

156 FERC ¶ 61,025  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Michigan Electric Transmission Company, LLC

Docket No. EL16-53-000

v.

Midcontinent Independent System Operator, Inc.

ORDER DISMISSING COMPLAINT

(Issued July 8, 2016)

1. On April 1, 2016, Michigan Electric Transmission Company, LLC (Michigan Electric) filed a complaint against Midcontinent Independent System Operator, Inc. (MISO) in MISO's capacity as agent for Consumers Energy Company (Consumers)<sup>1</sup> pursuant to section 206 of the Federal Power Act (FPA)<sup>2</sup> and Rule 206 of the Commission's Rules of Practice and Procedure<sup>3</sup> (Complaint). In this order, we dismiss the Complaint, without prejudice, as it is not ripe for Commission review.

**I. Complaint**

2. In background information provided in its Complaint, Michigan Electric states that it is engaged in an on-going dispute with Consumers regarding certain transmission

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<sup>1</sup> MISO is the tariff administrator of the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) and agent for certain transmission owners, including Consumers, under the Agreement of Transmission Facilities Owners to Organize the Midcontinent Independent System Operator, Inc., a Delaware Non-Stock Corporation (TO Agreement).

<sup>2</sup> 16 U.S.C. § 824e (2012).

<sup>3</sup> 18 C.F.R. § 385.206 (2015).

facilities currently held and operated by Consumers (the Disputed Facilities). Michigan Electric states that Michigan Electric and Consumers entered into a Distributed Transmission Interconnection Agreement (DTIA), made effective by the Commission on May 1, 2002,<sup>4</sup> that required conveyance of Consumers' transmission facilities to Michigan Electric. Michigan Electric states Section 3.4 of the DTIA states the "principles upon which the initial identification was made of facilities as being either Transmission or Distribution . . . shall continue to be applied for the future unless modification is agreed to by both Parties."<sup>5</sup>

3. Michigan Electric states that in 2014 and 2015, Consumers sought authorization from the Michigan Public Service Commission and the Commission to reclassify certain distribution facilities as transmission facilities.<sup>6</sup> Michigan Electric contends that the reclassified facilities (i.e., the Disputed Facilities) should be conveyed to Michigan Electric pursuant to Section 3.4 of the DTIA. Michigan Electric states that Consumers disputes this position and the matter is currently in mediation pursuant to the DTIA.<sup>7</sup>

4. In its Complaint, Michigan Electric asks the Commission to establish a refund effective date as of April 1, 2016, the date the Complaint was filed, as a "protective measure" in case refunds of certain Michigan Joint Zone<sup>8</sup> revenues are necessary due to the pending contract dispute between Michigan Electric and Consumers regarding the rightful ownership of the Disputed Facilities, which are located in the Michigan Joint Zone. Michigan Electric also includes a conditional complaint for refunds against MISO in MISO's capacity as agent for Consumers, and asks the Commission to hold the complaint in abeyance until the rightful ownership is established. Michigan Electric contends that MISO distributes transmission revenues to transmission owners pursuant to MISO's TO Agreement, which is filed with the Commission.<sup>9</sup>

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<sup>4</sup> *Mich. Elec. Transmission Co.*, Docket No. ER01-3012-000 (Oct. 3, 2001) (delegated letter order).

<sup>5</sup> Michigan Electric Complaint at 5.

<sup>6</sup> *See Order Approving Settlement Agreement*, Case No. U-17598 (Michigan Public Service Commission Oct. 16, 2014); *Consumers Energy Co.*, 151 FERC ¶ 61,033 (2015).

<sup>7</sup> Michigan Electric Complaint at 6-8.

<sup>8</sup> The Michigan Joint Zone is one of a number of transmission pricing zones within the MISO footprint.

<sup>9</sup> Michigan Electric Complaint at 1-2, 10-11.

5. Under the TO Agreement, Michigan Electric argues, it is assumed that revenues are collected on behalf of, and distributed to, the rightful owner of such assets, and that here, there is a possibility that MISO could collect revenue on behalf of Consumers associated with the Disputed Facilities for which Consumers may not be the rightful owner. Specifically, the TO Agreement states that “MISO shall distribute on a monthly basis to each Owner or its designee(s) an amount determined in accordance with Appendix C to this Agreement and the Tariff.”<sup>10</sup> Michigan Electric contends that an incorrect distribution would be a violation of a Commission-approved rate schedule (i.e., distribution of revenue to a party who is not the rightful owner of the assets in question). Michigan Electric states that it is not seeking a Commission resolution of the substantive issue associated with the question of which party rightfully owns the Disputed Facilities and only requests the Commission establish a refund effective date as of the date of the Complaint. Michigan Electric argues that no further action in this proceeding is required until: (1) a court or the parties determine the rightful ownership of the Disputed Facilities in question; and (2) the Commission is notified in this proceeding about the resolution of such dispute and any requested remedial action that may be necessary.<sup>11</sup>

## **II. Notice and Responsive Pleadings**

6. Notice of Michigan Electric’s Complaint was published in the *Federal Register*, 81 Fed. Reg. 20,631 (2016), with answers, interventions, and protests due on or before April 21, 2016. Wolverine Power Supply Cooperative, Inc. filed a timely motion to intervene. MISO filed a timely answer to the Complaint and Consumers filed a timely motion to intervene, protest, and motion to dismiss the Complaint. On May 6, 2016, Michigan Electric filed an answer to Consumers’ motion to intervene, protest, and motion to dismiss. On May 13, 2016, Consumers filed a motion for leave to respond and response to Michigan Electric’s May 6, 2016 answer. On May 19, 2016, Michigan Electric filed a motion for leave to answer and answer to Consumers’ motion for leave to respond and response.

### **A. Answer to the Complaint**

7. MISO states that it filed its answer to the Complaint to avoid being deemed in default or to have admitted any allegation under Rule 213(e)(1) of the Commission’s regulations and to preserve its rights as a party to the proceeding. MISO states that it remains impartial to the outcome of the ongoing dispute over the Disputed Facilities and that it is involved in this proceeding only to the extent that it serves as agent for both

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<sup>10</sup> TO Agreement, Article Three, Section III, E. (emphasis added).

<sup>11</sup> Michigan Electric Complaint at 2-3, 8-9.

Michigan Electric and Consumers under the TO Agreement and in its capacity as Tariff administrator, and does not take a position on the Complaint.<sup>12</sup>

**B. Consumers' Protest**

8. Consumers argues that the Commission should dismiss the Complaint for a number of reasons. First, Consumers argues that the Complaint is premature, speculative, and based on insufficient evidence. Consumers states that because the dispute regarding the Disputed Facilities is still going through the mediation process, there is not yet any violation of the MISO Tariff, and thus no need for a refund effective date.<sup>13</sup> Consumers argues that litigation related to the Disputed Facilities could potentially go on for years, and as such could easily exceed the 15-month limit on refunds.<sup>14</sup> Consumers also argues that holding the Complaint in abeyance does not resolve the deficiencies presented by the Complaint.<sup>15</sup> Second, Consumers states that it is Commission policy to not provide refunds where the correct amount of revenue was collected, but was allocated incorrectly.<sup>16</sup> Third, Consumers argues that a refund effective date of April 1, 2016 creates a risk to Consumers of under-recovering actual, unavoidable, and legitimate costs. This is because MISO might have to institute a surcharge on Consumers if MISO were directed to provide refunds to Michigan Electric, resulting in the inability of Consumers to recover its actual costs.<sup>17</sup> Consumers contends that the only way to avoid the costs associated with the operation of the Disputed Facilities during the pendency of the DTIA litigation is to either forego maintenance on the facilities or take them out of service. Consumers argues that in either circumstance it would lose the revenue it is currently entitled to through its ownership of the Disputed Facilities.<sup>18</sup>

9. Finally, Consumers argues that the Complaint should be dismissed as a matter of policy. Consumers argues that the Complaint is an improper “placeholder” complaint, as

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<sup>12</sup> MISO Answer at 3.

<sup>13</sup> Consumers Protest at 5.

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.* at 14-15.

<sup>16</sup> *Id.* at 9 (citing *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040, at P 25 (2011) (*Black Oak*)).

<sup>17</sup> *Id.* at 12.

<sup>18</sup> *Id.* at 14.

there is no actual tariff violation currently occurring. Consumers states that were the Commission to grant the Complaint, it may influence the outcome of the ongoing mediation and encourage other unripe complaints to be filed.<sup>19</sup> Consumers also argues that the Complaint only seeks a reallocation of revenue and, therefore, customers are neutral in this case.<sup>20</sup>

### C. Subsequent Pleadings

10. In its May 6, 2016 answer to Consumers' protest, Michigan Electric argues that the Complaint is appropriately before the Commission, and that there is no standard under the FPA that a complainant seeking a refund effective date pursuant to section 206 of the FPA must show actual harm. Michigan Electric contends that a complainant need only show that a rate *may* be unjust and unreasonable.<sup>21</sup> Michigan Electric also argues that Commission precedent disfavors asserting primary jurisdiction over contract interpretation matters appropriately decided under state law. Further, Michigan Electric argues that Consumers reliance on *Black Oak* is misplaced because refund protection is appropriate when the wrong amount of revenues may be collected, which may be the case in the instant proceeding due to differences in Michigan Electric's and Consumers' rates. Michigan Electric asserts that the *Black Oak* precedent is limited to situations related to "behavioral aspects of rates in effect" and "the lack of accuracy with being able to predict what might have happened during a given refund period," neither of which apply here.<sup>22</sup>

11. In its May 13, 2016 response to Michigan Electric's answer, Consumers argues that Michigan Electric will not need refunds in this situation because Michigan Electric has no costs associated with the Disputed Facilities. As such, Consumers states that refund protection in this case is unnecessary.<sup>23</sup> Consumers again cites to *Black Oak*, stating that MISO here will collect the proper amount of revenue, which may turn out to

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<sup>19</sup> *Id.* at 20, 23.

<sup>20</sup> *Id.* 16-17.

<sup>21</sup> Michigan Electric May 6, 2016 Answer at 5 (citing *Fla. Power Corp.*, 65 FERC ¶ 61,040, at n.5 (1993) ("Very simply, an order setting a[] [Regulatory Fairness Act] refund effective date does not order refunds; it merely institutes the section 206 proceeding and satisfies Congress' mandate to establish the [Regulatory Fairness Act] refund effective date . . . the Commission at that point has not even determined whether the existing rate is unjust and unreasonable, much less ordered refunds.")).

<sup>22</sup> *Id.* at 8-9.

<sup>23</sup> Consumers May 13, 2016 Response at 3.

be misallocated, which is the situation contemplated by the precedent. Consumers argues that in that instance, there should be no refunds, and hence, no need for a refund effective date.<sup>24</sup> Finally, Consumers argues that the Commission should not prejudge the ongoing dispute by setting a refund effective date. Consumers states that any determination made by the Commission at this point in time would be arbitrary and capricious because it would be based on insufficient information as the ownership of the Disputed Facilities is not before the Commission.<sup>25</sup>

12. In its May 19, 2016 answer to Consumers' May 13, 2016 response, Michigan Electric argues that the primary arguments raised by Consumers in fact ask the Commission to make a determination without the complete record before it. Michigan Electric states that each of the issues raised by Consumers would be in dispute if it is determined that the transmission facilities should have been conveyed to Michigan Electric. However, Michigan Electric believes that those issues are not yet ripe for discussion as the Disputed Facilities have not been conveyed to Michigan Electric yet. Michigan Electric argues that the Commission should not make the determination that refunds would not be appropriate until the issue of the refunds themselves is before the Commission, not merely the refund *date*, as is the case here.<sup>26</sup> Michigan Electric finally argues that the ongoing dispute is separate and apart from the issue of whether refund protection should be afforded here.<sup>27</sup> Michigan Electric states that it has correctly brought the dispute up through the mediation process, as dictated by the DTIA, and that it is unaware of any requirement that a complainant seeking refund protection under a Commission-approved rate schedule must also initially litigate the merits of any related contract interpretation matter before the agency.<sup>28</sup>

### **III. 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), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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<sup>24</sup> *Id.* at 4-7.

<sup>25</sup> *Id.* at 8-9.

<sup>26</sup> Michigan Electric May 19, 2016 Answer at 3-6.

<sup>27</sup> *Id.* at 7-8.

<sup>28</sup> *Id.* at 8.

14. 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 answer unless otherwise ordered by the decisional authority. We accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

**B. Commission Determination**

15. We find that the Complaint is not ripe for consideration. The Complaint seeks the establishment of a refund effective date so that refunds can be provided as of the date of the Complaint (i.e., April 1, 2016) pending the resolution of ownership of the Disputed Facilities. Michigan Electric provides neither evidence nor argument in the Complaint itself that there is presently a Tariff violation; it merely argues that there *may* be a Tariff violation if it prevails in mediation or before another body.<sup>29</sup>

16. Under section 206 of the FPA, a complainant has the "burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential."<sup>30</sup> We agree with Consumers that Michigan Electric has not made this showing. As Consumers states, and we agree, the Complaint is premised on the notion that Michigan Electric, at some point in the future, may establish its ownership of the Disputed Facilities through mediation, litigation, or other means. Accordingly, we find that the Complaint does not present a ripe controversy due to the speculative nature of Michigan Electric's allegations and the lack of sufficient evidence of harm.<sup>31</sup> Therefore, we dismiss the Complaint, without prejudice.

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<sup>29</sup> Michigan Electric's reliance on *Fla. Power Corp.* is misplaced. In that case, it was the Commission that instituted the section 206 proceeding, not the complainant, and therefore the Commission was statutorily required to establish a refund effective date when issuing the order. *See* 16 U.S.C. § 824e(b) (2012) ("Whenever the Commission institutes a proceeding under [section 206], the Commission shall establish a refund effective date."). Here, on the other hand, we find that the complaint filed by Michigan Electric is not ripe for consideration, and therefore, setting a refund effective date is neither required nor appropriate.

<sup>30</sup> 16 U.S.C. § 824e(b) (2012).

<sup>31</sup> *See, e.g., ConocoPhillips Transportation Alaska, Inc.*, 112 FERC ¶ 61,213, at PP 26-28 (2005) (denying a complaint due to the speculative nature of the complainant's claims of injury); *CSOLAR IV South, LLC*, 142 FERC ¶ 61,250 (2013) (dismissing a complaint, without prejudice, as unripe).

The Commission orders:

Michigan Electric's Complaint is hereby dismissed, without prejudice, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.