

156 FERC ¶ 61,115
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Michigan South Central Power Agency

Docket Nos. EL16-77-000

v.

Michigan Electric Transmission Company, LLC

Michigan Electric Transmission Company, LLC

ER16-1986-000
(Consolidated)

ORDER ON COMPLAINT, ACCEPTING AND SUSPENDING UNEXECUTED
AGREEMENT, ESTABLISHING HEARING AND SETTLEMENT JUDGE
PROCEDURES, AND CONSOLIDATING PROCEEDINGS

(Issued August 18, 2016)

1. On June 1, 2016, pursuant to Federal Power Act (FPA) sections 206 and 306¹ and section 306 of the Commission's Rules of Practice and Procedure,² Michigan South Central Power Agency (Michigan South Central) filed a complaint (Complaint) against Michigan Electric Transmission Company, LLC (METC).³ On June 21, 2016, pursuant to FPA section 205,⁴ METC submitted an unexecuted Amended and Restated Michigan

¹ 16 U.S.C. §§ 824e, 825e (2012).

² 18 C.F.R. § 385.306 (2015).

³ Pursuant to Rule 2001(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2001(a)1(2) (2015), because the Complaint was received after normal Commission business answers (after 5:00 p.m., Tuesday, May 31, 2016), it is deemed filed on the next regular business day, in this case Wednesday, June 1, 2016.

⁴ 16 U.S.C. § 824d (2012).

South Central 2004 Transmission Ownership and Operating Agreement (Unexecuted Agreement).

2. In this order, we set the Complaint for hearing and settlement judge procedures, and set a refund effective date of June 1, 2016. We also accept the Unexecuted Agreement, suspend it for a nominal period to become effective August 21, 2016, subject to refund. In addition, we set the Unexecuted Agreement for hearing and settlement judge procedures and consolidate it with the Complaint proceeding.

I. Background

3. Michigan South Central is a municipal power agency and public body organized by its member municipalities⁵ under Michigan law. It serves the bulk power supply needs of its municipal members from various generation resources and suppliers and is a transmission-owning member of Midcontinent Independent System Operator, Inc. (MISO). According to Michigan South Central, it has 121.5 megawatts (MW) of ownership interests in, and usage rights over, the METC transmission system pursuant to the terms of ownership and operating agreements entered into in 1980 and 2004.⁶

4. METC, a wholly-owned subsidiary of ITC Holdings Corp. and transmission-owning member of MISO, is an independent transmission company that operates primarily in the western and northern portions of Michigan's Lower Peninsula. It owns, operates, and maintains approximately 5,600 circuit miles of transmission lines, serving a population of approximately 4.9 million.⁷

5. According to METC, on November 20, 1980, Consumers Energy Company (Consumers) and Michigan South Central entered into a Transmission Ownership and Operating Agreement (1980 Agreement) pursuant to which Consumers agreed to sell to Michigan South Central ownership interests and related use rights in the transmission system then owned by Consumers and now owned by METC.⁸ METC states that the 1980 Agreement established that, in connection Michigan South Central's construction

⁵ Michigan South Central's members include the cities of Coldwater, Hillsdale, and Marshall, Michigan, and the Villages of Clinton and Union City, Michigan. Complaint at n.8.

⁶ *Id.* at 4, 7-8.

⁷ METC June 21, 2016 Application at 2 (METC Application).

⁸ *Id.*

of a 55 MW fossil fuel-fired generating unit in Litchfield, Michigan (Project I Plant), Consumers and Michigan South Central would jointly own a double-circuit 345 kilovolt (kV) transmission line (Jointly Owned Line) from the Vergennes 345 kV substation to the Palisades-Tallmadge 345 kV transmission line. The 1980 Agreement included a formula for calculating Michigan South Central's ownership percentage of the Jointly Owned Line and provided that Michigan South Central would bear the costs of the Jointly Owned Line in proportion to its ownership interests. The 1980 Agreement also provided that Michigan South Central could use 90 MW of transmission service on Consumers' transmission system and that associated with this usage is a "utilization adjustment" charge, which is calculated pursuant a detailed formula in the 1980 Agreement.⁹

6. METC explains that Article 19.1 of the 1980 Agreement contemplates termination of the agreement. Specifically, it provides that:

[i]f [Michigan South Central] is a party to another transmission ownership and operating agreement with [METC], or has at that time agreed to enter a new transmission ownership and operating agreement with [METC], related to a generating plant other than the [Project I Plant], then [METC] shall offer [Michigan South Central] the option of retaining their ownership interests (or a portion thereof) in any Designated EHV Transmission Lines then existing under this Agreement and having such Designated EHV Transmission Lines (or portions thereof) recognized as designated EHV transmission lines under such other transmission ownership and operating agreement. Within sixty (60) days of such offer by [METC], [Michigan South Central] shall advise [METC] in writing as to whether they choose to exercise such option to retain their ownership interests (or portions thereof) in those Designated EHV Transmission Lines.

7. METC asserts that, in 2004, METC filed an FPA section 203 application to transfer to Michigan South Central and Michigan Public Power Agency ownership interests in two 345 kV lines. For Michigan South Central, the transfer included an additional 1.14 percent ownership interested in the Jointly Owned Line and 55.29 percent ownership interests in the Campbell to Palisades-Tallmadge 345 kV transmission line. Additionally, METC filed the 2004 Transmission Ownership and Operating Agreement (2004 Agreement) to govern METC's and Michigan South Central's joint ownership of the transmission lines and Michigan South Central's use of an additional 31.5 MW of transmission service on METC's transmission system.¹⁰

⁹ *Id.* at 3.

¹⁰ *Id.* at 4.

II. Filings

A. Complaint

8. According to Michigan South Central, section 19.1(i) of the 1980 Agreement obligates METC to offer the unconditional option to transfer its ownership interests under the 1980 Agreement to the 2004 Agreement upon expiration of the 1980 Agreement due to the retirement of the Project I Plant. On January 6, 2016, Michigan South Central advised METC that the Project I Plant was expected to retire on June 1, 2016 and that Michigan South Central intends to transfer its ownership interests from the 1980 Agreement to the 2004 Agreement pursuant to section 19.1(i) of the 1980 Agreement.¹¹

9. As noted above, Michigan South Central states that it currently has ownership interests in, and usage rights over, the METC transmission system totaling 121.5 MW pursuant to the terms of the 1980 Agreement (90 MW) and the 2004 Agreement (31.5 MW). According to Michigan South Central, such ownership interests qualify it for 121.5 MW of “Deducted Load” under the Michigan Third Joint Zone Settlement (Joint Settlement), which recognizes its (and other customers’) investment in METC’s transmission system in the Michigan Joint Zone. Michigan South Central states that, consistent with those arrangements, it does not collect or receive an annual revenue requirement and does not pay the Schedule 9 zonal rate for network service served by Michigan South Central’s ownership entitlement in the METC system.¹²

10. Michigan South Central states that on April 28, 2016, METC first took the position that in order to transfer Michigan South Central’s 90 MW ownership and usage rights to the 2004 Agreement, Michigan South Central would have to agree to amend the 2004 Agreement to incorporate the utilization adjustment provisions of the 1980 Agreement, even though there is no such provision in the 2004 Agreement.¹³

¹¹ Complaint at 2.

¹² *Id.* at 7-8. Michigan South Central notes that the Commission accepted the Joint Settlement in *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,067 (2008). Under that agreement, “Deducted Load” is defined as a joint zone customer’s ownership entitlement in METC’s transmission system, expressed in MW, which is used to reduce the customer’s system load and network billing demand. Complaint n.14. Michigan South Central explains that, while it is not a party to the Joint Settlement, its ownership interests in METC’s transmission system are recognized thereunder. *Id.* n.15.

¹³ *Id.* at 10.

Michigan South Central states that it rejects METC's position as contrary to section 19.1(i) of the 1980 Agreement.¹⁴

11. Michigan South Central states that its transmission service and usage rights under the 1980 Agreement cannot lapse as of June 1, 2016 because no replacement agreement is in place and METC did not file a notice of cancellation at least 60 days in advance of June 1, 2016 consistent with section 35.13 of the Commission's regulations.¹⁵ For this reason, Michigan South Central argues that unless and until the Commission accepts cancellation of the 1980 Agreement, the transmission service provided under its terms and conditions are not terminated regardless of whether the 1980 Agreement expires on its own terms.¹⁶

12. Michigan South Central argues that the 1980 Agreement provides a "clear, unambiguous, and unconditional path" for transferring its 1980 Agreement ownership interests to the 2004 Agreement.¹⁷ It argues that recognition of its ownership interests under the 1980 Agreement in the 2004 Agreement will allow Michigan South Central to preserve its usage rights in the METC system and the capacity credit for Deducted Load under the joint zone structure.¹⁸ With regard to its usage rights, Michigan South Central asserts that the 2004 Agreement equates ownership interests recognized under the 2004 Agreement with transmission usage rights governed by the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff. Additionally, Michigan South Central argues that, with respect to the capacity credit, transfer of 90 MWs of ownership interests from the 1980 Agreement to the 2004 Agreement will allow Michigan South Central to deduct load associated from these ownership entitlements from its transmission demand bill in recognition of its investments in the METC system. Michigan South Central contends that, absent such a deduction, it would be double-paying for transmission service by virtue of the payments made to acquire its ownership entitlements and usage rights and by paying network rates for services as if it had no such

¹⁴ *Id.*

¹⁵ 18 C.F.R. § 35.13 (2015).

¹⁶ Complaint at 12.

¹⁷ *Id.*

¹⁸ *Id.*

ownership entitlements and usage rights.¹⁹ It asserts that until the amendment of the 2004 Agreement, the 1980 Agreement cannot be lawfully terminated and it would be unjust and unreasonable to deprive Michigan South Central of the use and benefit to its ownership entitlements.²⁰

13. For these reasons, Michigan South Central asks the Commission to require METC to comply with the requirements of the 1980 Agreement and to amend the 2004 Agreement consistent with the proposed amendments submitted as Attachment 4 to its Complaint. It also asks the Commission to direct METC to “confirm that [Michigan South Central’s] ownership and usage rights under the [1980 Agreement] remain in effect until such time as the amended [2004 Agreement] is accepted.” Finally, it asks for the Commission to establish a refund effective date commencing on May 31, 2016 to protect Michigan South Central if it is assessed any charges that would not be assessable “had the appropriate amendments to the [2004 Agreement] been made effective as of June 1, 2016.”²¹

B. Unexecuted Agreement

14. METC states that the Complaint includes Michigan South Central’s proposed amendments to the 2004 Agreement but that Michigan South Central fails to include all of the necessary provisions for Michigan South Central to retain its service. METC argues that Michigan South Central’s rights to the 90 MW that are reflected in the 1980 Agreement include both rights and obligations and that METC’s proposed changes to the 2004 Agreement, which are incorporated into the Unexecuted Agreement, are just and reasonable to provide Michigan South Central with continued service consistent with Michigan South Central’s rights and obligations in the 1980 Agreement.²²

15. METC argues that the simplest way to update the 2004 Agreement is to create a new Exhibit F to reflect some of the terms of the 1980 Agreement, which it has submitted in this proceeding.²³ Additionally, METC has proposed changes to the “Whereas

¹⁹ *Id.* at 13. Michigan South Central asserts that METC’s “breach of contractual obligations” would cost Michigan South Central approximately \$3,500,000 annually in increased payments. *Id.* at 14.

²⁰ *Id.* at 13.

²¹ *Id.* at 13-14.

²² METC Application at 5.

²³ *Id.*

Clauses” and Articles 1, 2, 3, 5, 6, 7, 8, 10, and 11 through 20.²⁴ METC requests an effective date of June 1, 2016 and requests waiver of section 35.15 of the Commission’s regulations to allow this effective date. METC contends that good cause exists for the Commission to grant waiver because the 1980 Agreement provides for the transfer of ownership agreements to another agreement upon termination of the 1980 Agreement to allow Michigan South Central to have continuous uninterrupted service.²⁵

III. Notice of Filings and Responsive Pleadings

16. Notice of the Complaint was published in the *Federal Register*, 81 Fed. Reg. 37,192 (2016), with answers, interventions, and protests due on or before June 21, 2016. METC filed a timely answer. Consumers filed a timely motion to intervene and protest. On July 12, 2016, Michigan South Central filed a motion for leave to answer METC’s answer, protest of the Unexecuted Agreement, and motion to consolidate the Complaint and Unexecuted Agreement proceedings.²⁶ On July 19, 2016, Consumers filed a notice of withdrawal of its protest to the Complaint.

17. Notice of the Unexecuted Agreement was published in the *Federal Register*, 81 Fed. Reg. 42,342 (2016), with interventions and protests due on or before July 12, 2016. Michigan South Central and Consumers filed timely motions to intervene and protests. On July 19, 2016, Consumers filed a notice of partial withdrawal of its protest to the Unexecuted Agreement. On July 27, 2016, METC filed an answer to Michigan South Central’s answer. On August 3, 2016, Michigan South Central filed an answer to METC’s answer.

IV. Comments, Protests, and Answers

A. Complaint Proceeding

18. METC disputes Michigan South Central’s assertion that it breached the terms of the 1980 Agreement. METC states that the 1980 Agreement simply requires that, upon termination of that agreement, METC make an offer to Michigan South Central to continue joint ownership of the Jointly Owned Line. However, METC argues that nothing in the 1980 Agreement specifies the content of such offer and that Michigan

²⁴ *Id.* at 5-7.

²⁵ *Id.* at 8.

²⁶ Michigan South Central filed a singular pleading to serve as the answer in the Docket No. EL16-77-000 and as a protest in Docket No. ER16-1986-000.

South Central has the right to reject any offer. METC argues that it has made an offer to Michigan South Central, and the fact that Michigan South Central does not prefer the terms of the offer does not mean that METC has breached any agreement.²⁷

19. Second, METC states that Michigan South Central's reading of the term "ownership interests" is inconsistent with the 1980 Agreement as a whole.²⁸ METC argues that the 1980 Agreement only specifies that METC must continue to offer Michigan South Central's "ownership interests" in the Jointly Owned Line, but that Michigan South Central has instead interpreted the scope of "ownership interests" continued to extend only to transmission usage rights that exist under the 1980 Agreement while ignoring its obligation to pay both for the facilities it jointly owns, and the transmission system it uses.²⁹

20. Third, METC argues that Michigan South Central inappropriately attempts to rely on extrinsic evidence to support its interpretation of the 1980 Agreement.³⁰ METC argues that the Commission need only consider the 1980 Agreement to interpret the 1980 Agreement. It further states that when one examines the extrinsic evidence that Michigan South Central relies upon, those documents distort the intent of the 1980 Agreement.³¹

21. Fourth, METC states that Michigan South Central misreads the Commission's regulations with respect to termination or cancellation of agreements, raising concern that METC could somehow terminate the 1980 Agreement without notice to Michigan South Central.³² METC states that it must submit a filing with the Commission in order to cancel the 1980 Agreement and otherwise incorporate the surviving terms into the 2004 Agreement.³³ METC states that Michigan South Central's concern is without merit since concurrent with the instant answer that it has submitted a section 205 filing

²⁷ METC Answer at 2, 8-10.

²⁸ *Id.* at 10-14.

²⁹ *Id.* at 2, 10-14.

³⁰ *Id.* at 2, 14-17.

³¹ *Id.* at 15-17.

³² *Id.* at 2, 17-18.

³³ *Id.* at 18.

with the Commission to (1) transfer the ownership interests from the 1980 Agreement to the 2004 Agreement and (2) terminate the 1980 Agreement.³⁴

22. Lastly, METC states that, should the Commission grant the Complaint, the refund effective date must be clarified. Specifically, METC argues that, although Michigan South Central attempts to establish a June 1, 2016 refund effective date, Michigan South Central fails to explain how the utilization adjustment charges are assessed and exactly how the refund effective date should apply.³⁵

B. Unexecuted Agreement Proceeding

23. In its protest, Consumers argues that the Unexecuted Agreement, like the Complaint, incorporates language relating not just to transmission-related matters involving METC and Michigan South Central, but also to Consumers' provision of wholesale distribution service to Michigan South Central even though Consumers is not a party to the 2004 Agreement and has not otherwise consented to such language.³⁶ Moreover, Consumers argues that even if some form of wholesale distribution service related revisions are permitted in the Unexecuted Agreement, METC has made inappropriate changes that: (1) suggest that Michigan South Central's entitlement in Consumers' wholesale distribution service system is 121.5 MW instead of the 3.6 MW entitlement under the 2004 Agreement; (2) suggest that Consumers gave METC *carte blanche* to file whatever changes it seeks to the 2004 Amendment; and (3) state that Consumers' wholesale distribution service system does not include 138 kV facilities.³⁷ It asks the Commission to reject any wholesale distribution service-related provisions in the Unexecuted Agreement and grant such further relief "as may be lawful and proper."³⁸

24. In its partial withdrawal, Consumers states that its protest addressed two categories of changes to the 2004 Agreement: (1) those providing for a 3.6 MW entitlement over Consumers' wholesale distribution service system; and (2) certain specific provisions proposed by only METC. Consumers argues that Michigan South Central, Consumers, and METC have come to an agreement in principle to resolve the first category of

³⁴ *Id.*

³⁵ *Id.* at 19.

³⁶ Consumers Protest at 2-3.

³⁷ *Id.* at 3.

³⁸ *Id.* at 7.

objections and that it withdraws its protests with regard to these objections and asks that the Commission not address them in this proceeding. With regard to the second category, Consumers asserts that it is negotiating with Michigan South Central and METC and if it comes to an agreement in principle to resolve these objections, it will file a notice of withdrawal to this portion of the protest as well. It asks the Commission to defer any order addressing the second category of objections until further notice.³⁹

25. Michigan South Central argues that METC has failed to comply with section 19.1(i) of the 1980 Agreement and asks the Commission to reject METC's interpretation of that Agreement.⁴⁰ It also asserts that METC has no right to transfer the utilization adjustment from the 1980 Agreement to the 2004 Agreement. In support, it argues that METC deleted the proposed utilization adjustment provisions when negotiating the 2004 Agreement in 2002.⁴¹ Additionally, it states that section 19.1(i) provides for recognition of Michigan South Central's ownership interests under the 2004 Agreement, not for the incorporation of the 1980 Agreement into the 2004 Agreement.⁴² Furthermore, it argues that there is no direct link between Michigan South Central's ownership interests and the utilization adjustment.⁴³ Michigan South Central also states that the utilization adjustment is a pre-MISO requirement that clashes with the post-MISO terms and conditions of the 2004 Agreement.⁴⁴

26. Additionally, Michigan South Central argues that, while it is not a party to the Joint Settlement, its ownership entitlements were purposely recognized through this settlement and that it discussed this settlement to explain the potential financial harm to Michigan South Central.⁴⁵ Additionally, it argues that METC has not qualified for a waiver of the 60-day prior notice requirements because the waiver would have

³⁹ Consumers July 19, 2016 Partial Withdrawal at 2-3.

⁴⁰ Michigan South Central Answer at 4-8.

⁴¹ *Id.* at 9-10.

⁴² *Id.* at 10-11.

⁴³ *Id.* at 11-13.

⁴⁴ *Id.* at 13-15.

⁴⁵ *Id.* at 16-17.

a rate impact on Michigan South Central and this rate increase is not prescribed in section 19.1(i) of the 1980 Agreement.⁴⁶

27. Michigan South Central asks the Commission to reject the Unexecuted Agreement and order METC to adopt the amendments submitted with the Complaint because the utilization adjustment proposed is unjust and unreasonable and METC has no right to unilaterally change how usage rights are exercised under the 2004 Agreement.⁴⁷

28. Additionally, in response to Consumers, Michigan South Central argues that the 1980 Agreement has not expired and will not expire until the Commission accepts METC's notice of cancellation and that an obligation under section 1(b) of the Partial Novation and Release Agreement of August 6, 2001 obliges Consumers to provide wholesale distribution service on its system and that this commitment will continue for the duration of the relevant ownership and operation agreements.⁴⁸

29. According to Michigan South Central, Consumers also argues that the wholesale distribution service agreement between METC and Consumers, which is included in Michigan South Central's proposed amendments to the 2004 Agreement, will be terminated and that the Commission accepted a revised METC-Consumers wholesale distribution agreement.⁴⁹ Michigan South Central argues that this agreement is "currently being litigated" and that it is therefore premature to refer to the previous agreement as defunct.⁵⁰

30. Additionally, in response to Consumers, Michigan South Central says that it is not incorporating language related to a new 3.6 MW wholesale distribution service entitlement but that such entitlement is already recognized in section 3.4 of the 2004 Agreement.⁵¹ Finally, Michigan South Central argues that, if and when the 2003 wholesale distribution agreement between METC and Consumers expires, there may be

⁴⁶ *Id.* at 17-18.

⁴⁷ *Id.* at 19-23.

⁴⁸ *Id.* at 25.

⁴⁹ *Id.* (citing *Midcontinent Indep. System Operator, Inc.*, 154 FERC ¶ 61,262 (2016)).

⁵⁰ *Id.* at 26.

⁵¹ *Id.*

need for METC to enter into new arrangements with Consumers and Michigan South Central. However, it states that Michigan South Central is indifferent as to whether Consumers or METC perform the wholesale distribution service billing because both have a contractual commitment to recognize Union City's 3.6 MW of wholesale distribution service entitlements.⁵²

31. In response, METC states that it has appropriately included the utilization adjustment for the 1980 Agreement in its offer to Michigan South Central to continue its ownership interests in the Jointly Owned Line. METC contends that, despite Michigan South Central's desire to retain 90 MW of usage rights on METC's system without paying for that capacity, "the only reasonable interpretation" of the "ownership interests" includes Michigan South Central's title in the Jointly Owned Line, obligation to operate and maintain that line, and Michigan South Central's transmission use rights and the utilization adjustment.⁵³ METC argues that Michigan continues to make unsupported and inconsistent arguments that "cherry-pick" the "ownership interests" that Michigan South Central wishes to include and that would allow for continued joint ownership of the Jointly Owned Line without continuing the payment of operations and maintenance costs. METC also disagrees with Michigan South Central's arguments that the utilization adjustment is unjust and unreasonable. Furthermore, METC argues that Michigan South Central has taken inconsistent positions by showing concern that METC's proposal leaves a gap between the expiration of the 1980 Agreement and the effectiveness of the Unexecuted Agreement and simultaneously arguing that the Commission should not allow METC's notice of termination of the 1980 Agreement to become effective on June 1, 2016.⁵⁴

32. With regard to Consumers' protest, METC agrees that the reference to 121,500 kW in section 3.4 of the Unexecuted Agreement should be changed to 3,600 kW, but acknowledges that the parties are currently negotiating other terms regarding Consumers' wholesale distribution system. For this reason, METC asks the Commission to accept the Unexecuted Agreement and states that METC will make its proposed changes on compliance.⁵⁵

⁵² *Id.* at 28.

⁵³ METC Second Answer at 2.

⁵⁴ *Id.* at 2-3.

⁵⁵ *Id.* at 3.

33. In response to METC, Michigan South Central states that section 19.1(1) of the 1980 Agreement provides for the transfer of “ownership interest,” not usage rights.⁵⁶ Michigan South Central also states that since the 1980 Agreement will be terminating, nothing in the 1980 Agreement provides that the utilization adjustment will survive.⁵⁷ Moreover, Michigan South Central notes that the Commission accepted the 2004 Agreement without such a utilization adjustment.⁵⁸ Michigan South Central argues that the Commission should reject arguments that the 2004 Agreement should include a utilization adjustment because the 2004 Agreement was structured to keep the ownership entitlement levels fixed.⁵⁹ Lastly, Michigan South Central argues that although the Commission found the utilization adjustment just and reasonable in the context of the 1980 Agreement does not mean that the utilization adjustment is just and reasonable in the context of the 2004 Agreement.⁶⁰

V. Discussion

A. Procedural Matters

34. 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 these proceedings. 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 will accept Michigan South Central’s and METC’s answers because they have provided information that assisted us in our decision-making process.

35. We find that the issues that have been raised with respect to the Complaint in Docket No. EL16-77-000 and the Unexecuted Agreement in Docket No. ER16-1986-000 are closely interrelated, and this warrants consideration of the two proceedings jointly for purposes of settlement, hearing, and decision. Consequently, the Commission will consolidate these proceedings for purposes of settlement, hearing, and decision.

⁵⁶ Michigan South Central Second Answer at 3.

⁵⁷ *Id.*

⁵⁸ *Id.* at 3-4.

⁵⁹ *Id.* at 4-5.

⁶⁰ *Id.* at 6.

B. Commission Determination

36. We find that the Complaint raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing and settlement procedures ordered below. Therefore, as discussed above, the Complaint is consolidated with the Unexecuted Agreement for purposes of settlement, hearing, and decision.

37. Our preliminary analysis indicates that the Unexecuted Agreement has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. We also find that the Unexecuted Agreement raises issue of material fact that cannot be resolved on the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Therefore, we will accept the Unexecuted Agreement, suspend it for a nominal period, to become effective August 21, 2016, subject to refund, and establish hearing and settlement judge procedures. We also find that METC has not demonstrated good cause for waiver of the prior notice requirement.⁶¹ Therefore, we will accept the Unexecuted Agreement effective 61 days from the date of METC's June 21, 2016 filing (i.e., August 21, 2016).

38. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁶² If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.⁶³ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement

⁶¹ See 18 C.F.R. § 35.11 (2015).

⁶² 18 C.F.R. § 385.603 (2015).

⁶³ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

39. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Section 206(b) permits the Commission to order refunds for a 15-month refund period following the refund effective date. Consistent with our general policy of providing maximum protection to customers,⁶⁴ we will set the refund effective date at the earliest date possible, i.e., June 1, 2016.

40. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonable expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within twelve months of the commencement of hearing procedures, or August 31, 2017. Thus, we estimate that, absent settlement, we would be able to issue our decision within approximately eight months of the filing of briefs on and opposing exceptions, or by June 30, 2018.

The Commission orders:

(A) The Unexecuted Agreement is hereby accepted for filing and suspended for a nominal period to become effective August 21, 2016, subject to refund, as discussed in the body of this order.

(B) Docket Nos. EL16-77-000 and ER16-1986-000 are hereby consolidated for purposes of settlement, hearing, and decision, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in the above-captioned dockets. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (D) and (E) below.

⁶⁴ See, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2015), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all the powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(E) Within thirty (30) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(G) The refund effective date in Docket No. EL16-77-000, established pursuant to section 206(b) of the FPA, is June 1, 2016.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.