition of time-value refunds when a public utility violates the Prior Notice policy does not constitute interference with a contract.⁵¹ Lowell argues that the Prior Notice policy does not seem to contemplate that extended violation will result in a penalty of zero dollars. Lowell points out that the Commission stated from the outset of the Prior Notice policy that public utilities should face some sanction in order for them to appreciate the "respect for and compliance with the prior notice and filing requirement."⁵² Lowell believes that the Commission should reconsider its practice of capping time-value refunds when the resulting penalty will be for zero dollars, regardless of the severity prior notice violation.⁵³

24. Finally, Lowell maintains that as the sole customer subject to the Interconnection Agreement, no other party could adequately represent its interests and that granting its motion to intervene out-of-time would not prejudice Michigan Electric or result in a delay to the proceeding. Lowell states that the Commission has considered whether the nature of a late intervention is for a limited purpose,⁵⁴ and here Lowell states that it moved to intervene for the limited purpose of becoming a party to the instant proceeding only after the Michigan Electric submitted its incomplete refund report.⁵⁵

⁴⁹ *PacifiCorp*, 136 FERC ¶ 61,233.

⁵⁰ Lowell Answer at 3 (citing Lowell Protest at 11 n. 47).

⁵¹ *Id.* at 4 (citing *El Paso Electric Co.*, 105 FERC ¶ 61,131).

⁵² *Id.* 5-7 (citing *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,980).

⁵³ *Id.* at 6-7.

⁵⁴ *Id.* at 7 (citing *New England Power Pool and ISO New England Inc.*, 110 FERC ¶ 61,003 (2005)).

⁵⁵ *Id.* at 7-8.

III. Discussion

A. Procedural Matters

25. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.⁵⁶ Lowell has not met this higher burden of justifying its late intervention. Nevertheless, despite Lowell's failure to timely move to intervene in this proceeding, we have considered its protest in determining the outcome, pursuant to Rule 211(a)(3) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.211(a)(3) (2015).⁵⁷

26. 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 Lowell and Michigan Electric because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

27. We accept Michigan Electric's Compliance Filing. Our review of the Interconnection Agreement and the Compliance Filing indicates that Michigan Electric received only the cost of work it performed under the Interconnection Agreement without profit. In this regard, the Commission has recently clarified in *International Transmission Co.*,⁵⁸ 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, 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

⁵⁶ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

⁵⁷ *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,177, at P 21 (2014).

⁵⁸ 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).

and variable.⁵⁹ The Interconnection Agreement falls within this category of agreement. Thus, because Michigan Electric only recovered its costs of performing its obligations under the Interconnection Agreement, as they were incurred, without any profit, Michigan Electric would operate at a loss if required to refund time-value of amounts collected prior to filing the Interconnection Agreement. Accordingly, we will accept Michigan Electric's refund report and find that no time-value refunds are warranted here.

28. Having determined that no that time-value refunds are warranted with respect to unauthorized collections under the Interconnection Agreement, it is unnecessary to address Michigan Electric's alternative argument that it should have no liability for time-value refunds on amounts collected prior to becoming a subsidiary of ITC Holdings in 2006, since the benefit of collections before 2006 accrued to a prior subsidiary of Trans-Elect.⁶⁰ We note, however, that this is essentially the same argument that International Transmission Company made, and the Commission rejected, in *International Transmission Co.*, described above.⁶¹

29. We reject the arguments raised by Lowell in its protest and answer asserting that when the Commission considers Michigan Electric's time-value gain on the monies Michigan Electric collected in violation of the Prior Notice policy, Michigan Electric cannot demonstrate that making a time-value refund would result in a loss, and therefore, consistent with the Prior Notice policy, it must provide time-value refunds. While the Prior Notice policy does require time-value refunds to be paid on amounts collected under jurisdictional agreements prior to their filing,⁶² the Commission has consistently found, as Lowell acknowledges,⁶³ that this requirement to make time-value refunds does not apply where the utility demonstrates that doing so would force it to operate at a loss.⁶⁴ Here, we have determined that Michigan Electric recovered its costs of providing service

⁵⁹ *International Transmission Co.*, 152 FERC ¶ 61,043 at P 29.

⁶⁰ Compliance Filing at 1.

⁶¹ *International Transmission Co.*, 152 FERC ¶ 61,043 at P 16 (citing ITC Request for Rehearing, Docket No. ER12-2170-001, at 16).

⁶² *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,979.

⁶³ Lowell Protest at 4-5.

⁶⁴ *FP&L*, 98 FERC ¶ 61,276; *Southern California*, 98 FERC ¶ 61,304; *Florida Power & Light Co.*, 133 FERC ¶ 61,120 (2010); *International Transmission Co.*, 152 FERC ¶ 61,043; *International Transmission Co.*, 152 FERC ¶ 61,042 (2015).

as those were incurred, and there was no profit or return reflected in the rates Michigan Electric charged; therefore, there is no opportunity for it to have earned any sort of time-value profit that Michigan Electric could refund without it operating at a loss, contrary to Lowell's assertions; Michigan Electric was simply made whole for the work it performed under the Interconnection Agreement. We also reject Lowell's arguments that Michigan Electric is required to show "extraordinary circumstances" to justify waiving the Prior Notice requirement because, as Michigan Electric properly observes, "the Commission does not have to find extraordinary circumstances to waive the payment of time-value refunds."⁶⁵ We are similarly unpersuaded by Lowell's arguments that the length of time during which a utility fails to file a jurisdictional agreement should be considered by the Commission in deciding whether to require that utility to issue time-value refunds. Whether to require time-value refunds is a function of whether the utility can demonstrate that doing so would require it to operate at a loss and does not have a remedial component once such a demonstration is made, as Lowell implies.

30. We disagree with Lowell that not requiring refunds in this case would sanction disregard for the Prior Notice policy. In the *Prior Notice Order*, as Lowell partially quotes, the Commission stated that requiring a utility "to refund to its customers the time-value of the revenues collected . . . for the entire period that the rate was collected without Commission authorization"⁶⁶ properly balances the competing concerns; it would "encourage respect for and compliance with the [FPA's] prior notice and filing requirements, yet not impose . . . a severe financial burden on the utility filing rates that otherwise are just and reasonable."⁶⁷ Therefore, there is an interest in the Prior Notice policy to not impose a severe financial burden on a utility, which would indeed result should that utility be required to operate at a loss as a result of issuing such refunds. Not requiring time-value refunds in instances where the utility can demonstrate that doing so would require it to operate at a loss is therefore consistent with the intent of the Prior Notice policy.

31. Further, on March 11, 2014, the Commission approved a Stipulation and Consent Agreement (Settlement) between the Office of Enforcement, International Transmission Company, Michigan Electric, ITC Midwest LLC and ITC Great Plains, LLC for their violations of FPA section 203 (and related Commission regulations) and FPA section 205 (and related Commission regulations) for failing to timely file certain Commission jurisdictional documents between 2003 and 2011 that included a civil penalty of

⁶⁵ Michigan Electric Answer at 8.

⁶⁶ *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,979.

⁶⁷ *Id.* at 61,980.

\$750,000.⁶⁸ The Appendix in the Settlement specifically identifies the filing submitted in Docket No. ER11-4197 as one of the late filings covered by the Settlement. Thus, the Commission has not allowed Michigan Electric to escape sanction for violating section 205 of the FPA and the compliance monitoring conditions imposed in the Settlement ensure that Michigan Electric (and its affiliates) implement steps to ensure future compliance with FPA section 205 (and section 203). Moreover, the civil penalty serves as a reminder to other market participants, as the Commission said in the Settlement Order:

We remind market participants of the importance of the obligation to file with the Commission all required agreements and other documents under FPA Section 205 and to obtain authorization for all transactions subject to FPA Section 203(a)(1)(B). Absent such filings, the Commission cannot perform its necessary regulatory oversight responsibilities under the FPA. We further urge market participants to include in their compliance programs processes that will enable them to fulfill their FPA Section 203 and 205 obligations.⁶⁹

The Commission orders:

Michigan Electric'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.

⁶⁸ *International Transmission Co.*, 146 FERC ¶ 61,172 (2014) (*Settlement Order*).

⁶⁹ *Id.* P 15.