

155 FERC ¶ 61,022
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Otter Tail Power Company

Docket Nos. ER16-584-000
ER16-584-001
ER16-584-002

ORDER ACCEPTING AND TERMINATING AGREEMENTS AND DISCLAIMING
JURISDICTION

(Issued April 8, 2016)

1. On December 18, 2015, Otter Tail Power Company (Otter Tail), submitted for filing, pursuant to section 205 of the Federal Power Act (FPA),¹ a 1986 Integrated Transmission Agreement (ITA) and a 1988 amendment to the ITA (ITA Amendment), among Otter Tail, Missouri Basin Municipal Power Agency (doing business as Missouri River Energy Services (Missouri River)), and Western Minnesota Municipal Power Agency (Western Minnesota), along with notices of termination for the ITA and ITA Amendment. Otter Tail also submitted, as amended on February 9, 2016, an agreement among Otter Tail, Missouri River, and Western Minnesota to resolve billing disputes that arose under the ITA (ITA Billing Dispute Resolution Agreement). In addition, Otter Tail provided notice of termination of nine transmission service agreements (TSAs) with Missouri River member municipalities that preceded the ITA and of the TSA with the City of Breckenridge, Minnesota (Breckenridge TSA) that preceded the ITA Amendment. Finally, Otter Tail seeks clarification from the Commission whether a 2014 agreement under which Otter Tail provides maintenance (but not operations) services to

¹ 16 U.S.C. § 824d (2012).

Western Minnesota for a substation owned by Western Minnesota (2014 Substation Maintenance Agreement) must be filed under FPA section 205.²

2. As discussed below, we (1) accept the ITA, effective February 17, 2016, 61 days after the December 18, 2015 Filing, and accept Otter Tail's notice of termination, as of February 18, 2016; (2) accept the ITA Amendment effective February 17, 2016, 61 days after the December 18, 2015 Filing and accept Otter Tail's notice of termination of the ITA Amendment, as of February 18, 2016; (3) accept the ITA Billing Dispute Resolution Agreement, as amended, effective December 19, 2015; (4) accept the notices of termination of the ten TSAs that preceded the ITA and ITA Amendment, as of February 17, 2016; (5) deny Otter Tail's request for waiver of the Commission's 60-day prior notice requirement for the ITA, ITA Amendment, and notice of termination for the ten TSAs that preceded the ITA and ITA Amendment; and (6) disclaim jurisdiction over the 2014 Substation Maintenance Agreement.³

I. Background

3. Otter Tail states that it is an investor-owned public utility, with headquarters in Fergus Falls, Minnesota, that provides electric service to approximately 130,000 residential, commercial and industrial customers in parts of Minnesota, South Dakota, and North Dakota.⁴ Otter Tail states that Missouri River is a multi-state municipal joint

² Otter Tail explains that to satisfy eTariff rules that preclude submitting and amending a service agreement in the same docket, Otter Tail has separated its submittal into two filings, each in its own subdocket. Otter Tail December 18, 2015 Filing (Filing) at 2 n.2. Otter Tail notes that although its transmittal letter is the same for both filings, the submitted eTariff records and attachments differ between the two filings. Otter Tail notes that the filing in subdocket -000 submits the ITA and the 2014 Substation Maintenance Agreement. Otter Tail states that the Commission should also consider the notices of termination of the ten TSAs that preceded the ITA as provided in subdocket -000. Otter Tail states that the filing in subdocket -001 submits the ITA Amendment and the 2014 Substation Maintenance Agreement. Otter Tail states that the Commission should also consider the notice of termination of the ITA (as amended) and the notice of termination of the 2014 Substation Maintenance Agreement as provided in subdocket -001.

³ It appears that, contrary to the requirements of section 35.3 of the Commission's regulations, 18 C.F.R. § 35.3 (2015), Otter Tail failed to timely file the agreements. We remind Otter Tail that it must submit required filings on a timely basis or face possible sanctions by the Commission.

⁴ Filing at 2.

action agency with municipal utility members in Iowa, Minnesota, South Dakota, and North Dakota, and that Western Minnesota is a municipal joint action agency formed by member municipalities located in Minnesota for, among other purposes, financing the construction and acquisition of electric generation and transmission facilities for the use and benefit of its members. Otter Tail states that Western Minnesota finances and owns transmission facilities used to serve Missouri River members pursuant to agreements between Western Minnesota and Missouri River and agreements between Western Minnesota and Missouri River member municipal utilities.

II. The ITA and the ITA Amendment

A. Summary of the ITA

4. Otter Tail states that the ITA has governed for nearly thirty years the use and operation of certain transmission facilities that consist of separate segments, each of which is wholly owned by either Otter Tail or Western Minnesota.⁵ Otter Tail states that it, Western Minnesota, and Missouri River entered into the ITA as of March 31, 1986 to avoid duplication of transmission facilities and provide for the establishment, planning and utilization of an Integrated Transmission System (ITS) to deliver electric power and energy to loads of Western Minnesota and Otter Tail in the area encompassed by the ITS.⁶ Otter Tail states that the ITA was executed in connection with Otter Tail's sale to Western Minnesota of certain transmission facilities, which became part of the ITS. Otter Tail states that the ITA: identifies the facilities that comprise the ITS; requires Western Minnesota and Otter Tail to contribute additional facilities as needed such that their relative investments match their relative use; sets rules on the use of the ITS by Otter Tail and Western Minnesota for service to their loads; recognizes Missouri River as agent for the Western Minnesota-owned transmission facilities; provides for Otter Tail to operate and maintain the ITS facilities; and establishes governance procedures for the parties' planning and operation of the ITS.⁷ Otter Tail states that the ITA separately identifies transmission facilities wholly owned by Western Minnesota, and transmission facilities wholly owned by Otter Tail, which together comprise the ITS.

5. Otter Tail states that the ITA requires Otter Tail and Western Minnesota to contribute facilities to the ITS in proportion to their respective use of the ITA.⁸ Otter Tail

⁵ *Id.* at 1. Otter Tail submitted the ITA as Attachment A to its Filing.

⁶ *Id.* at 3 (citing ITA at 2).

⁷ *Id.* (citations omitted).

⁸ *Id.* at 4 (citing ITA, Art. V).

states that each party's use of the ITA is measured by the proportional peak demand of its loads served from the ITS relative to the total peak demand on the ITS. Otter Tail explains that contribution of transmission facilities is measured by the depreciated replacement cost of the transmission facilities dedicated by each party to the ITS. Otter Tail states that if a party becomes deficient in its investment responsibility by more than two percent, it must pay a deficiency charge, calculated as an interest rate applied to the amount of the investment deficiency in excess of the two percent allowance.

6. Otter Tail states that under the ITA, each party is permitted to use the ITS facilities primarily to serve its native loads, and secondarily to serve interruptible loads.⁹ Otter Tail explains that the parties to the ITA agreed that Otter Tail would operate the ITS transmission facilities. Otter Tail states that the parties also agreed that Otter Tail would maintain the Western Minnesota-owned ITS transmission facilities, but granted Western Minnesota the right for Missouri River or a third party to take over responsibility to maintain the Western Minnesota-owned transmission facilities in the ITS, if given three years advance notice.¹⁰ Otter Tail states that the parties agreed in the ITA, *inter alia*, that Western Minnesota would reimburse Otter Tail for Western Minnesota's share of Otter Tail's expenses of operating and maintaining the ITS facilities. Otter Tail states that as prescribed by the ITA, Otter Tail's operations and maintenance (O&M) expenses are the expenses attributable, under normal accounting procedures, to transmission operations and maintenance costs, transmission administrative and general costs, and the transmission portion of depreciation and property taxes on general plant. Otter Tail explains that each party's share of the expenses of operating and maintaining the ITS is determined by the ratio of the Missouri River energy delivered to the ITS divided by the sum of the same Missouri River delivered energy plus all of Otter Tail's retail energy sales and energy wheeling to parties other than Missouri River and the Missouri River members.

7. Otter Tail states that the ITA establishes an Administrative Committee, comprised of a senior representative of Western Minnesota/Missouri River and a senior representative of Otter Tail, to manage the ITS.¹¹ Otter Tail states that, among other duties, the Administrative Committee is responsible for certain facility planning functions and for review of, and developing proposals to improve, various ITA procedures. Otter Tail notes that the Administrative Committee is also responsible for determining the monthly amount Missouri River/Western Minnesota must pay to Otter Tail each month

⁹ *Id.* (citing ITA § 3.1).

¹⁰ *Id.* (citing ITA § 7.3.2).

¹¹ *Id.* at 5 (citing ITA, Art. IV).

based on estimated O&M costs, and for reconciling those amounts to actual costs when they become available.

B. Prior Submittals to the Commission of the ITA and the ITA Amendment

8. Otter Tail explains that the ITA was filed with the Commission on March 13, 1986 before the ITA became effective, but that it was filed under section 203 of the FPA, rather than under section 205.¹² Otter Tail explains that it appears from Otter Tail's filings at the time that it considered the ITA as integral to the transmission facilities transfers that established the ITS, inasmuch as the ITA provided the terms of the ITS that would be established by those transfers. Otter Tail states that on March 13, 1986, Otter Tail filed in Docket No. EC86-16-000 for Commission approval under FPA section 203 to transfer (indirectly) to Western Minnesota "certain properties listed in Exhibit C of the Integrated Transmission Agreement," which was submitted at Exh. L-1 as part of the filing.¹³ Otter Tail states that the 1986 Section 203 Filing noted that, *inter alia*, "Otter Tail presently wheels for nine municipalities which are members of [MRES]"¹⁴ and that "[t]he Integrated Transmission Agreement provides . . . that effective with the approval of the Agreement, Otter Tail shall no longer provide service to each of the Municipalities under its currently effective FERC 'Rate Schedule for Firm Wheeling Electric Service, Based Upon Fully Allocated Costs.'"¹⁵ Otter Tail states that on May 30, 1986, the Commission approved the 1986 Section 203 Filing.¹⁶ Otter Tail explains that it, Missouri River, and Western Minnesota thereafter began operating under the terms of the ITA, and Otter Tail ceased providing service under the pre-existing TSAs with the Missouri River members.

¹² *Id.* at 5-6.

¹³ *Id.* (citing Application of Otter Tail Power Company, a Minnesota Corporation, for Authority to Transfer Certain Electric Facilities to Grant, Inc., a Wholly Owned Subsidiary of Northwestern Public Service Company, a Delaware Corporation, and Thence to the Missouri Basin Municipal Power Agency and Western Minnesota Municipal Power Agency, Docket No. EC86-16-000, at 1 (Mar. 13, 1986) (1986 Section 203 Filing)).

¹⁴ *Id.* at 7 (citing 1986 Section 203 Filing at 10).

¹⁵ *Id.* (citing 1986 Section 203 Filing at 12).

¹⁶ *Id.* at 8 (citing *Nw. Pub. Serv. Co.*, 35 FERC ¶ 62,417 (1986)).

9. Otter Tail explains that the same pattern seen in 1986 was repeated in 1988 when the ITA was amended. Otter Tail notes that it again appears that Otter Tail viewed the ITA as appropriately and sufficiently reviewed by the Commission via a section 203 filing. Otter Tail states that in 1988, it, Western Minnesota, and Missouri River entered into an amendment to the ITA to reflect an additional sale of transmission facilities from Otter Tail to Western Minnesota, for the benefit of the City of Breckenridge, Minnesota (ITA Amendment).¹⁷ Otter Tail states that on November 15, 1988, Otter Tail submitted an FPA section 203 application in Docket No. EC89-3-000 requesting authorization of the sale of transmission facilities to Western Minnesota relating to the City of Breckenridge.¹⁸ Otter Tail explains that the 1988 Section 203 Filing explained that the transmission facilities would be added to the ITS under the terms and conditions of the ITA, as amended by the ITA Amendment. Otter Tail notes that the 1988 Section 203 Filing, *inter alia*, referred to the ITA as having been approved by the Commission in Docket No. EC86-16-000. Otter Tail notes that the 1988 Section 203 Filing included the ITA Amendment as an exhibit. Otter Tail states that the filing also included, as an exhibit, a supplemental power agreement between Otter Tail and the City of Breckenridge.

10. Otter Tail states that, on December 15, 1988, the Commission approved the 1988 Section 203 Filing.¹⁹ Otter Tail notes that the Commission advised Otter Tail that the supplemental power agreement and the ITA Amendment were rate schedules that needed to be filed with the Commission under FPA section 205.²⁰ Otter Tail states that on December 16, 1988, Otter Tail filed the supplemental power agreement under section 205 in Docket No. ER89-137-000. However, Otter Tail states that there is no record of Otter Tail filing the ITA Amendment or the ITA itself under section 205.

11. Otter Tail states that its actions after the section 203 filings reinforce the conclusion that the failure to file the ITA under section 205 was an honest

¹⁷ A copy of the ITA Amendment is attached as Attachment E to the Filing. In addition, Attachment D to the Filing includes a copy of the ITA that incorporates the changes necessitated by the ITA Amendment.

¹⁸ *Id.* (citing Application of Otter Tail Power Company, a Minnesota Corporation, for Authority to Sell Certain Electric Facilities to Western Minnesota Municipal Power Agency, Docket No. EC89-3-000 (Nov. 15, 1988) (1988 Section 203 Filing)).

¹⁹ *Id.* at 9 (citing *Otter Tail Power Co.*, 45 FERC ¶ 62,235 (1988)).

²⁰ *Id.* (citing *Otter Tail Power Co.*, 45 FERC at 63,397).

misunderstanding or oversight.²¹ Otter Tail states that in the early years of operation under the ITA, Otter Tail's actions are consistent with a continued view that the ITA was not subject to any further filing requirement. Otter Tail states that as time wore on and personnel turned over, Otter Tail's actions are consistent with an assumption that the ITA had long since been filed with the Commission, as the ITA was openly and regularly referenced, in a jurisdictional context, in other Commission proceedings.

C. Filing of ITA and ITA Amendment Under FPA Section 205

12. Otter Tail states that in preparing a notice of termination for the ITA, Otter Tail determined, upon investigation, that the ITA had not previously been filed with the Commission under FPA section 205.²² Otter Tail states that it also determined that Commission precedent, particularly recent Commission precedent, indicates that the ITA should be filed under FPA section 205.²³ Thus, Otter Tail requests that the Commission accept the ITA for filing under FPA section 205.

13. Otter Tail asserts that the ITA is just and reasonable.²⁴ Otter Tail states that, for nearly thirty years, the ITA has provided a means for Otter Tail and Western Minnesota/Missouri River to avoid duplication of transmission facilities in areas where both serve loads, and to enhance the value each receives from its investment in transmission facilities. Otter Tail states that the ITA also has provided a framework for cooperation between Otter Tail and Missouri River/Western Minnesota on transmission facility planning, operation, and maintenance. Otter Tail also states, *inter alia*, that the ITA is similar to transmission equalization agreements that the Commission has previously accepted.²⁵

14. Otter Tail requests an effective date of March 31, 1986 for the ITA. Although Otter Tail recognizes that the Commission usually does not allow retroactive effective

²¹ *Id.* at 10.

²² *Id.* at 13.

²³ *Id.* (citing *Mich. Elec. Transmission Co.*, 115 FERC ¶ 61,105, at PP 14-15 (2006); *Int'l Transmission Co.*, 152 FERC ¶ 61,043 (2015)).

²⁴ *Id.*

²⁵ *Id.* at 14 (citing *Am. Elec. Power Serv. Corp.*, Opinion No. 311, 44 FERC ¶ 61,206 (1988); *Cajun Elec. Power Coop., Inc. v. Gulf States Utils. Co.*, 69 FERC ¶ 61,317, at 62,210 (1994)).

dates for late-filed jurisdictional agreements, Otter Tail nonetheless asks for waiver of the Commission's 60-day notice requirement in the unique circumstances presented in this proceeding, based on: (1) actual notice to the Commission and the parties of the ITA, including its terms, conditions, purpose, and benefits, in the section 203 filing, before the ITA became effective; (2) the ITA's fundamental attribute of establishing a transmission ownership structure, which allowed the Commission's section 203 review to provide most of the protections that would have been afforded by the Commission's section 205 review; (3) Otter Tail's repeated submissions of the ITA to the Commission over the years; (4) Missouri River's and Western Minnesota's integral role in the development of the ITA before it was filed; and (5) Missouri River's and Western Minnesota's deep, sustained, and active role over the last thirty years in administration of the ITA (including review of expense allocations) through the Administrative Committee and other regular routine discussions of Otter Tail and Missouri River staff concerning the ITA. Otter Tail states that for the same reasons, it requests waiver of the Commission's notice rule to permit an effective date of December 28, 1988 for the ITA Amendment.²⁶

15. Otter Tail asserts that no-time value refunds are required for Otter Tail's failure to timely file the ITA.²⁷ Otter Tail notes that the Commission established in the *Prior Notice Order* that a public utility that fails to timely file an agreement that is required to be filed under FPA section 205 must pay the customer under the agreement a refund based on the time value of all charges collected from the customer during the period that the agreement should have been (but was not) on file with the Commission.²⁸ However, Otter Tail also notes that the Commission has also made clear that time-value refunds are not due when the charges under the late-filed agreement recovered only the public utility's costs for the service at issue, with no profit.²⁹ Otter Tail states that all services under the ITA were provided at Otter Tail's cost with no profit.³⁰ Otter Tail also states that, as in other cases in which the Commission did not require time-value refunds, Otter Tail is providing O&M services to a single customer, Missouri River, at a rate that

²⁶ December 28, 1988 reflects the date of the ITA Amendment.

²⁷ *Id.* at 17-18.

²⁸ *Id.* at 17 (citing *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,980-81, *clarified*, 65 FERC ¶ 61,081 (1993) (*Prior Notice Order*)).

²⁹ *Id.* (citing *Int'l Transmission Co.*, 152 FERC ¶ 61,043 at P 37).

³⁰ *Id.* at 1; *see also id.* at 17-20.

recovers only Missouri River's share of Otter Tail's actual expenses to operate and maintain the ITS.

16. Otter Tail states that the investment deficiency charge under the ITA also does not require time-value refunds.³¹ Otter Tail explains the deficiency charge should not be viewed as exceeding a party's costs of providing service. Otter Tail notes, *inter alia*, that the investment deficiency charge recovers only an interest expense applied solely to the investment deficiency and that the deficiency charge does not include any return on equity (i.e., profit) component.

D. Notice of Termination of the ITA and ITA Amendment

17. Otter Tail requests, pursuant to section 35.15 of the Commission's regulations, that the Commission permit termination of the ITA and ITA Amendment as of December 31, 2015.³² Otter Tail explains that the ITA states that it continues in effect until January 1, 2016, provided that either party gives five years advance written notice of its election to terminate the ITA as of that date.³³ Otter Tail explains that because Missouri River timely provided such notice on December 27, 2010, Otter Tail's notice of termination accords with the termination of the ITA by its own terms.

18. Otter Tail asserts that in this proceeding the Commission has good cause for the requested termination date because: (1) it accords with the parties' agreement; (2) it facilitates the parties' ability to timely implement any successor arrangements; and (3) it reflects that Otter Tail timely initiated the expected ministerial task of notification of termination of the ITA, but the failure to locate an authorizing docket for the ITA greatly expanded the scope of Otter Tail's filing, producing an understandable delay while the matter was fully investigated.³⁴ Otter Tail also notes that there is no unexpected termination of service in this proceeding, as Missouri River itself gave notice to Otter Tail in 2010 that it was invoking the ITA's provision for termination of the ITA as of December 31, 2015.

³¹ *Id.* at 19.

³² *Id.* at 16.

³³ *Id.* at 12, 16 (citing ITA § 10.1). Otter Tail explains that this provision states that the agreement remains in effect "until January 1, 2016." Otter Tail explains that the parties understand this to mean that the agreement expires at midnight on December 31, 2015.

³⁴ *Id.* at 15.

III. ITA Billing Dispute Agreement

19. Otter Tail explains that for approximately the first fifteen years that the ITA was in effect, Otter Tail and Missouri River reviewed and concurred in the calculation of O&M expense charges and investment equalization deficiency charges.³⁵ Otter Tail states that beginning with the 2003 calendar year, however, Missouri River raised objections to one or more aspects of those calculations. Otter Tail states that Missouri River paid the charges as determined by Otter Tail, but preserved its objections, which the parties have made efforts to resolve. Otter Tail explains that in December 2015, Western Minnesota, Missouri River, and Otter Tail resolved those differences for all relevant years. Otter Tail states that the parties' agreement is memorialized in the ITA Billing Dispute Resolution Agreement, which provides for payments from Otter Tail to Missouri and a release by the parties of any claims against one another under the ITA — in effect “closing out” the ITA. Otter Tail states that the agreement prescribes a final payment in December 2015 to resolve any billing disputes for the years 2003 through 2014, and requires a final true-up for the 2015 calendar year by April 30, 2016, after final 2015 cost and load data is known.

20. Otter Tail states that in the ITA Billing Dispute Resolution Agreement, the parties confirm that the disputes have been resolved in accordance with the terms of the ITA.³⁶ Otter Tail states that, out of an abundance of caution, Otter Tail submits the ITA Billing Dispute Resolution Agreement for filing under FPA section 205 with the ITA and the ITA Amendment. Otter Tail requests that the Commission accept the ITA Billing Dispute Resolution Agreement, as amended, with an effective date of December 19, 2015, the day after its Filing, to accommodate the December 31, 2015 payment deadlines prescribed by that agreement as the means to resolve all outstanding billing disputes under the ITA.³⁷

³⁵ *Id.* at 12.

³⁶ Filing at 12. On February 9, 2016, Otter Tail amended the ITA Billing Dispute Resolution Agreement by attaching as Attachment A, a copy of the ITA. Otter Tail notes that the ITA Billing Dispute Resolution Agreement uses terms contained in, and makes multiple references to, the ITA, which terminated as of December 31, 2015. Otter Tail explains that the amended ITA Dispute Resolution Agreement will eliminate any possible confusion arising from references to the terminated ITA.

³⁷ *Id.* at 16; Otter Tail February 9, 2016 Amendment to Filing at 2.

IV. Status of the Transmission Service Agreements that Preceded the ITA

21. As noted above, Otter Tail is a party to nine TSAs with nine municipalities, which preceded the ITA.³⁸ Otter Tail states that no service has been provided under those agreements since the ITA took effect. Similarly, Otter Tail states that Otter Tail is a party to a TSA with the City of Breckenridge, which preceded the ITA Amendment, and that no service has been provided under that TSA since the City of Breckenridge came under the ITA.

22. Otter Tail explains that in the course of reviewing the Commission's and Otter Tail's records on Otter Tail's filed rate schedules and service agreements to determine the status of the ITA, Otter Tail noted there was no evidence that Otter Tail had filed any formal notifications under FPA section 205 of termination of the ten pre-existing TSAs.³⁹ Otter Tail states that the relevant TSA customers and service agreement designations are as follows:

Service Agreements under FERC Electric Tariff, Original Volume No. 4

Alexandria, MN Original Service Agreement No. 11
Barnesville, MN Original Service Agreement No. 2
Benson, MN Original Service Agreement No. 4
Big Stone City, SD Original Service Agreement No. 3
Breckenridge, MN Original Service Agreement No. 5
Detroit Lakes, MN Original Service Agreement No. 6
Elbow Lake, MN Original Service Agreement No. 12
Henning, MN Original Service Agreement No. 13
Lake Park, MN Original Service Agreement No. 7
Ortonville, MN Original Service Agreement No. 14⁴⁰

23. Otter Tail explains that the lack of such formal termination filings appears to be because Otter Tail expressed its understanding to the Commission in both the 1986 Section 203 Filing and 1988 Section 203 Filing that the Commission's action in those dockets would have the effect of terminating those agreements.⁴¹ Otter Tail states that,

³⁸ Filing at 13.

³⁹ *Id.* at 13, 20.

⁴⁰ *Id.* at 21.

⁴¹ *Id.* at 13, 21.

to ensure satisfaction of the Commission's section 205 requirements, Otter Tail provides notice of termination of each of the ten TSAs. Otter Tail requests under section 35.15 of the Commission's regulations that the Commission permit termination of the TSAs (except the Breckenridge TSA) as of May 30, 1986, the date of the Commission's order on the 1986 Section 203 Filing, and permit termination of the Breckenridge TSA as of December 28, 1988. Otter Tail asserts that there is good cause for these requested termination dates, insofar as Otter Tail explicitly asked the Commission in the 1986 and 1988 Section 203 Filings to take action that Otter Tail stated would terminate and supersede these TSAs.

V. 2014 Substation Maintenance Agreement

24. Otter Tail states that, on August 12, 2014, Otter Tail and Western Minnesota entered into the 2014 Substation Maintenance Agreement, under which Otter Tail provides certain maintenance (but not operations) services for a 345 kV transmission substation owned by Western Minnesota.⁴² Otter Tail states that the 2014 Substation Maintenance Agreement defines the relevant services as certain inspection, maintenance and repair services comparable to those Otter Tail would perform on its own similar facilities. Otter Tail states that the 2014 Substation Maintenance Agreement terminates by its own terms on December 31, 2015, so long as either party provides 180 days advance notice and that such notice was timely provided by Western Minnesota to Otter Tail.

25. Otter Tail asserts that the Commission should find that the 2014 Substation Maintenance Agreement need not be filed under FPA section 205.⁴³ Otter Tail notes that the 2014 Substation Maintenance Agreement provides only for maintenance services and does not provide for transmission facility operation. Otter Tail argues, *inter alia*, that because the 2014 Substation Maintenance Agreement does not provide for transmission facility operation services, the agreement is not an "O&M Agreement" of the type addressed in the *Prior Notice Order*.

26. Otter Tail notes that the Commission's test for filing an O&M agreement asks which entity "owns" or "operates" the facility, with identification of the operator "turn[ing] on which entity keeps control and [decision-making] authority over major

⁴² *Id.* at 13. Otter Tail attaches a copy of the 2014 Substation Maintenance Agreement as Attachment B to its Filing.

⁴³ *Id.* at 22.

matters.”⁴⁴ Otter Tail states that an agreement that provides only for maintenance services, with no transmission facility operations services, is unlikely to involve “major” operational matters. Otter Tail asserts that the 2014 Substation Maintenance Agreement is similar to the agreement that the Commission found in *Puget Sound* need not be filed. Otter Tail states that as in *Puget Sound*, the 2014 Substation Maintenance Agreement is styled only as a maintenance agreement, and provides only for routine inspection, testing and repair of the substation equipment. Otter Tail notes that although it is not required to seek Missouri River’s prior approval for routine services or actions in an emergency, Otter Tail does seek Missouri River’s prior approval for any major repairs. Otter Tail also notes that Missouri River retains decision-making authority, subject to compliance with MISO’s planned outage rules, over de-energization of the transmission facilities needed for the planned maintenance Otter Tail conducts under the agreement. Accordingly, Otter Tail argues that the Commission should find that the 2014 Substation Maintenance Agreement does not vest Otter Tail with control or decision-making authority over major operational matters concerning the subject transmission facilities and, consequently, that the agreement need not be filed.

27. In the alternative, Otter Tail submits the 2014 Substation Maintenance Agreement for filing, asserting that the agreement is just and reasonable and the charges under the agreement also are just reasonable.⁴⁵ Otter Tail seeks waiver of the Commission’s 60-day prior notice requirement to permit (1) acceptance of the agreement effective August 12, 2014, and (2) termination of the agreement effective December 31, 2015. Otter Tail argues that no time-value refunds are due for Otter Tail’s failure to file the 2014 Substation Maintenance Agreement, because such refunds would require Otter Tail to provide service at less than its costs for such service.

VI. Notice of Filings

28. Notice of the Filing was published in the *Federal Register*, 80 Fed. Reg. 80,763 (2015). Notice of the February 9, 2016 Amendment to Filing was published in the *Federal Register*, 81 Fed. Reg. 8489 (2016), with interventions or protests due on or before February 16, 2016. Missouri River filed a timely motion to intervene.

⁴⁴ *Id.* (quoting *Puget Sound Power & Light Co.*, 64 FERC ¶ 61,335, at 63,427 (1993) (*Puget Sound*)).

⁴⁵ *Id.* at 23.

VII. Discussion

A. Procedural Matters

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), Missouri River's timely unopposed motion to intervene serves to make it a party to this proceeding.

B. Substantive Matters

30. The Commission's notice requirements in section 35.3 of the Commission's regulations allow service agreements under tariffs to be filed up to 30 days after service commences.⁴⁶ Otter Tail filed the ITA, ITA Amendment, and notice of termination of the ten TSAs that preceded the ITA and ITA Amendment well past the 30-day time limit. Where service has commenced, a waiver of the 60-day prior notice requirement is granted for untimely filings only upon a showing of extraordinary circumstances.⁴⁷ Otter Tail has not made such a showing. Accordingly, we deny Otter Tail's request for a waiver of the 60-day notice requirement and accept the ITA, ITA Amendment, and notice of termination of the ten TSAs that preceded the ITA and ITA Amendment, as just and reasonable effective February 17, 2016, after a full 60 days from the date of filing. Furthermore, we cannot grant an effective date for the notice of termination of the ITA and ITA Amendment on the same day they become effective. Thus, we grant the notices of termination for the ITA and ITA Amendment one day after the effective date for the ITA and ITA Amendment, February 18, 2016. We grant Otter Tail's request for an effective date of December 19, 2015, for the ITA Billing Dispute Resolution Agreement, as amended.

31. Commission policy requires that, for any monies collected before the effective date of the ITA and ITA Amendment, Otter Tail must refund the time value of the monies actually collected for the time period during which the rates were charged without Commission authorization consistent with section 35.19(a) of the Commission's regulations,⁴⁸ with the refunds limited so as not to cause Otter Tail to suffer a loss.⁴⁹

⁴⁶ 18 C.F.R. § 35.3(a)(2) (2015).

⁴⁷ *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,984.

⁴⁸ *El Paso Electric Co.*, 101 FERC ¶ 61,276 (2002), *reh'g denied*, 105 FERC ¶ 61,131 (2003).

⁴⁹ *See So. Cal. Edison Co.*, 98 FERC ¶ 61,304; *Fla. Power & Light Co.*,

32. However, in regards to time-value refunds, the Commission has recently clarified in *International Transmission Co.*,⁵⁰ 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 could 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 or variable.⁵¹ The ITA, ITA Amendment, and ITA Billing Dispute Resolution Agreement, as amended, fall within this category of agreement. Thus, because Otter Tail only recovers its costs of providing service to Western Minnesota, as those costs are incurred, without any profit, Otter Tail would operate at a loss if required to refund the time-value of amounts (including the investment deficiency charges) collected prior to filing the ITA, ITA Amendment, and ITA Billing Dispute Resolution Agreement, as amended. Because all services under the ITA, ITA Amendment, and ITA Billing Dispute Resolution Agreement, as amended, have been provided at Otter Tail's cost with no profit, we find that no time-value refunds are warranted here.

33. In addition, we disclaim jurisdiction over the 2014 Substation Maintenance Agreement. In this regard, the Commission 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 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?⁵² 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

98 FERC ¶ 61,276, *reh'g denied*, 99 FERC ¶ 61,320 (2002); *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,357 (1999).

⁵⁰ See *International Transmission Co.*, 152 FERC ¶ 61,043 at PP 34-38. See also *CED Corcoran Solar, LLC and CED Corcoran Solar 2, LLC*, 152 FERC ¶ 61,075, at P 10 (2015).

⁵¹ *International Transmission Co.*, 152 FERC ¶ 61,043 at P 29.

⁵² Prior Notice Order, 64 FERC at 61,993.

operational decisions, then it is not ‘operating’ the facility.”⁵³ 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.

34. As noted by Otter Tail, in *Puget Sound*, the Commission inquired whether the entity performing the O&M service under the agreement was acting merely as the agent of another party wielding authority to make main operational decisions. Puget Sound Power and Light Company (Puget) provided primarily routine maintenance services although from time to time it de-energized and re-energized the facilities while performing basic maintenance and repair. Puget stated that Whatcom County made all significant decisions and provided approval of Puget’s actions and that Puget had no control or decision-making authority over the operation of the facilities, except for minor repairs and emergencies. The Commission upon examining the agreement found that many of Puget’s activities were either routine or emergency in nature, and that other activities required Whatcom County’s prior direction or approval. The Commission held that, because Puget had little discretion, if any, to perform the necessary O&M work, it was not “operating” the facilities and thus the O&M service was not jurisdictional. The Commission stated:

Whatcom specifically limited in the agreement the operation and maintenance services that Puget may perform without prior direction or approval. In contrast, Whatcom could simply have directed that Puget operate and maintain the facilities in accordance with some general standard, such as prudent utility practice. In the latter case, the agreement would have given Puget control and [decision-making] authority over the operation of the facilities --and would have transformed the agreement into a jurisdictional agreement requiring prior filing with, and review by, the Commission.⁵⁴

35. Otter Tail argues, in order to support its position that the 2014 Substation Maintenance Agreement is not subject to the Commission’s jurisdiction, that the 2014 Substation Maintenance Agreement fails to meet the second prong of the *Prior Notice Order*. With regard to the second prong, Otter Tail argues that it is not an “operator” of the subject facilities because the 2014 Substation Maintenance Agreement provides only

⁵³ *Id.* at 61,993-94.

⁵⁴ *Puget Sound*, 64 FERC at 63,428.

for maintenance, and not operations and maintenance.⁵⁵ Otter Tail states that the 2014 Substation Maintenance Agreement provides only for routine inspection, testing and repair of substation equipment and that Missouri River retains decision making authority for any major repairs and over de-energization of the transmission facilities.

36. In addition, Exhibit B of the 2014 Substation Maintenance Agreement describes the procedures that Otter Tail follows in performing its services on the facilities covered by the agreement. Under the 2014 Substation Maintenance Agreement, while Otter Tail may revise these procedures, any modifications must be submitted to Western Minnesota with 180 days' advance notice of the proposed modifications. At any time during the 180 days' advance notice, Western Minnesota may elect to terminate the 2014 Substation Maintenance Agreement, effectively giving Western Minnesota operational control over all services that Otter Tail may provide at the facilities.⁵⁶

37. Based on Otter Tail's representations and the terms of the 2014 Substation Maintenance Agreement, we find that Otter Tail is not the operator of the substation facilities, within the meaning of the *Prior Notice Order*, because Otter Tail does not have control or decision making authority over major matters under the 2014 Substation Maintenance Agreement. As we find that Otter Tail is not an operator of jurisdictional facilities under the 2014 Substation Maintenance Agreement, we disclaim jurisdiction over the 2014 Substation Maintenance Agreement and therefore dismiss the Filing, in part, as it relates to the 2014 Substation Maintenance Agreement, for lack of jurisdiction under FPA section 205.⁵⁷

The Commission orders:

(A) The ITA is hereby accepted, effective February 17, 2016, and Otter Tail's notice of termination of the ITA, is hereby accepted as of February 18, 2016, as discussed in the body of this order.

(B) The ITA Amendment is hereby accepted, effective February 17, 2016, and its notice of termination is hereby accepted as of February 18, 2016, as discussed in the body of this order.

⁵⁵ Filing at 22-23.

⁵⁶ *Id.*, Att. B, § 1(c).

⁵⁷ This finding is specific to the 2014 Substation Maintenance Agreement before us here; it does not affect or prejudice the jurisdictional status of substation maintenance agreements in general.

(C) The ITA Billing Dispute Resolution Agreement, as amended, is hereby accepted, effective December 19, 2015, as discussed in the body of this order.

(D) The notices of termination of the ten TSAs that preceded the ITA and ITA Amendment, are hereby accepted, effective February 17, 2016, as discussed in the body of this order.

(E) Otter Tail's request for a disclaimer of jurisdiction over the 2014 Substation Maintenance Agreement is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.