

137 FERC ¶ 61,166
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Midwest Independent Transmission
System Operator, Inc.
American Transmission Company, LLC

Docket No. ER11-4514-000

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

(Issued November 30, 2011)

1. On September 13, 2011, pursuant to section 205 of the Federal Power Act (FPA),¹ American Transmission Company, LLC (ATC) and Midwest Independent Transmission System Operator, Inc. (MISO)² filed a *pro forma* Blackstart Resource Service Agreement (Attachment NN-ATCLLC or agreement) and rate formula template (Schedule 33-ATCLLC or rate formula) to be used by ATC to satisfy its Blackstart System Restoration Plan. The Commission accepts ATC's filing, suspends it for a nominal period, to become effective December 1, 2011, as requested, subject to refund and, as discussed below, establishes hearing and settlement judge procedures.

I. Background

2. ATC is a Wisconsin limited liability company established pursuant to Wisconsin state law as a single-purpose, transmission-only company. ATC states that it owns,

¹ 16 U.S.C. § 824d (2006).

² ATC states that MISO joins this filing as the administrator under MISO's Open Access Transmission, Energy, and Operating Reserve Markets Tariff, FERC Electric Tariff, Fifth Revised Volume 1 (Tariff), but takes no position on the substance of the current filing.

controls and operates more than 9,440 miles of transmission lines in the States of Wisconsin, Illinois, Minnesota and Michigan. ATC transferred operational control of its facilities to MISO as of February 1, 2002.

3. In the September 13 filing, ATC explains that it is functionally registered as a Transmission Owner, Transmission Operator, Transmission Planner and Planning Authority in the North American Electric Reliability Corporation (NERC) registry and is registered as such in the Midwest Reliability Organization and Reliability *First* Corporation regions. Consequently, ATC states it is subject to the mandatory NERC reliability standards. Specifically, NERC Reliability Standard EOP-005-02 requires ATC to establish a plan for restoring the ATC transmission system “following a Disturbance in which one or more areas of the Bulk Electric System (BES) shuts down and the use of Blackstart Resources is required to restore the shut-down area to service...”³ Furthermore, EOP-005-02 requires ATC to maintain a “written Blackstart Resource Agreement or mutually agreed upon procedures or protocols, specifying the terms and conditions of such an arrangement.”⁴

4. Under Wisconsin state law, ATC is prohibited from owning generating facilities except in limited circumstances.⁵ Thus, in order to comply with the NERC reliability standards, ATC must contract with generation owners for the provision of blackstart service. However, ATC asserts that generation owners of blackstart-capable units have been reluctant to commit the investment necessary to qualify under the NERC reliability standards. ATC explains that Schedule 33 requires blackstart resource owners to first bring their facilities into compliance with the NERC reliability standards and then to seek approval from the Commission to recover the annual revenue requirement. In addition, ATC states that MISO’s Schedule 33 provides “only a general description of costs that are eligible for recovery . . . and is not a formula that can be implemented without further

³ ATC September 13, 2011 Application at 2 (citing NERC Reliability Standard EOP-005-02 at R1).

⁴ *Id.* at 2-3 (citing NERC Reliability Standard EOP-005-02 at R13).

⁵ *See* Wis. Stat. § 196.485(3m)(2)(c) (2011) (“The transmission company may not . . . [o]wn electric generation facilities or sell, market or broker electric capacity or energy in a relevant wholesale or retail market as determined by the commission, except that, if authorized or required by the federal energy regulatory commission [sic], the transmission company may procure or resell ancillary services obtained from 3rd parties, engage in redispatch activities that are necessary to relieve transmission constraints or operate a control area.”).

cost detail.”⁶ Thus, ATC asserts that its proposed agreement and rate formula are more comprehensive and can be used by any blackstart-capable generator owner to determine the incremental annual revenue requirement that would be incurred to provide blackstart service if the facility is included in ATC’s System Restoration Plan.⁷ ATC explains that, if approved by the Commission, the agreement would be used in lieu of the Attachment NN form of agreement developed by MISO in connection with Schedule 33.

II. Instant Filing

5. ATC states that the proposed agreement sets forth the obligation of a blackstart resource owner to provide service to ATC.⁸ Specifically, section 3 of the agreement requires resource owners to fulfill the training, testing and maintenance requirements necessary to satisfy the Critical Infrastructure Protection Standards and Schedule 33 of MISO’s Tariff. The Agreement includes a three-year minimum term of service by blackstart resources.

6. ATC states the proposed rate formula, will be used to establish the annual revenue requirement to be paid to blackstart resource owners under the agreement.⁹ ATC states that the proposed rate formula “is essentially the same formula included in Schedule 33 of the MISO Tariff but with more specificity.”¹⁰ That is, like MISO’s Schedule 33, ATC’s 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.¹¹ ATC states 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. ATC proposes to use MISO’s Cost of New Entry (CONE) as a proxy for the blackstart resource owner’s existing generator

⁶ ATC September 13, 2011 Application at 5.

⁷ The Agreement is designated as Attachment NN-ATCLLC and ATC’s rate formula is designated as Schedule 33-ATCLLC.

⁸ ATC September 13, 2011 Application at 8.

⁹ *Id.* at 7.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 9-10 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,106, at P 30 (2008)).

investment.¹² Further, ATC proposes to utilize ATC's return on equity (ROE) and capital structure in order to calculate each blackstart resource owner's return on net incremental investment.¹³

7. ATC acknowledges 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. However, ATC states that future changes in the topology of its transmission system may necessitate removal of resources from the System Restoration Plan. ATC explains that retaining a resource when its inclusion is no longer necessary may subject its transmission customers to higher costs. At the same time, however, ATC posits 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 agreement and rate formula provide for the recovery of those costs over a period of ten years following the removal of the resource.¹⁴

III. Notice of Filing and Responsive Pleadings

8. Notice of ATC's filing was published in the *Federal Register*, 76 Fed. Reg. 58,491 (2011), with comments, interventions and protests due on or before October 4, 2011. Alliant Energy Corporate Services, Inc., Wisconsin Public Service Corporation and Upper Peninsula Power Company filed timely motions to intervene. On October 3, 2011, the Public Service Commission of Wisconsin (Wisconsin Commission) submitted a notice of intervention, as well as a motion to extend the comment period to October 21, 2011, which was granted on October 17, 2011.

9. International Transmission Company, LLC (ITC) and Calpine Corporation (Calpine) filed motions to intervene out of time on October 6 and October 12, 2011, respectively.

10. On October 4, 2011, Consumers Energy Company (Consumers Energy) filed a timely motion to intervene and a protest and Wisconsin Electric Power Company

¹² Section 1 of the proposed agreement, entitled "Fixed Costs," references the Tariff at Module E and notes that MISO's CONE is set at \$95,000 per MW-year.

¹³ ATC September 13, 2011 Application at 11.

¹⁴ ATC September 13, 2011 Application at 15-16. ATC explains that only variable costs actually incurred by blackstart resource owners may be recovered.

(Wisconsin Electric) filed a timely motion to intervene and comments. The Wisconsin Commission submitted comments on October 21, 2011. ATC filed an answer to Consumers Energy's protest on October 19, 2011 (October 19 Answer) and a response to the comments of the Wisconsin Commission on November 4, 2011 (November 4 Answer).

11. Wisconsin Electric strongly supports approval of the agreement and rate formula. Wisconsin Electric argues that approval of the rate formula is critical to potential blackstart resources because the need to file individual agreements under section 205 of the FPA is both time-consuming and costly and serves as a disincentive for generation owners to provide the service. Wisconsin Electric adds that approval of the agreement and rate formula will provide greater certainty required by potential service providers to make the investments necessary to render generation units compliant with the NERC reliability standards.¹⁵

12. In its protest, Consumers Energy argues that ATC incorrectly characterizes its rate formula as "essentially the same formula" as the one approved in Schedule 33 of MISO's Tariff.¹⁶ Specifically, Consumers Energy contends that the fixed cost component of ATC's proposed rate formula includes two percent of the blackstart resource owner's existing generator investment, valued at MISO's CONE. Consumers Energy requests that the Commission reject the proposed rate formula, arguing that this element of the fixed cost component is inconsistent with the Commission's order accepting MISO's Schedule 33.¹⁷ Specifically, Consumers asserts that this element of the fixed cost component "is clearly not a cost 'that would not otherwise be incurred, but for providing [blackstart service].'"¹⁸ Furthermore, Consumers Energy argues that ATC's use of two percent of MISO's CONE is an inappropriate proxy for existing generator investment

¹⁵ Wisconsin Electric October 4, 2011 Comment at 3.

¹⁶ Consumers Energy October 4, 2011 Protest at 3-4.

¹⁷ *Id.* at 4 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,106 at P 30 (2008) describing Schedule 33 as a pass-through of the costs incurred by blackstart resource owners in providing blackstart service as being "costs that would not otherwise be incurred, but for providing [blackstart service].").

¹⁸ *Id.* at 4 (quoting *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,106 at P 30).

because CONE has no bearing on the actual costs of a blackstart owner's existing generator investment.¹⁹

13. Consumers Energy also objects to ATC's proposed substitution of its ROE and capital structure for that of potential blackstart resource owners. Consumers Energy argues that the Commission has previously held it was inappropriate to use an incentive ROE for transmission providers in determining a cost-based revenue requirement for the provision of ancillary services.²⁰ Consumers Energy also argues ATC's proposed use of its capital structure is improper because the factors considered by the Commission in approving the capital structure of an independent transmission owner differ from those that should be considered in approving the capital structure of a blackstart resource owner.²¹

14. The Wisconsin Commission suggests that, if generator owners in the ATC footprint are hesitant to dedicate sufficient capital investment to qualify as blackstart resources, it assumes that such reluctance would exist on the part of generator owners elsewhere in the MISO region. If true, the Wisconsin Commission states that this would suggest that MISO's Schedule 33 may be ineffectual. Thus, the Wisconsin Commission urges the Commission to seek more information on this issue from MISO and other transmission owners in the MISO region before the Commission approves ATC's proposed solution and is forced to deal with the other transmission owners in the MISO region on a piecemeal basis.²²

15. The Wisconsin Commission also objects to ATC's calculation of the fixed cost component of the annual revenue requirement. Specifically, the Wisconsin Commission characterizes ATC's inclusion of a two percent portion of blackstart resources' existing generator investment in rate base as a "Z Factor," similar to that previously approved by the Commission.²³ However, the Wisconsin Commission believes that the rationale for previously approving such a "Z Factor" is inapplicable in this case. Moreover, the Wisconsin Commission contends that ATC has not otherwise justified the use of two percent of CONE in its rate formula. In short, the Wisconsin Commission expresses

¹⁹ *Id.* at 4.

²⁰ *Id.* at 4-6 (citing *Detroit Edison Co.*, 105 FERC ¶ 61,264 (2003)).

²¹ *Id.* at 6.

²² Wisconsin Commission October 21, 2011 Comment at 2-3.

²³ *Id.* at 5 (citing *PJM Interconnection, LLC*, 127 FERC ¶ 61,197 (2009)).

concern that allowing generators to recover a percentage of CONE as well as incremental costs may result in excessive rates.²⁴

16. The Wisconsin Commission objects to ATC's proposed use of its ROE and capital structure, as well, noting that ATC's rate formula, including its ROE, was originally approved and negotiated as part of a settlement agreement.²⁵ Thus, the Wisconsin Commission concludes it would be unreasonable to use that ROE and hypothetical capital structure as a proxy in this case. Furthermore, the Wisconsin Commission argues that ATC has provided no evidence concerning the level of risk that must be undertaken by potential blackstart resource owners in order to justify use of ATC's ROE and capital structure. The Wisconsin Commission instead suggests either that the rate formula should utilize the currently approved ROE of the relevant blackstart resource owner or that a fact-specific process to develop an entity specific ROE be undertaken.

17. The Wisconsin Commission opposes ATC's proposal to allow blackstart resource owners to receive unrecovered variable costs and unamortized net incremental capital costs in the event that such a resource is removed from ATC's System Restoration Plan. The Wisconsin Commission states that preauthorization in this case would be troubling, in part, because many blackstart-capable generators in the area have never been subject to the Commission's jurisdiction. The Wisconsin Commission argues this is especially true given the affiliated relationship between ATC and the owners of many blackstart-capable generating units.²⁶ The Wisconsin Commission adds that it has previously approved requests to include blackstart capability in the cost of proposed generating facilities on the condition that the facility is included in ATC's System Restoration Plan. As a result, the Wisconsin Commission argues that to allow blackstart resource owners to recover stranded costs after they are no longer included in ATC's System Restoration Plan would be "clearly unreasonable." The Wisconsin Commission suggests that the agreement be modified to require Commission approval of any proposal to compensate blackstart resources that have been removed from ATC's System Restoration Plan for unamortized incremental capital costs and unrecovered variable costs.²⁷

18. In its October 19 Answer, ATC first asserts that its approved 12.20 percent ROE does not reflect a 50 basis point ROE adder approved by the Commission for RTO

²⁴ *Id.* at 5-6.

²⁵ *Id.* at 4-5.

²⁶ *Id.* at 6-7.

²⁷ *Id.*

membership.²⁸ ATC further argues that generators with market-based rate authority would have no Commission-approved ROE or capital structure to utilize in the proposed rate formula. Thus, ATC reiterates its position that the cost associated with requiring potential blackstart resource providers to submit individual section 205 applications would deter the provision of service. Finally, ATC points out that the Commission has previously allowed generators to use a transmission owner's ROE and capital structure in the context of rate formulas for ancillary services such as reactive power.²⁹

19. In its October 19 Answer, ATC argues that MISO's Schedule 33 does not preclude recovery of a portion of existing generator investment as a fixed cost and that the Commission has previously approved similar cost recovery inputs in blackstart resource rates.³⁰ Additionally, ATC asserts that inclusion of both fixed cost recovery elements (i.e., a two percent portion of existing generator investment and incremental costs) is necessary to ensure that blackstart resources are available and to adequately compensate those resources for risk associated with ATC's proposed minimum three-year contract requirement.³¹ ATC also rejects the notion that the proposed rate formula goes beyond that previously approved by the Commission, maintaining that its proposed reimbursement methodology does not include a "Z Factor" or any other component above incurred costs.³²

²⁸ ATC October 19, 2011 Answer at 6.

²⁹ *Id.* at 7 (citing *Prairie Power, Inc.*, 135 FERC ¶ 61,025, at P 4-10 (2011); *Bluegrass Generation Co., LLC*, 118 FERC ¶ 61,214, at P 86 (2007)). In its November 4 Answer, ATC reiterates this argument, citing two instances in which the Commission determined that generator owners could use ATC's ROE in determining the cost of providing reactive power. ATC November 4, 2011 Answer at 3-4.

³⁰ ATC October 19, 2011 Answer at 3-4 (citing *PJM Interconnection, LLC*, 128 FERC ¶ 61,249, at P 19 (2009)). ATC points out that PJM Interconnection, LLC (PJM) recently proposed to modify its rules and procedures governing provision of blackstart service to, among other things, allow blackstart service providers to recover NERC related capital costs as well as historic capital costs.

³¹ *Id.* at 4. ATC incorrectly asserts that MISO's Schedule 33 requires only a two-year service commitment. *Id. see Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,106 at P 5 (observing that service will be provided "for a minimum continuous three-year period" under Schedule 33).

³² *Id.*

20. ATC also refutes Consumers Energy's assertion that the proposed use of MISO's CONE is an improper proxy for measuring blackstart resource owners' existing generator investment.³³ ATC argues that its proposed proxy methodology simplifies the methodology for calculating the fixed cost component of the annual revenue requirement. ATC points out that this mechanism avoids the need for individual filings by potential blackstart resource owners to have the Commission determine individual entitlements. Moreover, ATC argues that the Commission has approved a similar substitution in the context of the blackstart rate formula for PJM.³⁴

21. In its November 4 Answer, ATC states that, unlike other transmission owners in the MISO region who own generation, ATC has no capability to provide blackstart capability to itself. It reiterates that it is statutorily prohibited from owning generation and has no other option but to contract with third-party generation owners who are willing to make the required investment in blackstart-capable generating resources, and that the proposed agreement and rate formula will overcome the reluctance of such third-parties to make the necessary investment by assuring them of reasonable recovery of incurred costs.³⁵

22. ATC also argues that contrary to the Wisconsin Commission's suggestion, the proposed agreement and rate formula are available to any generator that meets the needs of ATC's System Restoration Plan and is not limited to ATC's affiliates.³⁶ Further, ATC adds that the Commission has accepted provisions allowing for continued recovery of new investment costs for units that are removed from a System Restoration Plan in its approval of MISO's Schedule 33.³⁷ Finally, ATC posits that, based on its understanding of the Wisconsin Commission's jurisdiction, the Wisconsin Commission would have the authority to review the receipt of revenues under the proposed rate formula.³⁸

³³ *Id.* at 5-6.

³⁴ *Id.* at 5-6.

³⁵ ATC November 4, 2011 Answer at 3.

³⁶ *Id.* at 3.

³⁷ *Id.* at 5.

³⁸ *Id.*

IV. Discussion

A. Procedural Matters

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2011), the Commission will grant ITC's and Calpine's late-filed motions to intervene given their interests in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept ATC's answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

24. Our preliminary analysis indicates that ATC's proposed agreement and rate formula have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept ATC's filing, suspend it for a nominal period to become effective December 1, 2011, as requested, subject to refund, and set the agreement and rate formula for hearing and settlement judge procedures.

25. While we are setting the proposed agreement and rate formula for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.³⁹ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁴⁰ The settlement judge shall report to the Chief Judge and the Commission within 30 days

³⁹ 18 C.F.R. § 385.603 (2011).

⁴⁰ If the parties decide to request a specific judge, they may make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov –click on Office of Administrative Law Judges).

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) ATC's proposed agreement and rate formula are hereby accepted for filing and suspended for a nominal period to become effective December 1, 2011, 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 Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of ATC's proposed agreement and rate formula. However, the hearing will 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 (2011), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(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 administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Such 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. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.