

157 FERC ¶ 61,016
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Generation, LLC

Docket No. EL16-66-000

ORDER DIRECTING REFUNDS

(Issued October 11, 2016)

1. On July 21, 2016, Midwest Generation, LLC (Midwest) responded to the Commission's June 21, 2016 Order to Revise Tariff Rate or Show Cause (June 21 Order),¹ agreeing it had failed to abide by the terms and conditions of the Settlement Agreement establishing its rate for Reactive Supply and Voltage Control Service (Reactive Service) for the Commonwealth Edison (ComEd) zone of PJM Interconnection, L.L.C. (PJM) (Compliance Filing). Midwest set forth its calculation of the payments received in violation of the Settlement Agreement. As discussed below, we accept Midwest's calculations and find that Midwest's refund obligation, under the Federal Power Act (FPA), is \$3,654,051.07, as calculated through June 30, 2016, to be updated to include interest through the refund payment date. We direct Midwest to pay to PJM the portion of this refund obligation that accrued after Midwest emerged from bankruptcy on April 1, 2014, in the amount of \$1,705,833.89, as calculated through June 30, 2016, to be updated to include interest through the refund payment date in accordance with 18 C.F.R. § 35.19a (2016). We also direct PJM to flow through such refunds to PJM market participants that paid for Midwest's provision of Reactive Service during the April 1, 2014 through June 30, 2016 period. We further direct Midwest to file a refund report.

I. Background

2. Schedule 2 of PJM's Open Access Transmission Tariff (Tariff) provides that PJM will compensate owners of generation and non-generation resources for providing

¹ *Midwest Generation, LLC*, 155 FERC ¶ 61,289 (2016) (June 21 Order). A full background on the basis for the initiation of Docket No. EL16-66-000 is discussed in the June 21 Order.

Reactive Service. In 2004, the Commission accepted a Settlement Agreement establishing a Reactive Service revenue requirement for Midwest's provision of Reactive Service from its facilities interconnected to the ComEd transmission system.² As relevant here, the Settlement Agreement required Midwest to provide notice and seek an amendment to the Midwest portion of Schedule 2 of the PJM Tariff for the ComEd Zone "reducing the Capability Charge" for any suspended unit.³

3. As the Commission explained in the June 21 Order, information posted to PJM's website indicated that units covered under the Settlement Agreement had deactivated, yet Midwest's Reactive Service revenue requirement appeared to include the Capability Charges for the deactivated units. Pursuant to sections 205, 206, and 309 of the FPA,⁴ the Commission directed Midwest to: (1) make a compliance filing setting forth its calculation of the amount of payments it received in violation of the terms and conditions of the Settlement Agreement due to suspended units, or show cause why it should not be found to have received payments in violation of the Settlement Agreement; and (2) either revise its tariff rate in the ComEd zone of PJM to reflect the costs of the generating units continuing to provide reactive power capability, or show cause why it should not be required to do so.⁵ The Commission also stated that "given that Midwest may have continued to receive payments for deactivated units, we have referred such concern to the Commission's Office of Enforcement for further examination and inquiry as may be appropriate."⁶

4. In a related matter, on June 30, 2016, in Docket No. ER16-2095-000, Midwest submitted, pursuant to section 205 of the FPA,⁷ a revised Reactive Service tariff, in order

² *Midwest Generation EME, LLC*, 108 FERC ¶ 61,166 (2004) (accepting Midwest Generation, LLC, Uncontested Offer of Settlement, Docket No. ER04-190-000 (filed May 14, 2004) (Settlement Agreement)).

³ See Settlement Agreement § 3.5; *id.* at Attachment B. The Settlement Agreement defines Suspended Operation to mean "the state of a Unit that [Midwest] has determined has been removed from service for an extended duration for reasons other than an Outage or a Forced Outage. . . ." *Id.* § 1.14.

⁴ 16 U.S.C. §§ 824d, 824e, 825h (2012).

⁵ June 21 Order, 155 FERC ¶ 61,289 at P 7.

⁶ *Id.* P 13.

⁷ 16 U.S.C. § 824(d).

to increase its Reactive Service rates for its facilities in the ComEd Zone to reflect the addition of new generation and to comply with the Commission's second directive in the June 21 Order. On August 29, 2016, the Commission accepted for filing Midwest's revised tariff and suspended it for a nominal period, to become effective August 1, 2016, subject to refund, and established hearing and settlement judge procedures.⁸ The Commission also consolidated Docket Nos. ER16-2095-000 and EL16-66-000 for purposes of hearing and settlement judge procedures regarding Midwest's Reactive Service rate from the July 1, 2016 refund effective date forward. The Commission, however, did not set for hearing this Compliance Filing.⁹

II. Midwest's Compliance Filing

5. In the Compliance Filing, Midwest sets forth the amounts that it owes for failing to comply with the Settlement Agreement, but contends that it should not be responsible to refund amounts that accrued prior to April 1, 2014, and were discharged in bankruptcy. Midwest explains that it filed for bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois on December 17, 2012.¹⁰ The Bankruptcy Court confirmed a plan of reorganization (Bankruptcy Plan) for Midwest Generation and its various affiliates effective April 1, 2014.¹¹ In connection with the Bankruptcy Plan, NRG Energy, Inc. (NRG) acquired through its subsidiaries all of the interests in Midwest. NRG is now the ultimate parent of Midwest.

6. Midwest asserts that when NRG acquired Midwest, NRG was unaware of the requirements of Section 3.5 of the 2004 Settlement Agreement and Midwest's failure to comply with the requirements. Midwest also asserts that NRG was unaware of the

⁸ *Midwest Generation, LLC*, 156 FERC ¶ 61,136 (2016).

⁹ *Id.* P 9 n.15.

¹⁰ The bankruptcy proceeding was initiated by Edison Mission Energy and certain of its affiliated entities, including Midwest. Information about the bankruptcy proceedings and recent court activities can be accessed at the Edison Mission Energy case administration website. See Edison Mission Energy, *Case Administration Website*, <http://www.edisonmissionrestructuring.com/index.php>.

¹¹ Compliance Filing, Transmittal Letter at 3 (citing *Edison Mission Energy*, Order Confirming Debtors' Joint Plan of Reorganization, Case Nos. 12-49219 (JPC) (Mar. 11, 2014) (Confirmation Order), http://edisonmissionrestructuring.com/pdflib/2206_49219.pdf (last accessed Sept. 27, 2016)).

requirements when Midwest, NRG's indirect subsidiary, later deactivated the Will County 3 unit.¹² Both Midwest and NRG "recognize that notices should have been issued and revisions to the Midwest Generation Rate Schedule should have been proposed in connection with the deactivation of Fisk 34-1, Waukegan 6, Will County 1 and 2, Crawford 7 and 8, Fisk 19 and Will County 3."¹³

7. In response to the June 21 Order, Midwest calculated the amount of Reactive Service payments it received for the Deactivated Units subsequent to the 2004 Settlement Agreement. Specifically, as set forth in Exhibits 3 and 4 to the Compliance Filing, Midwest calculated the amount of Reactive Service revenue received per Deactivated Unit from their respective deactivation dates through June 30, 2016, and associated interest. Midwest calculated the total payment amount to be \$3,322,767.52, plus interest (calculated from the respective deactivation dates through June 30, 2016) of \$331,283.55, which totals \$3,654,051.07.¹⁴

8. Midwest also calculated the amount of Reactive Service revenue received per Deactivated Unit that accrued from the April 1, 2014 effective date of the Bankruptcy Plan through June 30, 2016, and associated interest.¹⁵ Midwest calculates this total amount to be \$1,638,427.54 plus interest (calculated from the later of April 1, 2014 or the deactivation date, through June 30, 2016) of \$67,406.35, which totals \$1,705,833.89.¹⁶

9. Midwest states that it "has not proposed to refund reactive power payments and associated interest that accrued prior to the April 1, 2014 effective date of the Bankruptcy Plan," arguing that any debts that accrued under the 2004 Settlement Agreement that occurred prior to April 1, 2014 are discharged and neither NRG nor Midwest has any liability relating to such claims.¹⁷ Citing the "fresh start" purpose of the bankruptcy

¹² Compliance Filing, Transmittal Letter at 4.

¹³ *Id.* The listed units are referred to herein as the Deactivated Units.

¹⁴ *Id.* at 5; *see also id.* at Exs. 3 & 4.

¹⁵ Compliance Filing, Transmittal Letter at 7.

¹⁶ *Id.*; *see also id.* at Exs. 5 & 6. Midwest explains: "For units that deactivated prior to April 1, 2014, Exhibit 5 reflects a calculation of reactive revenues allocated to these units since April 1, 2014. It also includes a calculation to allocate reactive power revenues to Will County 3, which is the only unit that deactivated after the April 1, 2014 date." Compliance Filing, Transmittal Letter at 7.

¹⁷ *Id.* at 5, 7.

code, Midwest asserts that parties are “barred from asserting pre-bankruptcy claims against [Midwest] to the extent that such party failed to timely file a proof of claim.”¹⁸ Midwest explains that, in an April 10, 2013 order, the Bankruptcy Court set a general bar date of June 17, 2013.¹⁹ According to Midwest, under the April 10, 2013 Order Setting Bar Dates, if a creditor fails to file a proof of claim before the bar date, such creditor “shall be barred, stopped, and enjoined” from asserting a claim against Midwest, which “shall be forever discharged from any and all indebtedness or liability” with respect to such claim.²⁰ Midwest asserts that no proof of claim regarding the Reactive Service revenues accrued under the 2004 Settlement Agreement was filed, and, according to the terms of the April 10, 2013 Order Setting Bar Dates, such claims are barred.²¹ For these reasons, Midwest argues that the appropriate refund amount is \$1,705,833.89.²²

III. Motions to Intervene

10. Commonwealth Edison Company, PJM, and Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM, filed timely motions to intervene in this proceeding.²³

¹⁸ *Id.* at 6 (citing Section VIII.F of the Bankruptcy Plan and paragraph 5 of the Confirmation Order).

¹⁹ Compliance Filing, Transmittal Letter at 6 (citing *In Re: Edison Mission Energy*, BK No.: 12-49219, Dkt. No. 640 (Bankr. ND. Ill. Apr. 10, 2013) (“Order (A) Setting Bar Dates for Filing Proofs of Claim, Including 503(B)(9) Proofs of Claim and (B) Approving the Form and Manner of Notice Thereof”) (April 10, 2013 Order Setting Bar Dates)).

²⁰ Compliance Filing, Transmittal Letter at 6 (quoting April 10, 2013 Order Setting Bar Dates ¶ 11).

²¹ Compliance Filing, Transmittal Letter at 6-7.

²² *Id.* at 7.

²³ Interested persons wishing to become a party to Docket No. EL16-66-000 were required to intervene pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), within 21 days of the June 21 Order. June 21 Order, 155 FERC ¶ 61,289 at ordering para. (E).

IV. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Substantive Matters

12. As discussed below, we find that Midwest failed to comply with the terms and conditions of its filed rate for Reactive Service. We accept Midwest's calculations and find that its refund obligation, under the FPA, is \$3,654,051.07, as calculated through June 30, 2016, to be updated to include interest through the refund payment date. We direct Midwest to pay to PJM the portion of this refund obligation that accrued after Midwest emerged from bankruptcy on April 1, 2014, in the amount of \$1,705,833.89, as calculated through June 30, 2016, to be updated to include interest through the refund payment date. We also direct PJM to flow through such refunds to PJM market participants that paid for Midwest's provision of Reactive Service during the April 1, 2014 through June 30, 2016 period. We further direct Midwest to file a refund report.

13. When a utility charges a rate inconsistent with its filed rate, the Commission under the FPA can enforce the terms of the filed rate and order refunds for past violations of the filed rate.²⁴ We find that Midwest's refund obligation under the FPA is the amount of Reactive Service revenue received for the Deactivated Units, from the units' respective deactivation dates through the present, plus associated interest. We accept Midwest's methodology for calculating, and calculation of, the amount of refunds and associated interest owed, as set forth in Exhibits 3 and 4 of the Compliance Filing. Thus Midwest's refund obligation under the FPA, from the 2004 Settlement Agreement through July 1, 2016, is \$3,654,051.07, as calculated through June 30, 2016, to be updated for interest through the refund payment date, as calculated pursuant to 18 C.F.R. § 35.19a (2016).

14. The Commission has determined Midwest has a refund obligation under the FPA for the period prior to the bankruptcy discharge. However, we see no reason for the

²⁴ See, e.g., *Boston Edison Co. v. FERC*, 856 F.2d 361, 369 (1st Cir. 1988) (explaining that the Commission "can enforce the terms of a filed rate and order refunds for past violations of one").

Commission to interpret and apply bankruptcy law here.²⁵ PJM and those parties owed refunds may choose to pursue the refunds in the bankruptcy proceeding if they believe they can be recovered despite the discharge. We find no reason under the Commission's *Arkla*²⁶ doctrine to assert primary jurisdiction over the bankruptcy discharge issue. Under the *Arkla* doctrine, the Commission may defer to court proceedings when the Commission finds that it need not exercise primary jurisdiction based on three factors: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.²⁷

15. Applying the *Arkla* factors, we defer to the bankruptcy court regarding whether Midwest's liability for refunds that accrued prior to April 1, 2014 has been discharged, and thus decline to direct Midwest to pay such refunds here. First, the issue of whether there has been a discharge does not require special Commission expertise, as it requires

²⁵ See *TransAmerican Natural Gas Corp.*, 61 FERC ¶ 61,234, at 61,861 (1992) (“The Commission has recognized that it is the bankruptcy court, not this Commission, that interprets the bankruptcy law.”). The Commission has deferred to bankruptcy courts regarding the payment of refunds in the bankruptcy context. See, e.g., *Columbia Gas Transmission Corp.*, 69 FERC ¶ 61,330, at 62,249–50 (1994), *reh'g denied*, 70 FERC ¶ 61,153 (1995) (“[S]uch issues as the applicability of the automatic stay provisions of the Bankruptcy Code to refund orders by this Commission in the exercise of its statutory responsibilities under the [Natural Gas Act] should be decided in the bankruptcy proceeding, since those issues turn on an interpretation of provisions of the Bankruptcy Code.”); *Transcontinental Gas Pipe Line Corp.*, 79 FERC ¶ 61,224, at 62,012 (1997) (deferring “to the Bankruptcy Court for resolution of such matters as the timing of Columbia's repayment obligation,” because “[a]bsent such deferral, Columbia could be placed in the position of facing conflicting orders from the Bankruptcy Court and the Commission”); *Niagara Mohawk Power Corp.*, 77 FERC ¶ 61,224, at 61,900 (1996) (“[W]hether Niagara Mohawk ultimately will be permitted to collect . . . any monies ordered by the Commission is a matter for the bankruptcy court to decide.”).

²⁶ *Ark. La. Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*).

²⁷ E.g., *PJM Interconnection, L.L.C. v. Accord Energy, LLC*, 129 FERC ¶ 61,010, at P 27 & n.18, *reh'g denied*, 129 FERC ¶ 61,265 (2009) (explaining that “[u]nder the *Arkla* doctrine, the Commission may defer to a court proceeding when the Commission finds that it need not exercise primary jurisdiction” based on the three factors) (citing *Arkla*).

the interpretation and application of bankruptcy law. Second, there is no special need for uniformity of interpretation, as the issue of whether Midwest's refund obligation was partially discharged likely would have little import beyond the instant proceeding. Third, the discharge matter is not of particular significance to the Commission's regulatory responsibilities.

16. Accordingly, we direct Midwest to pay to PJM refunds that accrued from the April 1, 2014 effective date of the Bankruptcy Plan through June 30, 2016, and associated interest. We accept Midwest's calculation of this refund amount, as set forth in Exhibits 5 and 6 of the Compliance Filing. Thus we specifically direct Midwest to, within 30 days of the date of this order, pay to PJM refunds of \$1,705,833.89, updated to reflect interest through the refund payment date, as calculated pursuant to 18 C.F.R. § 35.19a. We also direct PJM to flow through such refunds to PJM market participants that paid for Midwest's provision of Reactive Service during the April 1, 2014 through June 30, 2016 period. We further direct Midwest to file a refund report within 30 days of the refund payment date.

The Commission orders:

(A) Midwest shall, within 30 days of the date of this order, pay to PJM the portion of its refund obligation under the FPA that accrued subsequent to the April 1, 2014 effective date of Midwest's Bankruptcy Plan, which is \$1,705,833.89, as calculated through June 30, 2016, to be updated to reflect interest through the refund payment date in accordance with 18 C.F.R. § 35.19a (2016), as discussed in the body of this order. PJM shall then flow through such refunds to market participants, as discussed in the body of this order.

(B) Midwest shall file a refund report within 30 days of the refund payment date, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.