

138 FERC ¶ 61,203
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Michigan Electric Transmission
Company, LLC

Docket No. ER11-136-001

ORDER ON REHEARING

(Issued March 20, 2012)

1. On December 17, 2010,¹ the Commission accepted a late-filed agency agreement (Agency Agreement)² between Consumers Energy Company (Consumers Energy),³ as principal, and Michigan Electric Transmission Company, LLC (Michigan Electric),⁴ as agent, pursuant to which Consumers Energy engaged Michigan Electric to perform certain of Consumers Energy's obligations under an interconnection agreement (Facilities Agreement) between Midland Cogeneration Venture Limited Partnership

¹ *Mich. Elec. Transmission Co.*, 133 FERC ¶ 61,238 (2010) (Agency Agreement Order).

² The Agency Agreement, which was entered into on April 1, 2001, was filed in Docket No. ER11-136-000 on October 18, 2010.

³ Consumers Energy is a wholly-owned subsidiary of CMS Energy Corporation. Consumers Energy is a public utility that generates and buys and sells electric energy. It was an integrated utility until 2002 when it finished divesting its transmission assets.

⁴ Michigan Electric's predecessor, Michigan Transmission Company, was formed as a wholly-owned subsidiary of Consumers Energy. Consumers Energy transferred its transmission assets to Michigan Electric in 2001. *See Consumers Energy Co.*, 94 FERC ¶ 61,018 (2001). In 2002, Michigan Electric became independent of Consumers Energy and assumed responsibility for providing open access transmission service over the former Consumers Energy transmission system. *See Trans-Elect, Inc., et al.*, 98 FERC ¶ 61,142 (2002). Since 2006, Michigan Electric has been a subsidiary of ITC Holdings Corporation. *See ITC Holdings Corp.*, 116 FERC ¶ 61,271 (2006).

(Midland) and Consumers Energy.⁵ The duties and obligations concern the continuing operation and maintenance of certain interconnection facilities that enable Midland's cogeneration plant (Midland Plant), which has been certified and self-certified as a qualifying facility (QF),⁶ to connect with the transmission grid owned formerly by Consumers Energy and, since 2001, by Michigan Electric. Midland has requested clarification or, in the alternative, rehearing of the Agency Agreement Order. For the reasons described below, we will deny clarification and rehearing.

I. Background

2. In 1986, Consumers Energy and Midland executed a power purchase agreement (Power Purchase Agreement) under which Consumers Energy agreed to purchase substantially all of the electric capacity and energy associated with the Midland Plant.⁷ To interconnect the Midland Plant with Consumers Energy's transmission grid, the parties executed the Facilities Agreement on July 8, 1988. The Facilities Agreement describes the facilities required to complete the interconnection, assigns responsibility for the cost of those facilities, and provides for the conveyance of ownership of certain facilities provided by Midland to Consumers Energy. Section 3.1 of the Facilities Agreement obligates Consumers Energy to operate and maintain the interconnection facilities and obligates Midland to reimburse Consumers Energy for all direct and indirect costs and expenses (including property taxes) incurred by Consumers Energy in owning and operating the interconnection facilities and Midland's billing meters.

⁵ The Facilities Agreement was filed by Consumers Energy in Docket No. ER10-2156-000 on August 6, 2010, and accepted by the Commission on September 17, 2010. *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,241 (2010) (Facilities Agreement Order). Our order on rehearing of the Facilities Agreement Order is being issued concurrently with this order. *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,204 (2012).

⁶ The Commission initially certified the Midland Plant as a qualifying cogeneration facility in Docket No. QF87-237-000 on March 12, 1987. *See CMS Midland, Inc.*, 38 FERC ¶ 61,244 (1987). At that time, Midland was owned by Consumers Energy and Dow Chemical Company (Dow Chemical) and their affiliates. Since 2009, Midland has been owned by EQT Infrastructure, a Swedish private equity firm, and Fortistar, a United States energy investment group. *See Midland Cogeneration Venture Ltd. Partnership*, 127 FERC ¶ 62,045 (2009).

⁷ Midland also has contractual arrangements for the sale of steam and electric capacity and energy to Dow Chemical.

3. In 2001, Consumers Energy transferred its transmission assets, including the interconnection facilities that are the subject of the Facilities Agreement, to a predecessor of Michigan Electric, which was then a subsidiary of Consumers Energy.⁸ As part of that transaction, Consumers Energy and Michigan Electric entered into the Agency Agreement. As Consumers Energy's agent, Michigan Electric performs the operation and maintenance obligations provided for in the Facilities Agreement. For such services, Michigan Electric is paid a monthly fee of \$500. The Agency Agreement provides that, except for indemnity payments that may become due, the \$500 monthly payment for the services that Michigan Electric performs on Consumers Energy's behalf is the only compensation and reimbursement from Consumers Energy to which Michigan Electric is entitled. In addition, the Agency Agreement provides that Michigan Electric "shall be entitled to the payments from [Midland] pursuant to the [Facilities Agreement]," with an exception that is not relevant here.⁹

4. Midland paid the invoices submitted by Consumers Energy for services provided under the Facilities Agreement during the period when Consumers Energy itself was performing those services. After transfer of the interconnection facilities to Michigan Electric and execution of the Agency Agreement, Midland also paid invoices submitted by Michigan Electric, as agent for Consumers Energy, for the Facilities Agreement services. The payments were for actual operation and maintenance costs, including property taxes. However, since November 2004, Midland has not paid any of the invoices submitted by Michigan Electric. Michigan Electric filed suit against Midland for its unreimbursed costs. The matter is currently before the U.S. District Court for the Eastern District of Michigan (District Court), where it is being held in abeyance pending Commission action on a petition for declaratory order that Michigan Electric has filed in Docket No. EL11-2-00. In that proceeding, Michigan Electric asks the Commission to exercise its primary jurisdiction over the dispute and direct Midland to pay Michigan Electric for the latter's unreimbursed costs.¹⁰

5. In the Facilities Agreement Order, the Commission also conditionally accepted (in Docket No. ER10-1814-000) a partially executed generator interconnection agreement (GIA) among Midwest Independent Transmission System Operator, Inc. (MISO), Midland, and Michigan Electric. Subject to amendment or termination of the Facilities Agreement, the new GIA would replace the Facilities Agreement. The new GIA is

⁸ See *supra* note 4.

⁹ Agency Agreement, Article III (Compensation).

¹⁰ The Commission is issuing an order in Docket No. EL11-2-000 concurrently with the issuance of this order. *Michigan Electric Transmission Co. LLC*, 138 FERC ¶ 61,202 (2012).

necessary to enable Midland to increase capacity at and sales of electric energy from the Midland Plant.¹¹ In the Facilities Agreement Order, the Commission also directed Michigan Electric to file the Agency Agreement.¹² Michigan Electric did so on October 18, 2010, the filing that the Commission accepted in the Agency Agreement Order and that is now before us on rehearing.

II. Agency Agreement Order

6. Midland protested the filing of the Agency Agreement, claiming that the rates that Michigan Electric seeks to collect under the agreement are not just and reasonable; that the charges constitute an impermissible direct assignment of charges for network facilities, not interconnection facilities, in violation of the Commission's policy that network charges may not be directly assigned; and that the charges include property taxes that Michigan Electric has no right to recover under Order No. 2003.¹³ Midland also claimed that Michigan Electric already recoups from its transmission customers the very charges that it seeks to impose on Midland, so that Michigan Electric is seeking to recover expenses for which it has already been reimbursed. Finally, Midland asserted that enforcing the Agency Agreement retroactively would violate the Commission's filed rate doctrine and the ban on retroactive ratemaking.

7. In the Agency Agreement Order, the Commission found that Midland's objections pertained not to the rates in the Agency Agreement, i.e., the \$500 monthly fee paid by Consumers Energy to Michigan Electric, but to the payments by Midland required under

¹¹ Facilities Agreement Order, 132 FERC ¶ 61,241 at P 33-34. The Commission gave Midland the choice of continuing the Facilities Agreement and the Midland Plant's currently authorized output or increasing the plant's output, in which case the interconnection would be governed by the terms of the new GIA. *Id.* P 35. In a June 9, 2011, filing in Docket No. ER11-3764-000, MISO filed a revised GIA, which the Commission accepted on July 20, 2011, under delegated authority, subject to termination or amendment of the Facilities Agreement. On November 15, 2011, Consumers Energy filed a Notice of Cancellation of the Facilities Agreement in Docket No. ER12-420-000. That filing, which does not address the status of the Agency Agreement, is pending.

¹² *Id.* P 27.

¹³ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

the Facilities Agreement. In that regard, the Commission observed that, although Midland intervened in the Facilities Agreement proceeding (Docket No. ER10-2156-000), it did not protest the justness and reasonableness of the Facilities Agreement rates or seek rehearing of the Commission's determination, in the Facilities Agreement Order, that the rates under the Facilities Agreement are just and reasonable. Accordingly, the Commission held that Midland's objections to the Agency Agreement represented an impermissible collateral attack on the now accepted rates of the Facilities Agreement.¹⁴

8. Midland subsequently filed a request for clarification or rehearing of the Agency Agreement Order, and Michigan Electric filed an answer to Midland's request for clarification or rehearing.

III. Discussion

A. Procedural Matters

9. Rule 713(d) of the Commission's Rules of Practice and Procedure¹⁵ prohibits an answer to a request for rehearing. Accordingly, we will reject Michigan Electric's answer to Midland's request for clarification or rehearing.

B. Substantive Matters

10. On rehearing, Midland asks the Commission to reverse its finding that the Agency Agreement proceeding was not the proper proceeding in which to object to the rates set forth in the Facilities Agreement. Midland argues that the Commission erred in finding that the only rate in the Agency Agreement is the \$500 monthly agency fee payable by Consumers Energy to Michigan Electric. Instead, Midland urges, the Agency Agreement specifically incorporated and allocated, between Consumers Energy and Michigan Electric, Midland's purported reimbursement obligations under the Facilities Agreement. According to Midland, because the Agency Agreement gives Michigan Electric the right to the payments from Midland under the Facilities Agreement (with an exception not relevant here), Midland's duty to contest any reimbursement obligation did not arise upon the filing of the Facilities Agreement, but instead arose only when Michigan Electric filed the Agency Agreement.¹⁶ In this regard, Midland cites Articles II and III of the Agency Agreement.¹⁷ Article II sets forth the scope of the delegation to Michigan Electric of

¹⁴ Agency Agreement Order, 133 FERC ¶ 61,238 at P 9.

¹⁵ 18 C.F.R. § 385.713(d) (2011).

¹⁶ Midland Rehearing Request at 8.

¹⁷ *Id.* at 9.

Consumers Energy's duties and obligations under the Facilities Agreement. Article III provides that, for the performance of those duties and obligations, Consumers Energy shall pay Michigan Electric an "agency fee" of \$500 per month. Article III goes on to provide that:

This monthly agency fee [\$500.00] is the sole compensation and total reimbursement to which METC or other Downstream Owner is entitled to from Consumers in connection with performing its responsibilities and duties pursuant to this Agency Agreement, except for indemnity payments, if any that may become due Notwithstanding the foregoing, METC or other Downstream Owner shall be entitled to the payments from Seller [Midland] pursuant to the Subject Agreement [Facilities Agreement] as specified in Article II of this Agency Agreement except as otherwise provided in Section 11 thereof.

11. We do not agree that the Agency Agreement establishes the rates that are chargeable under the Facilities Agreement. The Agency Agreement does not purport to be anything other than what its name suggests - an agreement by which Consumers Energy has engaged Michigan Electric, as its agent, to perform certain of the operations and maintenance duties that would otherwise be performed by Consumers Energy under the Facilities Agreement. As compensation and reimbursement for performing such duties, Consumers Energy pays Michigan Electric an agency fee of \$500 per month and Michigan Electric is entitled to the payments that Midland is obligated to make under the Facilities Agreement.

12. Consumers Energy remains responsible for performance of its duties under the Facilities Agreement. While Michigan Electric and Consumers Energy agreed to "cooperate with one another in the preparation and submission of (a) an estimate of such costs and expenses for each ensuing calendar year and (b) the invoices necessary for recovery of such costs and expenses from [Midland] on a timely basis," the Agency Agreement does not authorize a rate other than the rate contained in the Facilities Agreement, nor does it authorize Michigan Electric to perform duties under the Facilities Agreement or to collect rates contained in the Facilities Agreement, except in its capacity as agent for Consumers Energy.

13. Midland argues next that the rates charged by Consumers Energy under the Facilities Agreement differ from the rates that Michigan Electric seeks to collect under the Agency Agreement. Midland explains that, currently, the only costs that Consumers Energy assesses Midland under the Facilities Agreement are for operating and maintaining the meters and equipment used to provide electric energy to Dow Chemical,

while Michigan Electric is seeking to recover operation and maintenance expenses relating to the interconnection facilities, which, according to Midland, would involve the direct assignment of transmission costs to an individual interconnection customer in contravention of Commission policy. Midland states that, because it has no objection to reimbursing Consumers Energy for costs incurred by Consumers Energy related to the Dow Chemical meters and equipment, it had no reason to protest the rates contained in Facilities Agreement.

14. We find Midland's argument disingenuous. In the transmittal letter that Consumers Energy submitted with the Facilities Agreement for filing, in Docket No. ER10-2156, Consumers Energy stated that the rates contained in the Facilities Agreement include all operation and maintenance expenses related to the interconnection facilities for which Midland is responsible under sections 3.1 and 3.4 of the Facilities Agreement. The Facilities Agreement itself also states the rates for operating and maintaining the interconnection facilities. Midland was thus not justified in believing that the filing of the Facilities Agreement and the rates contained in the agreement did not put the entire agreement before the Commission. As previously indicated, while Midland intervened in the Facilities Agreement proceeding, it did not contest the justness and reasonableness of the rates in the Facilities Agreement or seek rehearing of the Facilities Agreement Order accepting the Facilities Agreement and its rates. Midland is therefore obligated to pay the rates and charges set forth in the now accepted Facilities Agreement.

15. Midland further argues that, even if the charges for which Michigan Electric seeks reimbursement are the same as Consumers Energy's, the Commission has rejected the notion that one utility can incorporate the rates of another utility by reference, but must seek separate approval of its rates. Thus, Midland concludes, it had no reason to protest the Facilities Agreement filing.

16. We disagree with Midland that the Agency Agreement incorporates by reference rates that are chargeable under the Facilities Agreement. The Agency Agreement does not determine the rates reflected in the invoices that Michigan Electric, as agent, sends Midland on Consumers Energy's behalf. The Facilities Agreement determines those rates. As already noted, the Agency Agreement merely provides for the compensation and reimbursement of certain operation and maintenance duties that Michigan Electric performs on behalf of Consumers Energy.

17. Lastly, Midland argues that it had no reason to seek rehearing of the Facilities Agreement Order. The Commission did not grant a retroactive effective date and did not grant Michigan Electric's request, in the Facilities Agreement proceeding, that Midland be ordered to pay Michigan Electric the disputed past due charges. Moreover, according to Midland, the Facilities Agreement Order states that the Commission's acceptance of the Facilities Agreement was not intended as a determination that Michigan Electric has enforceable rights against Midland to collect and retain payments that Midland is

obligated to make under the Facilities Agreement. Midland argues, therefore, that because it believed that it had not suffered any apparent injury from the Facilities Agreement Order, it had no reason to seek rehearing of that order.

18. As we have already found, Midland's premise, that the Agency Agreement established the rates that Michigan Electric seeks to collect from Midland, is incorrect. Those rates were established in the Facilities Agreement. Midland's challenge in this proceeding to the rates contained in the Facilities Agreement represents an impermissible collateral attack on the acceptance of the Facilities Agreement¹⁸ in the Facilities Agreement Order.¹⁹

19. We also reiterate here, as we noted in the Agency Agreement Order,²⁰ that our acceptance of the Agency Agreement is not a determination that Michigan Electric itself, as distinct from Consumers Energy, has any rights against Midland under the Facilities Agreement. Importantly, Michigan Electric is not itself a party to the Facilities Agreement. The Agency Agreement only creates an agency relationship between Consumers Energy, the party responsible for the interconnection services under the Facilities Agreement, and Michigan Electric, its agent. We see no inconsistency between that finding, in the Agency Agreement Order,²¹ and our determination there,²² which we reiterate here, that the separate rate (i.e., the \$500 per month fee) paid by Consumers Energy to Michigan Electric under the terms of the Agency Agreement is just and reasonable.

20. Accordingly, we deny Midland's request for clarification or, in the alternative, rehearing.

¹⁸ Agency Agreement Order, 133 FERC ¶ 61,238 at P 9.

¹⁹ As the Commission noted in the Agency Agreement Order (at n.12), Midland may challenge the justness and reasonableness of the rates in the Facilities Agreement by filing a complaint under section 206 of the Federal Power Act, 16 U.S.C. § 824e (2006).

²⁰ *Id.* n.11.

²¹ *Id.* P 8.

²² *Id.*

The Commission orders:

Midland's request for clarification or, in the alternative, rehearing is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.