

168 FERC ¶ 61,144
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Midcontinent Independent System Operator, Inc. Docket Nos. ER19-2241-000
ER19-2241-001

ORDER ACCEPTING AND SUSPENDING BLACKSTART RESOURCE SERVICE
AGREEMENT, SUBJECT TO REFUND, AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued September 5, 2019)

1. On June 24, 2019, as amended on July 8, 2019, pursuant to section 205 of the Federal Power Act (FPA),¹ International Transmission Company d/b/a ITC*Transmission* (ITCT), Michigan Electric Transmission Company, LLC (METC), and Midcontinent Independent System Operator, Inc. (MISO)² filed an application for the approval of two *pro forma* Blackstart Resource Service Agreements (MISO Tariff Attachments NN-ITCT and NN-METC) and rate formula templates (MISO Tariff Schedules 33-ITCT and 33-METC) to be used by Blackstart Resource providers to provide Blackstart Resource service to ITCT and METC. We accept the filing, suspend it for a nominal period, to become effective August 24, 2019, as requested, subject to refund, and establish hearing and settlement judge procedures.

I. Background

2. ITCT and METC state that they are independent transmission companies that are wholly-owned subsidiaries of International Transmission Company and transmission-owning members of MISO. They state that they are functionally registered as transmission owners, transmission operators, and transmission planners in the North American Electric Reliability Corporation (NERC) registry and in the Reliability*First*

¹ 16 U.S.C. § 824d (2012).

² MISO states that it joins this filing as the administrator under MISO's Open Access Transmission, Energy, and Operating Reserve Markets Tariff (Tariff), but takes no position on the substance of the filing.

Corporation regions.³ Consequently, they state that they are subject to mandatory NERC reliability standards that require them to establish plans for restoring their systems following a disturbance in which one or more areas of the bulk electric system shuts down, thus necessitating the use of blackstart resources to restore service.⁴

3. ITCT and METC state that they currently each have two blackstart resources identified in their system restoration plans; however, the retirement of one of the two blackstart resources committed to METC as of June 1, 2019 will leave METC with a single blackstart resource in its footprint.⁵ They further state that, because of potential resource changes, there may be no blackstart resources in ITCT's footprint by 2023. Thus, ITCT and METC are concerned that, over the next two to three years, there may be insufficient blackstart resources in the ITCT and METC footprints to restore their respective systems after a blackout.⁶ ITCT and METC state that it is crucial that they identify blackstart resources to replace the blackstart resources that will become unavailable in the near future,⁷ and that they intend to issue a formal request for proposals (RFP) to identify generators willing to serve as blackstart resources.

4. ITCT and METC contend that, to make the investment that may be necessary to qualify as blackstart resources, generator owners must have reasonable assurances that their investment will be a recoverable cost and that they will earn a reasonable rate of return on their investment.⁸ ITCT and METC explain that, while MISO's *pro forma* Attachment NN blackstart agreement and associated Schedule 33 contain a methodology for determining appropriate costs generally, Schedule 33 requires blackstart capable resource owners to first make the necessary investment to bring their facilities into compliance with the NERC reliability standards and then to seek approval from the Commission to recover the annual revenue requirement.⁹ In addition, ITCT and METC state that MISO's Schedule 33 provides only a general description of costs that are eligible for recovery, but no formula that can be implemented without further cost detail;

³ June 24 Application, Transmittal Letter at 2, Moltane Test. at 4.

⁴ *Id.*, Moltane Test. at 4.

⁵ *Id.*, Transmittal Letter at 3, Moltane Test. at 5.

⁶ *Id.*, Transmittal Letter at 2.

⁷ *Id.*, Moltane Test. at 5.

⁸ *Id.*, Transmittal Letter at 3.

⁹ *Id.* at 3, Moltane Test. at 5-6.

thus, it does not provide sufficient detail to construct an annual revenue requirement that would permit blackstart capable generator owners to have a reasonable expectation that the costs incurred will be recoverable. ITCT and METC assert that they propose to incent generators to provide blackstart service by developing their more comprehensive, company-specific versions of Attachment NN and Schedule 33 that will provide generator owners greater certainty regarding the process of becoming a blackstart resource in the ITCT and METC footprints, as well as the costs they can expect to recover and return on equity they can expect to receive.¹⁰ ITCT and METC explain that, if approved by the Commission, the agreements would be used in lieu of the Attachment NN form of agreement in the MISO Tariff developed in connection with Schedule 33.¹¹

II. Filing

5. ITCT and METC state that their proposed *pro forma* agreements and formula rate template protocols are based on the currently effective versions of the American Transmission Company LLC (ATC) *pro forma* agreement (Attachment NN-ATCLLC) and formula rate template (Schedule 33-ATCLLC), which were approved by the Commission and have been in effect for over five years.¹² They state that the proposed *pro forma* blackstart service agreements set forth the obligation of a blackstart resource owner to provide service to ITCT or METC, including the specific requirements to be met and fulfilled by the blackstart resource, the testing requirements necessary to establish that the blackstart resource is capable of providing blackstart resource service, and the manner by which costs incurred by blackstart resource owners are to be determined and paid.¹³ ITCT and METC assert that, in accordance with Schedule 33 of the MISO Tariff, the amounts payable to the blackstart resource owners will be collected from all ITCT and METC transmission customers in the transmission pricing zone where the blackstart resource provides service and paid directly to blackstart resource owners on

¹⁰ *Id.*, Transmittal Letter at 4, Moltane Test. at 6.

¹¹ *Id.*, Moltane Test. at 6-7.

¹² *Id.*, Transmittal Letter at 2.

¹³ *Id.* at 4.

a monthly basis.¹⁴ The proposed *pro forma* agreements include a three-year minimum term of service by blackstart resources.¹⁵

6. ITCT and METC assert that Schedule 33-ITCT and Schedule 33-METC set forth formula rate template protocols that can be used to establish the annual revenue requirement to be paid under the *pro forma* agreements to the blackstart resource owners that elect to utilize Schedule 33-ITCT or Schedule 33-METC.¹⁶ ITCT and METC state that the proposed rate formula is generally the same formula included in ATC's Schedule 33-ATCLLC, which has been approved by the Commission.¹⁷ The proposed rate formula defines the annual revenue requirement as the sum of: (1) annual fixed cost; (2) annual variable cost; (3) and annual training/compliance cost, plus a true-up.¹⁸

7. ITCT and METC assert that the fixed cost component of the annual revenue requirement will be the sum of: (1) a two percent portion of the blackstart resource owner's existing generator investment; and (2) any net incremental capital investment necessary to make the unit compliant with the NERC reliability standards.¹⁹ ITCT and METC propose to use MISO's Cost of New Entry (CONE) as a proxy for the blackstart resource owner's existing generator investment. Further, blackstart resource owners in the ITCT footprint will use an ROE of 10 percent and a 50/50 debt-to-equity capital structure, which ITC notes is the same ROE and capital structure approved by the Michigan Public Service Commission for DTE Electric Company (DTE), while blackstart resource owners in the METC footprint will use an ROE of 10 percent and a 47.36/52.64 debt-to-equity capital structure.²⁰ With regard to training/compliance costs, ITCT and METC state that blackstart resource owners will be entitled to recover all costs incurred in providing employee training (including training on the mandatory reliability standards requirements applicable to blackstart resources), and all costs

¹⁴ *Id.* at 5, 15.

¹⁵ *Id.*, Attachment B-1 (proposed Attachment NN-ITCT § 5); Attachment B-2 (proposed Attachment NN-METC § 5).

¹⁶ *Id.*, Transmittal Letter at 4.

¹⁷ *Id.* at 8 (referencing *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,093 (2013)).

¹⁸ *Id.* at 9.

¹⁹ *Id.*

²⁰ *Id.* at 10.

associated with establishing and implementing a compliance program to the extent necessary to comply with mandatory reliability standards.²¹ ITCT and METC explain that, if the amounts collected by MISO from transmission customers and paid to the blackstart resource owner are insufficient to recover the blackstart resource owner's costs, and the total annual revenue requirement paid to the blackstart resource owner is less than the annual revenue requirement determined in the formula rate template for any rate period, then the blackstart resource owner may add to the annual revenue requirement for the next succeeding rate period the unpaid amount of any prior annual revenue requirement (without interest).²² Conversely, they explain, if the amounts collected by MISO from transmission customers and paid to the blackstart resource owner are in excess of the total annual revenue requirement to be paid to the blackstart resource owner in any rate period, then the amount over-collected by the blackstart resource owner shall be subtracted from the annual revenue requirement for the next succeeding rate period, and the annual revenue requirement reduced by the amount overcollected (without interest).

8. ITCT and METC state that blackstart resource owners that wish to provide blackstart resource service to ITCT or METC would not be required to utilize Schedule 33-ITCT or Schedule 33-METC and may instead elect to establish their own revenue requirement under FPA section 205.²³ However, they explain, if a generator owner does seek to recover amounts under Schedule 33-ITCT or Schedule 33-METC, the generating unit must be blackstart capable at the time it enters into the applicable *pro forma* agreement (Attachment NN-ITCT or Attachment NN-METC).

9. ITCT and METC acknowledge that capital improvements may be necessary in order for blackstart capable generating units to satisfy the criteria of a blackstart resource pursuant to the NERC reliability standards.²⁴ However, ITCT and METC state that future changes in the topology of their transmission systems may necessitate removal of resources from the system restoration plan. They explain that retaining a resource when its inclusion is no longer necessary may subject transmission customers to higher costs. At the same time, however, ITCT and METC concede that such removal should not impose an unreasonable cost on the owner of a resource that is removed. Thus, to the extent that a blackstart resource is removed from the system restoration plan and unrecovered variable costs or unamortized net incremental capital costs remain, the

²¹ *Id.* at 11.

²² *Id.* at 11-12.

²³ *Id.* at 7.

²⁴ *Id.* at 12-13.

pro forma agreements and rate formulas provide for the recovery of those costs over a period of 10 years following the removal of the resource.²⁵

10. On July 8, 2019, ITCT and METC filed an errata to their filing. They state that the errata filing contains the correct version of Attachment NN-ITCT and includes the previously omitted formula rate template protocols for both ITCT and METC blackstart resource service.²⁶

III. Notices and Responsive Pleadings

11. Notice of the filing submitted on June 24, 2019 was published in the *Federal Register*, 84 Fed. Reg. 31,312 (2019), with comments, interventions and protests due on or before July 15, 2019. Notice of the errata filing submitted on July 8, 2019 was published in the *Federal Register*, 84 Fed. Reg. 33,767 (2019), with comments, interventions and protests due on or before July 29, 2019.

12. On July 12, 2019, DTE filed a motion to intervene and a request for an extension of the comment period to August 8, 2019. On July 19, 2019, the Commission granted the request to extend the comment period.²⁷

13. Timely motions to intervene were filed by Consumers Energy Company and American Municipal Power, Inc.

14. DTE filed timely comments in which it asks the Commission to accept the proposed *pro forma* agreements and associated formula rate template and protocols, but also require some modifications and clarifications.²⁸ DTE states that applicants did not provide any detail regarding how the proposed RFP process will be conducted or the criteria that will be used in selecting resources to provide blackstart resource service.²⁹

²⁵ ITCT and METC explain that the CONE-based fixed costs related to pre-existing generator investment and costs that are variable or which relate to training or standards compliance that would no longer be incurred once the blackstart resource is removed from ITCT or METC's system restoration plan will not be recoverable. *Id.* at 13-14.

²⁶ July 8 Errata Filing, Transmittal Letter at 1.

²⁷ Notice of Extension of Time, Docket Nos. ER19-2241-000 and ER19-2241-001 (July 19, 2019).

²⁸ DTE Comments at 3.

²⁹ *Id.*

DTE argues that it is critical that the RFP processes undertaken by ITCT and METC are conducted in a fair, transparent, unbiased and objective manner in order for resulting rates to be just and reasonable, particularly where affiliates of ITCT and METC may participate in the RFP.³⁰ Therefore, DTE respectfully requests that the Commission require ITCT and METC to abide by clear and transparent guidelines in conducting their respective RFPs for blackstart resources.³¹

15. DTE also asserts that neither the proposed information exchange nor the subsequent challenge procedures identified in the proposed formula rate template and protocols are clearly defined, and that the proposed procedures lack the clarity and structure necessary to ensure the transparency required for the establishment of just and reasonable rates.³² DTE explains that the proposed protocols omit timelines for information exchange procedures; for example, instead of providing a specific period for information requests to be submitted by interested third parties after blackstart resource owners post informational filings detailing the costs of service, the proposed protocols permit interested parties to request information within a reasonable time and allow responses from the blackstart resource owner within a reasonable time. DTE contends that such open-ended timelines create an unacceptable period under which rates could be susceptible to challenge by interested third parties. DTE states that, additionally, the blackstart resource owner is afforded an opportunity to delay responses to such requests, thus extending the potential period of uncertainty.³³ DTE argues that the protocols should specify a period for third parties to review such informational filings and submit data requests in the same manner as the process employed in ITCT's and METC's formula rate protocols for transmission rates, and similarly, the blackstart resource owner should be provided a specific period to respond.

16. DTE states that the Commission has explicitly required that "formula rate protocols afford parties the opportunity to engage in a well-defined informal challenge process."³⁴ DTE asserts that the proposed protocols do not provide any processes for

³⁰ *Id.* at 3-4.

³¹ *Id.* at 4. For instance, DTE notes that the Commission could apply the guidelines adopted in *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082 (2004) (*Allegheny*), which were established to ensure that no affiliate receives undue preference during any stage of an RFP process.

³² DTE Comments at 5.

³³ *Id.* at 6.

³⁴ *Id.* (citing *ALLETE, Inc.*, 143 FERC ¶ 61,149, at P 18 (2013) (*ALLETE*)).

informal or formal challenge, and instead rely on Attachment HH Dispute Resolution procedures to resolve disputes regarding the revenue requirement. DTE notes that the Commission has already determined that the use of dispute resolutions procedures to resolve such disputes “imposes significant informational and financial obstacles that interested parties must overcome in order to raise issues with a...owner’s implementation of its formula rate...[and] could discourage interested parties from raising issues of less financial significance, even when their concerns are valid.”³⁵ DTE asserts that the proposal’s lack of structure could: (1) lead to unpredictable gamesmanship that could complicate and delay information exchange; (2) inappropriately shift the burden, at the outset, to the challenger of the rate to demonstrate that rates are not just and reasonable; (3) increase the financial burden on challengers to rates; and (4) have a chilling effect on challenges of less financial significance.³⁶ Accordingly, DTE states that the ITCT and METC should be required to establish detailed informal and formal challenge procedures.

17. On August 20, 2019, ITCT and METC filed an answer to DTE’s comments. They assert that the RFP process is outside the scope of this proceeding and does not warrant Commission action.³⁷ ITCT and METC contend that the *Allegheny* order cited by DTE is inapposite because the *Allegheny* proceeding involved the Commission’s consideration of an independently-conducted, already-completed RFP process as evidence probative of the Commission’s ultimate consideration of whether to grant market-based rate authority for sales between affiliates – it did not involve Commission oversight of, or modifications to, an ongoing RFP process itself.³⁸ ITCT and METC state that, although it is beyond the scope of this proceeding, they intend to conduct the RFP in a fair, transparent, and unbiased manner.³⁹

18. ITCT and METC assert that the challenge procedures in Schedule 33-ITCT and Schedule 33-METC are just and reasonable.⁴⁰ They argue that Section II of the formula rate protocols contains a well-defined challenge process, specifying that “disputes regarding the blackstart resource owner’s revenue requirement are to be resolved in accordance with Attachment HH of the MISO Tariff.” ITCT and METC further argue

³⁵ *Id.* (citing *ALLETE*, 143 FERC ¶ 61,149 at P 115).

³⁶ *Id.* at 7.

³⁷ ITCT and METC Answer at 2.

³⁸ *Id.* (citing *Allegheny*, 108 FERC ¶ 61,082 at P 2).

³⁹ *Id.* at 3.

⁴⁰ *Id.* at 4.

that Attachment HH provides substantial, well-developed procedures for the resolution of disputes regarding blackstart service, including extensive discovery procedures. ITCT and METC contend that DTE has failed to demonstrate that the requirements for dispute resolution procedures applied to transmission formula rates in *ALLETE* should also be extended to ancillary services rates such as those proposed in the filing.⁴¹ ITCT and METC reiterate that the formula protocols proposed here are functionally identical to those approved by the Commission for ATC's currently effective Schedule 33-ATC for blackstart service, which uses the dispute resolution procedures in MISO Attachment HH.

IV. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept the answer filed by ITCT and METC in this proceeding because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

21. Our preliminary analysis indicates that proposed Attachment NN-ITCT, Attachment NN-METC, Schedule 33-ITCT, and Schedule 33-METC have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. The filing raises issues of material fact that cannot be resolved based on the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Therefore, we will accept proposed Attachment NN-ITCT, Attachment NN-METC, Schedule 33-ITCT, and Schedule 33-METC for filing, suspend them for a nominal period, make them effective August 24, 2019, as requested, subject to refund, and set them for hearing and settlement judge procedures.

22. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures commence. 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

⁴¹ *Id.* at 5.

Commission's Rules of Practice and Procedure.⁴² 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.⁴³ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Proposed Attachment NN-ITCT, Attachment NN-METC, Schedule 33-ITCT, and Schedule 33-METC are hereby accepted for filing and suspended for a nominal period, to become effective August 24, 2019, as requested, subject to refund, as discussed in the body of this order.

(B) 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 the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the agreements and schedules, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2019), the Chief 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 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 within five (5) days of the date of this order.

⁴² 18 C.F.R. § 385.603 (2019).

⁴³ 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 available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

(D) Within thirty (30) days of the appointment of the settlement judge, 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.

(E) 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 these proceedings 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.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.