

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Michigan Electric Transmission Company

Docket No. ER03-1003-003

ORDER DENYING REHEARING

(Issued April 30, 2007)

1. This order addresses a request for rehearing of the Commission's April 26, 2006 Order in this proceeding.<sup>1</sup> The Remand Order addressed the issues raised by the United States Court of Appeals for the District of Columbia Circuit in remanding the Commission's prior orders in this proceeding, which addressed the Commission's assessment of annual charges on transmission service that Michigan Public Power Agency (MPPA) and Michigan South Central Power Agency (MSCPA) (collectively, Michigan Agencies) take from Michigan Electric Transmission Company (Michigan Electric) and Michigan Electric's pass-through of such assessment to Michigan Agencies.<sup>2</sup> As discussed below, we deny rehearing.

**I. Background**

2. On August 29, 2003, and affirmed on rehearing,<sup>3</sup> the Commission accepted for filing amendments to Transmission Ownership and Operating Agreements (O&O

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<sup>1</sup> *Michigan Electric Transmission Co.*, 115 FERC ¶ 61,105 (2006) (Remand Order).

<sup>2</sup> *Michigan Public Power Agency and Michigan South Central Power Agency v. FERC*, 405 F.3d 8 (D.C. Cir. 2005).

<sup>3</sup> *Michigan Electric Transmission Co.*, 104 FERC ¶ 61,236 (2003), *reh'g denied*, *Michigan Electric Transmission Co.*, 106 FERC ¶ 61,064 (2004).

Agreements) between Michigan Electric and, as relevant here, Michigan Agencies.<sup>4</sup> The Amendments allowed recovery by Michigan Electric, as relevant here, from Michigan Agencies of certain regional transmission organization (RTO) charges (including the Commission's annual charges assessed pursuant to 18 C.F.R. § 382.201) assessed by Midwest Independent Transmission System Operator, Inc. (Midwest ISO) under its Open Access Transmission Tariff (OATT).

3. Michigan Agencies protested the filing and claimed that, to the extent they were using transmission facilities, they were doing so pursuant to their ownership interests and were therefore not customers of Midwest ISO or Michigan Electric. Michigan Agencies argued that they should thus not be required to pay costs reflecting annual charges imposed by the Commission on Midwest ISO and passed through to Michigan Electric. The Commission responded stating that:

the Commission's annual charges may be allocated to them by Michigan Electric for services provided by Michigan Electric. Michigan Electric is being assessed these costs based on the Michigan Agencies' capacity entitlement being transmitted by the Midwest ISO over the Midwest ISO transmission system, under the Midwest ISO OATT, within the Michigan Electric pricing zone. Michigan Electric is merely recovering those costs it is being allocated by the Midwest ISO in connection with the transmission capacity entitlements.<sup>5</sup>

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<sup>4</sup> The O&O Agreements to which Michigan Agencies are parties are: (1) the Belle River O&O Agreement between Michigan Electric and MPPA, Michigan Electric Transmission Company Rate Schedule FERC No. 10 at Sheet Nos. 262 through 438; (2) the Campbell Unit No. 3 O&O Agreement between Michigan Electric and MPPA, Michigan Electric Transmission Company Rate Schedule FERC No. 10 at Sheet Nos. 439 through 687; and (3) the Project I O&O Agreement between Michigan Electric and MSCPA, Michigan Electric Transmission Company Rate Schedule FERC No. 30. While complete copies of the O&O Agreements have not been included in any of the submittals in this proceeding, they are publicly available rate schedules on file at the Commission. To the extent necessary, we take official notice of the O&O Agreements and incorporate them into the record in this proceeding.

<sup>5</sup> 104 FERC ¶ 61,236 at P 18.

4. On rehearing, the Commission stated that “as transmission customers, [Michigan Agencies] may, of course be charged rates by the transmission provider that reflect annual charges assessed to the transmission provider.”<sup>6</sup>

5. On appeal, the court expressed concern with the Commission’s failure to address certain arguments and remanded the case to the Commission for further explanation.

6. As discussed in greater detail in the Remand Order,<sup>7</sup> the court raised several concerns about the Commission’s findings. First, the Court found that the Commission failed to explain its apparent departure from past practice regarding the assessment of annual charges on the transmission service that Michigan Agencies take under the O&O Agreements.<sup>8</sup> Second, the court referenced language from Order No. 641<sup>9</sup> that states that annual charges will be “based on all transmission that [an ISO] provides pursuant to its tariff or rate schedule” and found that, as far as the record before it revealed, when Michigan Agencies take transmission pursuant to their ownership interests, Midwest ISO is not providing transmission service “pursuant to its tariff or rate schedule”<sup>10</sup> Third, the court found that the Commission failed “to recognize any distinction, regarding the assessment of annual charges when the Michigan Agencies act as co-owners by taking transmission [service] pursuant to their ownership interests, and when they act as transmission customers taking transmission [service] in excess of those interests and noted that nothing in the record indicated whether Michigan Agencies could be considered transmission customers when they take transmission service pursuant to their

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<sup>6</sup> 106 FERC ¶ 61,064 at P 18.

<sup>7</sup> Remand Order, 115 FERC ¶ 61,105 at P 5-7.

<sup>8</sup> 405 F.3d at 13.

<sup>9</sup> *Id.* at 14 (citing *Revision of Annual Charges Assessed to Public Utilities*, Order No. 641, 65 Fed. Reg. 65,757 (November 2, 2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,109 at 31,855 (2000), *reh’g denied*, Order No. 641-A, 66 Fed. Reg. 15,793 (March 21, 2001), 94 FERC ¶ 61,290 (2001). Order No. 641 revised the method of calculating FERC annual charges and changed who, power sellers or transmission providers or both, would be assessed such charges.

<sup>10</sup> 405 F.3d at 14.

ownership interests.”<sup>11</sup> The court found that the Commission similarly failed to address Michigan Agencies’ arguments that they do not pay a filed tariff rate to Midwest ISO or Michigan Electric for transmission they take pursuant to their ownership interests.<sup>12</sup>

7. In response to the court’s remand, the Commission in an October 20, 2005 Order found that the existing record was not sufficient for it to make a final determination on these issues and, therefore, requested additional supporting evidence from the parties to address these issues.<sup>13</sup> On November 21, 2005, Michigan Agencies and Michigan Electric filed a Joint Response addressing the 14 questions that the Commission posed in the October 20 Order. Then, in the Remand Order, the Commission addressed the issues raised by the court and upon consideration of the submittals of the parties, reaffirmed its rulings in the subject orders, with further explanation.

8. In the Remand Order, the Commission found that it had not improperly departed from past practice when it included the transmission taken by Michigan Agencies under the O&O Agreements to calculate Midwest ISO’s annual charges, when, previously, Michigan Electric’s predecessor, Consumers Energy Company (Consumers Energy), had apparently omitted this transmission when reporting transactions for the purpose of annual charge assessments. The Commission found upon review of its past annual charge regulations that if Consumers Energy or Michigan Electric were not reporting this transmission service in past years, it was *not* because they did not have to report it but rather they seemed to have erred in not reporting it.<sup>14</sup>

9. The Commission also found that Michigan Agencies’ argument that they take transmission service “pursuant to their ownership interests” left the false impression that the transmission service that Michigan Agencies take under the O&O Agreements is taken over only transmission lines in which they have an ownership interest. In fact, the Commission determined that the O&O Agreements are rate schedules on file with the Commission and outline the rates, terms and conditions of service whereby the output of

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<sup>11</sup> *Id.* at 15.

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

<sup>13</sup> *Michigan Electric Transmission Co.*, 113 FERC ¶ 61,054 (2005) (October 20 Order).

<sup>14</sup> Remand Order, 115 FERC ¶ 61,105 at P 11-13. Michigan Electric owns the transmission assets formerly owned by Consumers Energy and succeeded Consumers Energy as a party to the O&O Agreements.

Michigan Agencies' entitlement in certain generation resources are transmitted over *both* transmission facilities co-owned by Michigan Agencies and Michigan Electric *and* over transmission facilities owned solely by Michigan Electric. The Commission noted that, critically, the designated line segments in which Michigan Agencies have an ownership interest do not form a complete contract path from point of receipt to point of delivery on the Michigan Electric system and that the transmission service that Michigan Agencies take necessarily involves use of Michigan Electric facilities.<sup>15</sup>

10. The Commission concluded that Michigan Agencies take transmission service in interstate commerce as customers of Michigan Electric, a public utility, pursuant to the rates, terms and conditions of a rate schedule or tariff (here, the O&O Agreements), notwithstanding the exchange or 'in kind' nature of compensation under the O&O Agreements.<sup>16</sup> The Commission therefore found that annual charges assessed to Midwest ISO (and then passed through to Michigan Electric and, in turn, to Michigan Agencies) should properly reflect this transmission service.<sup>17</sup>

11. The Commission also explained that Midwest ISO properly reported to the Commission the transmission service provided to Michigan Agencies under the agreements for annual charge purposes because Midwest ISO provides service pursuant to its OATT to meet Michigan Electric's obligations under the O&O Agreements.<sup>18</sup> The Commission noted that Michigan Agencies recognize that the transmission service they receive pursuant to the O&O Agreements ultimately relies on facilities owned solely by Michigan Electric and that are under the operational control of Midwest ISO.<sup>19</sup> The

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

<sup>16</sup> Under the O&O Agreements, Michigan Agencies pay for the costs of owning, operating and maintaining discrete transmission facilities, and receive, in kind, transmission service over the entire Michigan Electric transmission system. We note that the Commission's filing requirements at 18 C.F.R. § 35.2(a) (2006) define electric service as including "transmission of electric energy in interstate commerce . . . without regard to the form of payment or compensation," and specifically mention exchanges.

<sup>17</sup> Remand Order, 115 FERC ¶ 61,105 at P 15.

<sup>18</sup> *Id.* at P 17.

<sup>19</sup> *Id.* at P 16 & n. 28, *citing* Joint Response at 8-10.

Commission explained that, pursuant to Opinion Nos. 453 and 453-A,<sup>20</sup> all transmission service over the Midwest ISO system, even transmission service under grandfathered contracts (such as the O&O Agreements) must be provided by Midwest ISO under the Midwest ISO OATT in order that Midwest ISO satisfy Order No. 2000's requirement that it be the sole transmission provider for facilities over which it has operational control.<sup>21</sup> In short, Midwest ISO is the transmission provider for the transmission service that Michigan Agencies receive under the O&O Agreements.<sup>22</sup>

12. On May 25, 2006, Michigan Agencies filed a request for rehearing. Michigan Agencies claim that the rationale articulated by the Commission is neither adequately explained nor supported by the record.

## II. Discussion

### A. The Commission Did Not Depart From Past Practice.<sup>23</sup>

#### 1. Request for Rehearing<sup>24</sup>

13. In their request for rehearing, Michigan Agencies argue that the Commission's conclusion that it was an error for the transmission service provided under the O&O

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<sup>20</sup> *Midwest Independent Transmission System Operator, Inc.*, Opinion No. 453, 97 FERC ¶ 61,033 at 61,170, *order on reh'g*, Opinion No. 453-A, 98 FERC ¶ 61,141 at 61,413 (2002), *order on remand*, 102 FERC ¶ 61,192 (2003), *reh'g denied*, 104 FERC ¶ 61,012 (2003), *aff'd sub nom. Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004).

<sup>21</sup> *See Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 at 31,108 (2000), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Feb. 25, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd*, *Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

<sup>22</sup> Remand Order, 115 FERC ¶ 61,105 at P 16.

<sup>23</sup> *Id.* at P 11-13.

<sup>24</sup> Request for Rehearing at 2-3, 8-11.

Agreements not to have been reported to the Commission is wrong because “the transmission was not provided over facilities owned by Consumers [Energy] or [Michigan Electric].”<sup>25</sup>

14. Michigan Agencies argue that, under the O&O Agreements, each of the Michigan Agencies paid a purchase price in exchange for which they acquired an ownership interest in certain designated transmission facilities, with associated rights to the use of the system at large, but that Michigan Agencies do not pay Michigan Electric “rates” for their use of those facilities. Rather, they reimburse Michigan Electric for a *pro rata* share of the operating and maintenance expenses associated with the jointly-owned facilities – essentially paying Michigan Electric as a third party operator of facilities owned by Michigan Agencies. Thus, according to Michigan Agencies, this transmission was properly excluded from the calculation of, previously, Consumers Energy’s and, now, Michigan Electric’s annual charges.

15. In addition, Michigan Agencies claim that if the parties intended to provide for an in kind exchange of transmission facilities, as the Remand Order suggests, then the O&O Agreements would not have contained a provision requiring Consumers Energy to “buy back unused capacity associated with the purchased lines based on MPPA’s costs.”<sup>26</sup> They also state that, while section 6.1 of each agreement gives Michigan Agencies a right to use the Michigan Electric system “without charge or cost,” nowhere in the agreements is it stated that such rights are premised on Consumers Energy’s or Michigan Electric’s right to use the portion of the lines owned by Michigan Agencies.

## 2. Commission Determination

16. Michigan Agencies’ assertion that transmission service was not and is not provided over facilities owned by, previously, Consumers Energy and, now, Michigan Electric is factually inaccurate and conflicts with previous statements Michigan Agencies have made in this proceeding. For instance, Michigan Agencies stated that services

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<sup>25</sup> *Id.* at 10.

<sup>26</sup> Michigan Agencies cite sections 6.2 and 6.3 of the Campbell Unit No. 3 O&O Agreement between Michigan Electric and MPPA, which contemplated that for an initial limited period of time, Consumers Energy would buy back certain amounts of MPPA’s capacity entitlement over the entire Consumers Energy system and the rate Consumers Energy paid for that capacity was based on costs associated with MPPA’s ownership share in the discrete line segments it purchased under the agreement. Request for Rehearing at 17.

provided under the O&O Agreements “necessarily involve use of [Michigan Electric] facilities” that are not partly owned by Michigan Agencies.<sup>27</sup> Therefore, as the Commission explained in the Remand Order, the transmission service provided under the O&O Agreements involves service over *both* transmission facilities co-owned by Michigan Agencies *and* over transmission facilities owned solely by Michigan Electric.<sup>28</sup> The Commission was correct to conclude that Michigan Agencies take transmission service over the Michigan Electric transmission system and that it was an error if service under the O&O Agreements was not reported to the Commission and/or used in the calculation of annual charges in past years.<sup>29</sup>

17. Michigan Electric not only operates and maintains the jointly-owned facilities and receives compensation for that service under the O&O Agreements, it also provides to Michigan Agencies transmission service over Michigan Electric’s entire transmission system, which includes facilities that are not jointly-owned facilities. In addition, the form or level of compensation that Michigan Agencies provides to Michigan Electric for such transmission service does not affect whether transmission service is being provided<sup>30</sup> nor whether that service must be reported for the purpose of assessing annual charges. Before Order No. 641, transmission service subject to annual charges included all service reported in Account 456, Transmission Of Electricity For Others, in the FERC Form No. 1,<sup>31</sup> and the FERC Form No. 1 instructions for Account 456 require reporting

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<sup>27</sup> Joint Response at 8.

<sup>28</sup> Remand Order, 115 FERC ¶ 61,105 at P 14.

<sup>29</sup> *Id.* at P 13.

<sup>30</sup> *See Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,990 and 61,992 (*Prior Notice*), *order on reh’g*, 65 FERC ¶ 61,081 (1993) (“[T]he question of our jurisdiction over a particular contract depends on whether the contract contains a rate or charge for or in connection with the transmission or sale of electric energy in interstate commerce, or whether the contract affects or relates to such rates or service... Since exchanges involve transfers of electric energy at wholesale, even though for payment in kind, our regulations, 18 C.F.R. § 35.2 (1992), require public utilities to file those agreements.”) As noted above and in the Remand Order, section 35.2 of the Commission’s regulations, 18 C.F.R. § 35.2 (2006), states that utilities must submit to the Commission rate schedules governing “electric service.” The regulation defines “electric service” as including transfers “without regard to the form of payment or compensation,” and specifically mentions “exchanges.”

<sup>31</sup> *See, e.g.*, 18 C.F.R. §§ 382.102(h)(2), 382.201(b) (1999).

of services provided even where no monetary compensation was received for the service.<sup>32</sup> After Order No. 641, the focus remains on so-called “Transmission of Electricity for Others.”<sup>33</sup>

18. We disagree with Michigan Agencies’ claim that they neither pay Michigan Electric rates for transmission service under the O&O Agreements nor take transmission service. Under the O&O Agreements, Michigan Agencies receive transmission service over the entire Michigan Electric transmission system, and not just jointly-owned facilities, subject to their contributing certain discrete facilities that they purchase and finance – but which Michigan Electric (and consequently Midwest ISO) has sole authority to operate and control – and subject to any additional monetary settlement required pursuant to an annual “utilization adjustment.” Specifically, under the O&O Agreements, Michigan Agencies purchase and own designated transmission facilities that Michigan Electric, and its predecessor, Consumers Energy, had planned to construct as a part of its bulk transmission system.<sup>34</sup> While Michigan Agencies thus acquired an undivided ownership interest in such designated transmission facilities, they did not acquire an ownership interest in all transmission facilities. Moreover, Michigan Electric has “sole authority to manage, control, operate, and maintain” the facilities, and Michigan Agencies merely receive a defined transmission service entitlement, which allows them to use the entire Michigan Electric transmission system.<sup>35</sup>

19. In addition, under each agreement, a monetary settlement or ‘utilization adjustment’ takes place each year between Michigan Agencies and Michigan Electric to compensate in the event that the ratio of Michigan Agencies’ investment in designated transmission facilities to aggregate investment in the entire transmission system is out of proportion to the ratio of their transmission service entitlement under the agreement,

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<sup>32</sup> See instructions on p. 330 of the FERC Form No. 1, at <http://www.ferc.gov/docs-filing/eforms/form-1/form-1.pdf>.

<sup>33</sup> Order No. 641 at 31,849-50.

<sup>34</sup> See section 3.1 of each O&O Agreement. Under section 3.2 of each O&O Agreement, the level of investment required of Michigan Agencies in such designated transmission facilities is determined by multiplying aggregate investment in the entire transmission system by the ratio of the transmission service entitlement that Michigan Agencies receive under the agreement, expressed in kW, to the transmission system peak load, expressed in kW

<sup>35</sup> See section 6.1 of each O&O Agreement.

expressed in kW, to the transmission system peak load, expressed in kW.<sup>36</sup> Each agreement further provides for Michigan Agencies' purchase of additional facilities to the extent that they make payments to Michigan Electric in excess of certain threshold amounts pursuant to the annual utilization adjustment.<sup>37</sup>

20. In short, under the O&O Agreements, in exchange for their contribution of certain components of that system (which they purchase, own, finance, and pay Michigan Electric to operate and maintain, but which Michigan Electric continues to control) and any additional monetary settlement required pursuant to the annual utilization adjustment, Michigan Agencies receive transmission service over – but not ownership of – the entire Michigan Electric transmission system. Michigan Agencies thus are incorrect and mischaracterize the O&O Agreements when they state that they are using only their own transmission facilities when they take transmission under the O&O Agreements. Furthermore, we disagree with Michigan Agencies that the transmission service they receive under the O&O Agreements is not premised on Consumers Energy's or Michigan Electric's use of the portions of the lines owned by Michigan Agencies; as discussed above, Consumers Energy previously retained, and Michigan Electric now retains, sole authority to control and operate the facilities that Michigan Agencies purchased under the O&O Agreements.

21. Michigan Agencies also mischaracterize sections 6.2 and 6.3 of the Campbell Unit No. 3 O&O Agreement as requiring Consumers Energy to pay Michigan Agencies for unused capacity for a limited initial period as a buy back of Michigan Agencies' "ownership interests." Rather, under this provision, Consumers Energy paid Michigan Agencies to use, for a limited period, a portion of Michigan Agencies' defined transmission service entitlement that was provided under the O&O Agreement but that Michigan Agencies did not yet need in the early years that the agreement was in effect. Significantly, Consumers Energy was not paying Michigan Agencies for use of limited discrete facilities but rather was buying back Michigan Agencies' *rights* to service over the *entire* system.

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<sup>36</sup> See sections 6.4 and 6.5 of the Campbell Unit No. 3 and Belle River O&O Agreements, and sections 6.2 and 6.3 of the Project I O&O Agreement.

<sup>37</sup> See section 6.6 of the Campbell Unit No. 3 and Belle River O&O Agreements, and section 6.4 the Project I O&O Agreement.

**B. Michigan Agencies Are Customers of Michigan Electric.**<sup>38</sup>

**1. Request for Rehearing**<sup>39</sup>

22. Michigan Agencies argue that the Commission's basis for finding that they are customers of Michigan Electric under the O&O Agreements is premised on an incorrect interpretation of information provided in the Joint Response. Michigan Agencies state that the Commission found that they are customers rather than co-owners under the O&O Agreements in spite of their "clear and unequivocal explanation of the ownership interests acquired pursuant to the O&O Agreements, which include the rights to a complete contract path."<sup>40</sup> Specifically, as to whether Michigan Agencies owned a complete contract path under the O&O Agreements, Michigan Agencies and Michigan Electric stated:

The O&O Agreements were structured as they are in order to balance two competing considerations. On the one hand, the Michigan Agencies' ownership interests were vested in discrete, designated line segments<sup>[41]</sup> in order to accommodate financing interests including lender lien releases by Consumers' creditors and lien interests by the Michigan Agencies' lenders. On the other hand, but for such financing considerations, the O&O Agreements would likely have been structured as "slice of system" ownership rights,<sup>[42]</sup> and thus the O&O Agreements provide for a combination of ownership interests and related use rights in order to achieve the functional equivalent of a "slice of system" arrangement. Thus, for each period, all of the megawatt hours transmitted by the Michigan

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<sup>38</sup> See Remand Order, 115 FERC ¶ 61,105 at P 14-15.

<sup>39</sup> Request for Rehearing at 3-4, 11-17.

<sup>40</sup> *Id.* at 13.

<sup>41</sup> We note Michigan Agencies' express concession that their ownership interests were in "discrete, designated line segments."

<sup>42</sup> While Michigan Agencies apparently would have preferred "slice of system" ownership rights, they acknowledge that that is not what they have.

Agencies under the O&O Agreements formed a complete contract path from the point of receipt to the point of delivery on the [Michigan Electric] transmission system.<sup>43</sup>

23. Michigan Agencies claim that because lenders required that the O&O Agreements provide specific, discrete line segments in which the Michigan Agencies obtain an ownership interest, they had to create what they characterize as “the functional equivalent” of a slice of system agreement. They also assert it was never their intention to pay on-going tariff rates.<sup>44</sup>

24. Michigan Agencies go on to argue that, even if they had purchased a specified slice of Michigan Electric’s entire system, it would not be possible as a matter of physics to conclude that their electrons were flowing on only *their* slice of the system. Michigan Agencies also note that Commission precedent treats a contract path as a commercial construct and the Commission has explained that “a contract path is simply a path that can be designated to form a continuous electrical path between the parties to an agreement” and “[b]ecause of the laws of physics, it is unlikely that the actual power will follow that contract path.”<sup>45</sup> According to Michigan Agencies, the Commission in the instant proceeding is making a marked departure of untold potential implications by abandoning analysis of commercial structures by citing to the physics of energy flows. They state that every Commission policy relative to transmission use and rates is premised on commercial constructs, not actual physics.

## 2. Commission Determination

25. The Commission did not misinterpret the Joint Response. Under the O&O Agreements, Michigan Agencies have *rights* to transmission service over facilities that form a complete path from point of receipt to point of delivery on the Michigan Electric transmission system.<sup>46</sup> Michigan Agencies do not have *ownership interests* in facilities that form a complete contract path. Indeed, the Commission’s finding that the transmission service under the O&O Agreements “necessarily involves use of Michigan

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<sup>43</sup> Request for Rehearing at 12-13, *citing* Joint Response at 4.

<sup>44</sup> *Id.* at 14.

<sup>45</sup> *Id.* at 15, *citing East Kentucky Power Cooperative, Inc.*, 112 FERC ¶ 61,160 at P 26 n.24 (2005).

<sup>46</sup> Request for Rehearing at 13.

Electric facilities” is language that comes directly from the Joint Response.<sup>47</sup> Furthermore, contrary to Michigan Agencies’ claim in their request for rehearing, Michigan Agencies and Michigan Electric in the Joint Response stated that Michigan Agencies “made a purchase price payment *in lieu of ongoing tariff rates.*”<sup>48</sup> Moreover, while Michigan Agencies state that the O&O Agreements would likely have been structured as ‘slice of system’ ownership rights if not for financing considerations,<sup>49</sup> the basis for the Commission’s decision in this case rests on *how* the agreements are structured and not the reasons *why* they are so structured; those reasons are simply not relevant to the finding the Commission made here. Under the O&O Agreements as structured, Michigan Agencies are entitled to system wide transmission service from Michigan Electric and not system wide ownership rights.

26. We also find without merit Michigan Agencies’ claim that the Commission’s discussion about Michigan Agencies’ not owning a complete contract path conflicts with past Commission precedent. It is of course true that energy may not flow on only a designated contract path.<sup>50</sup> The Commission’s findings in this case do not conflict with past Commission precedent nor with that reality. The simple truth is that Michigan Agencies do not own facilities that form a complete contract (or, given that Michigan Agencies raised it in their rehearing request, a complete electrical) path from the point of receipt to the point of delivery for the transmission service they take under the O&O Agreements, making it *impossible* for the transmission service Michigan Agencies

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<sup>47</sup> See Remand Order, 115 FERC ¶ 61,105 at P 14 & n.23 (*citing* to Joint Response at 7 and 8).

<sup>48</sup> Joint Response at 8 (emphasis added).

<sup>49</sup> *Id.* at 4.

<sup>50</sup> In the Remand Order, the Commission spoke of a “complete contract path” and not, we note, over which facilities energy actually flow. Remand Order, 115 FERC ¶ 61,105 at P 14. This is consistent with the Commission’s longstanding practice of focusing on contract paths. See, e.g., *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,666-67 & n.184, 31,668 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part, Transmission Access Policy Study Group, v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

receives under the O&O Agreements to be provided without making use of facilities that Michigan Electric owns. Rather than departing from past precedent regarding contract path transmission service, the Remand Order reflects a straight-forward application of that precedent. Because the Michigan Agencies do not own facilities that form a complete contract path from point of receipt to point of delivery for the transmission service they take under the O&O Agreements, *any* contract path for that transmission service necessarily includes facilities owned solely by Michigan Electric.

**C. The O&O Agreements Are Rate Schedules.**<sup>51</sup>

**1. Request for Rehearing**<sup>52</sup>

27. Michigan Agencies argue that the Commission was wrong to find that the O&O Agreements are rate schedules pursuant to which Michigan Agencies take transmission service as customers of Michigan Electric. They state that the O&O Agreements do not contain a rate or charge for the use of Michigan Electric's bulk transmission system and that the agreements are, at most, contracts that relate to rates and charges and not rate schedules in and of themselves. Michigan Agencies also argue that to convert the purchase price and the O&M payments associated with that purchase into a "rate" is to fundamentally alter the nature of the rights for which the parties bargained. They also claim this is contrary to the express terms of the O&O Agreements, which give Michigan Agencies the right to use the Michigan Electric system "without charge or cost."<sup>53</sup>

**2. Commission Determination**

28. For the same reasons discussed above, we continue to find that the O&O Agreements are rate schedules pursuant to which Michigan Agencies receive transmission service from Michigan Electric. While Michigan Agencies argue that the O&O Agreements give them rights to use Michigan Electric's entire transmission system "without charge or cost," that is *use* and not *ownership* of the entire system. In addition, the phrase immediately following that statement in the O&O Agreements is, "*except as specifically set forth in this Agreement.*"<sup>54</sup> As discussed above, the agreements set forth

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<sup>51</sup> See Remand Order, 115 FERC ¶ 61,105 at P 14-17.

<sup>52</sup> Request for Rehearing at 4, 18-19.

<sup>53</sup> *Id.* at 16, *citing* section 6.1 of the O&O Agreements.

<sup>54</sup> Section 6.1 of the O&O Agreements (emphasis added).

mechanisms for Michigan Agencies to provide compensation for such service. Such compensation is provided through: (1) Michigan Agencies' investment in designated facilities, the amount of which corresponded directly to their proposed use of Michigan Electric's entire system;<sup>55</sup> (2) Michigan Agencies' payment for Michigan Electric's operation and maintenance of those designated facilities, which Michigan Electric continues to operate and control; (3) annual monetary compensation if the dollar amount that corresponds to Michigan Agencies' actual use of Michigan Electric's entire system is out of proportion to the dollar amount of Michigan Agencies' ownership in discrete line segments; and (4) pass-through of charges that Midwest ISO assesses Michigan Electric, including Midwest ISO's recovery of the annual charges, for service that Midwest ISO provides Michigan Electric to meet Michigan Electric's obligations under the O&O Agreements. The agreements therefore set forth rates, terms and conditions for transmission service that Michigan Electric provides Michigan Agencies.

29. In this regard, the Commission's filing requirements, at 18 C.F.R. § 35.2(b) (2006), define a rate schedule as a statement of the electric service, and the rates, terms and conditions for that service, and electric service is defined as including "transmission of electric energy in interstate commerce . . . without regard to the form of payment or compensation."<sup>56</sup> Thus, contrary to Michigan Agencies' claim, the Commission's findings that Michigan Agencies are taking transmission service from Michigan Electric under the O&O Agreements and that the O&O Agreements are rate schedules are contrary neither to the terms of the O&O Agreements nor to the Commission's regulations.

30. Further, Michigan Electric's pass-through of the annual charges to Michigan Agencies under the O&O Agreements is just and reasonable. Michigan Agencies' contribution of facilities that they own and finance, and the annual utilization adjustment, provides for Michigan Agencies to share in the cost of transmission plant that makes up the Michigan Electric system in proportion to their usage of the system. The annual charges represent additional, non-plant, costs that Michigan Electric incurs to provide service to Michigan Agencies under the O&O Agreements and are appropriately

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<sup>55</sup> See Request for Rehearing at 14 (explaining how the dollar amount of Michigan Agencies' investment was determined).

<sup>56</sup> 18 C.F.R. § 35.2(a) (2006); *accord*, 64 FERC ¶ 61,139 at 61,992.

recovered through the separate charges approved in this proceeding.<sup>57</sup> In addition, we have already explained in our initial orders in this proceeding that a public utility may ultimately recover annual charges from its non-public utility transmission customers.<sup>58</sup>

The Commission orders:

The Michigan Agencies' request for rehearing is hereby denied.

By the Commission.

( S E A L )

Philis J. Posey,  
Deputy Secretary.

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<sup>57</sup> See Order No. 641, FERC Stats. & Regs. ¶ 31,109 at 31,857 (“annual charge assessments are costs that can be recovered in transmission rates as a legitimate cost of providing transmission service”).

<sup>58</sup> 104 FERC ¶ 61,236 at P 17 and 106 FERC ¶ 61,064 at P 18, *citing Midwest Independent Transmission System Operator, Inc.*, 103 FERC ¶ 61,048 at P 15 n. 25 (2003). We note that a public utility's recovery of annual charge assessments from its non-public utility customers is not unusual. For example, Schedule 10-FERC of Midwest ISO's Open Access Transmission and Energy Markets Tariff (TEMT) provides for the pass-through of Midwest ISO's annual charge obligations to all Transmission Customers under the TEMT, without regard to the jurisdictional status of the customer (the TEMT has superseded the Midwest ISO OATT). See Midwest ISO FERC Electric Tariff, Third Revised Volume No. 1, Third Revised Sheet Nos. 967 through 970. Similarly, Schedule 9-FERC of PJM Interconnection, L.L.C.'s (PJM) OATT provides for the pass-through of PJM's annual charge obligations to all customers taking transmission service under the PJM OATT. See PJM FERC Electric Tariff, Sixth Revised Volume No. 1, Original Sheet No. 268.