

I. Background

2. In an order issued November 18, 2004,² the Commission adopted the SECA, a transitional rate mechanism that had been defined in prior orders. The SECA is designed to recover lost revenues associated with the elimination of rate pancaking between the regional transmission systems operated by PJM Interconnection, L.L.C. (PJM) and Midwest Independent Transmission System Operator, Inc. (Midwest ISO). The SECA recovers these lost revenues from transmission customers in each license plate pricing zone in proportion to the benefits those customers realize as a result of the elimination of rate pancaking.

3. On November 24, 2004, and in subsequent filings, the Midwest ISO and PJM transmission owners submitted compliance filings to implement the SECA, including a specific SECA obligation for Quest. In the February 10 Order, the Commission accepted the SECA compliance filings effective December 1, 2004, subject to refund and set them for hearing

II. Request for Stay

4. Quest is a wholly owned subsidiary of WPS Energy Services, Inc., an indirect wholly owned subsidiary of WPS Resources Corporation. Quest engages in the retail marketing of electricity in Michigan as a licensed Alternative Electric Supplier.

5. Quest requests a partial stay of the November 18 and February 10 Orders adopting and implementing the SECA. Quest requests that the Commission direct Midwest ISO to defer billing SECA charges applicable to Quest until the Commission issues a decision in response to an initial decision by the presiding administrative law judge or a settlement resolving Quest's issues. Quest agrees to be subject to surcharge plus interest for any SECA obligations for which the Commission ultimately decides that it should be liable. Quest claims that its request for a stay is justified because: (1) it has made a showing that it is likely to win on the merits; (2) absent the stay, it will suffer irreparable harm; (3) issuance of the stay will not harm others; and (4) the stay is in the public interest.

6. First, Quest argues that it is likely to win on the merits because its SECA should be reduced under a "supplier as shipper" adjustment, a SECA refinement allowed for in

² *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,168 (2004) (November 18 Order).

the Commission's orders.³ Quest contends that the SECA is calculated to recover lost through and out revenues for which it would not have been responsible because the lost revenues are associated with transactions under its bundled power supply contracts. Accordingly, Quest argues that the suppliers for power purchased pursuant to those contracts should be assessed the SECA associated with those transactions. Quest indicates that it provided support for these adjustments as part of its protest to the SECA compliance filings, but as the SECA has been set for hearing it will be forced to pay an erroneously high SECA charges, pending the outcome of the hearing.

7. Second, Quest states that absent the relief provided by a partial stay, it will suffer irreparable harm from the imposition of the currently effective SECA, as applicable to Quest's sub-zone in the Midwest ISO.⁴ Quest states that the potential for refunds is not adequate protection because the imposition of the SECA in the meantime will drastically impact its ability to compete, thus causing irreparable harm absent the requested stay. Quest argues that, if forced to pay the SECA, it will be at a competitive disadvantage because most of its competitors entered the market after the 2002 test period for SECA calculations, and as a result face lesser or no SECA obligations. Quest asserts that this would cause a discriminatory situation, effectively penalizing Quest for entering the competitive retail market early.

8. Third, Quest states that granting a partial stay will not harm others because it has agreed to be subject to the SECA obligation for which the Commission ultimately decides it should be liable, plus interest, should it not prevail in its requested "supplier as shipper" adjustment.

9. Finally, Quest indicates that its request for stay is in the public interest because it would mitigate the irreparable harm to which Quest would be subjected by an erroneous SECA obligation and allow Quest to continue to operate in the Michigan competitive retail market.

³ In the Commission's November 17, 2003 Order initially defining and adopting the SECA, the Commission provided that, in the SECA compliance process, load-serving entities with existing contracts for delivered power that continue into the transition period may demonstrate that the supplier is the shipper for such transactions and should, therefore, be required to pay the SECA for that portion of the load-serving entities' load served by the contract. *Midwest Independent Transmission System Operator, Inc.*, 105 FERC ¶ 61,212 at P 45 (2003).

⁴ The SECA adopted in the November 18 Order may be implemented on a sub-zonal basis, *i.e.* separate SECAs may be derived for customers in a zone to reflect the relative benefits among customers.

III. Responsive Pleadings

10. Detroit Edison Company (Detroit Edison), Consumers Energy Company (Consumers), the Midwest ISO Transmission Owners,⁵ and jointly, American Electric Power Services Corporation (AEP)⁶ and Exelon Corporation (Exelon),⁷ filed answers and Quest filed an answer in response.

11. Consumers argues that Quest is not in a unique situation and has not demonstrated that it will suffer irreparable harm due to the implementation of the SECA. Consumers contends that any harm Quest faces as a result of the SECA is due to Quest's own business decisions in structuring its contracts without any protection to mitigate the

⁵ For this filing, the Midwest ISO Transmission Owners are: Ameren Services Company, as agent for Union Electric Company d/b/a AmerenUE, Central Illinois Public Service Company d/b/a AmerenCIPS, Central Illinois Light Co. d/b/a AmerenCILCO, and Illinois Power Company d/b/a AmerenIP; Alliant Energy Corporate Services, Inc. on behalf of its operating company affiliate Interstate Power and Light Company (f/k/a IES Utilities Inc. and Interstate Power Company); American Transmission Company LLC*; American Transmission Systems, Incorporated, a subsidiary of FirstEnergy Corp.; Cinergy Services, Inc. (for Cincinnati Gas & Electric Co., PSI Energy, Inc., and Union Light Heat & Power Co.); City of Columbia Water and Light Department (Columbia, MO); City Water, Light & Power (Springfield, IL); Hoosier Energy Rural Electric Cooperative, Inc.; Indianapolis Power & Light Company; International Transmission Company*; LG&E Energy LLC (for Louisville Gas and Electric Company and Kentucky Utilities Company); Manitoba Hydro; Michigan Electric Transmission Company, LLC*; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company and Northern States Power Company (Wisconsin), subsidiaries of Xcel Energy Inc.; Otter Tail Corporation d/b/a Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); and Wabash Valley Power Association, Inc.

The Midwest Stand Alone Transmission Companies are denoted with an asterisk (*).

⁶ AEP filed on behalf of Appalachian Power Service Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company.

⁷ Exelon filed on behalf of Commonwealth Edison Company and Commonwealth Edison Company of Indiana.

impact of unknown future changes. Consumers states that it is not the Commission's role to insulate Quest from the consequences of its own decisions. Consumers argues that if the Commission grants Quest's motion, it will provide Quest with an unfair competitive advantage in the Michigan retail electric market since other participants in that market will be paying their SECA obligation.

12. Detroit Edison asserts that it is a Quest competitor and that its own SECA obligation is the single largest monthly payment in the combined PJM-Midwest ISO region. Detroit Edison argues that granting a single-party stay for Quest, by absolving Quest of any SECA payment during the pendency of the hearing, would alter market competition in Michigan. Detroit Edison states that this is contrary to one of the determining factors in granting a stay, that no other parties would be harmed. Detroit Edison adds that the Commission should consider delaying all SECA billings until the final outcome of the proceeding or establish a single transition surcharge to apply across the region, rather than a zone or sub-zone specific SECAs.

13. AEP and Exelon assert some of the same concerns; that Quest has failed to demonstrate that it is likely to prevail on the merits of its position, that it is likely to suffer irreparable harm, or that a stay would not harm third parties. Regarding Quest's likelihood to prevail on the merits, AEP and Exelon argue that one of AEP's three power supply contracts with Quest expires on February 28, 2005, and the remaining two contracts expire on April 30, 2005, and, thus, there is no basis for Quest's proposal to shift any portion of its SECA obligation to AEP after these dates. With respect to Quest's SECA obligation prior to these dates, they argue that Quest may seek to shift only that portion of its SECA obligation associated with amounts served under each of the contracts, but that any such proposal must be evaluated under the contract terms. They indicate that granting Quest's stay would provide it a competitive advantage over other customers and leave certain PJM transmission owners, including AEP and ComEd, uncompensated for a significant amount of lost revenues while the hearing is ongoing. They state that the Commission adopted the SECA to offset part of the cost of the transmission owners' transmission system that would otherwise be paid by the transmission owners' native load, in order to mitigate such cost shifting to the transmission owners' native load, and that staying the implementation of the SECA would thus violate the Commission's orders adopting the SECA.

14. The Midwest ISO Transmission Owners do not specifically contest the requested stay. However, in their answer, they state that other parties are in similar circumstances and that Quest's motion should only be granted if truly extraordinary circumstances exist. The Midwest ISO Transmission Owners also express concern over the risk of non-collection if Quest's SECA obligation is deferred pending the outcome of the hearing. Therefore, they state that, if a stay is granted, Quest should provide credit assurances indicating its ability to pay the SECA obligation at the conclusion of the hearing.

15. In its answer, Quest reiterates that it meets all of the Commission's standards for granting a stay. Quest responds to Detroit Edison's argument that a single-party stay for Quest could alter market competition. Quest states that, although Detroit Edison's SECA payment is large in absolute terms, on a per unit basis Quest's SECA is \$6.70 per MWH compared to Detroit Edison's, which is \$0.54 per MWH. Quest argues that, under these circumstances, granting Quest's request for a stay would yield no discrimination against Detroit Edison. In response to Consumers' claim that Quest does not face irreparable harm, Quest states that Consumers is misguided. Quest states that it can, in fact, pass through the SECA costs to its customers, but that doing so would render it completely uncompetitive in the market, thus causing irreparable harm.

IV. Discussion

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits answers to answers unless otherwise ordered by the decisional authority. We will accept Quest's answer because it has provided information that assisted us in our decision making process.

17. To assure definiteness and finality in Commission proceedings, the Commission typically does not stay its orders.⁸ We are not persuaded to stay our orders here.

18. The Commission may stay its action when "justice so requires."⁹ In addressing motions for stay, the Commission considers: (1) whether the moving party will suffer irreparable injury without the stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest.¹⁰ The key element in the inquiry is irreparable injury to the moving party.¹¹ If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.¹² The standard for showing irreparable harm is strict, as the D.C. Circuit has explained:

⁸ See, e.g., *CMS Midland, Inc.*, 56 FERC ¶ 61,630 (1991), *aff'd sub nom.*, *Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993); *Robin Pipeline Co.*, 92 FERC ¶ 61,217 (2000).

⁹ 5 U.S.C. § 705 (2000).

¹⁰ See, e.g., *CMS Midland, Inc.*, 56 FERC at 61,631.

¹¹ *Id.*

¹² *Id.*

the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief ‘will not be granted against something merely feared as liable to occur at some indefinite time.’ It is well established that economic loss does not necessarily constitute irreparable harm....[M]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.¹³

19. The Commission finds that Quest has not demonstrated that it will suffer irreparable harm absent a stay. Quest has only demonstrated that, with the implementation of the SECA, it will face higher transmission costs (as do all others charged SECAs) pending the outcome of the hearing. While higher costs can affect its (and others’) competitiveness in retail markets, Quest has not demonstrated that paying higher transmission costs pending the outcome of the hearing will result in irreparable harm to Quest. Furthermore, the possibility that adequate compensatory relief will later be available through the ordinary course of litigation “weights heavily against a claim of irreparable harm.”¹⁴ SECA related issues are currently being aired in the ongoing proceedings and the SECA is being collected subject to refund; consequently, Quest has access to adequate compensatory relief through the normal course of the ongoing proceedings.

20. Additionally, Quest’s situation is very different from that involving Ormet Primary Aluminum Company (Ormet).¹⁵ In that case, the Commission granted a partial deferral of SECA billings for an aluminum company in Chapter 11 bankruptcy that demonstrated that it would be unable to make the SECA payment and could be forced to shut down as a result. The Commission found that requiring Ormet’s compliance would lead to irreversible economic harm.¹⁶ Quest is not in the same financially precarious situation as Ormet, and the SECA billings do not result in the same economic threat to Quest’s existence.

21. Finally, at this time we cannot agree that Quest will likely prevail on its merits of its requested “supplier as shipper” adjustment. In the February 10 Order the Commission established hearing procedures because the SECA compliance filings issues, including

¹³ *Wisconsin Gas Co. v. FERC*, 785 F.2d 699, 674 (D.C. Cir. 1985).

¹⁴ *Id.*

¹⁵ *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,022 (2005).

¹⁶ *Id.*

the “supplier as shipper” adjustment, are complex and required a more thorough analysis before the Commission could determine which approach will prevail. This complex analysis was best accomplished through a full evidentiary process which the hearing procedures provide and we cannot say at this junction that Quest is likely to prevail.

The Commission orders:

The request for stay is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.