

139 FERC ¶ 61,022
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

International Transmission Company

Docket Nos. ER12-424-001
ER12-425-001

Michigan Electric Transmission Company, LLC

(not consolidated)

ORDER GRANTING REHEARING AND CLARIFYING
FILING REQUIREMENTS

(Issued April 6, 2012)

1. On February 8, 2012, International Transmission Company, d/b/a *ITC Transmission* (ITC) and Michigan Electric Transmission, LLC (METC) (collectively, “the ITC Companies”) filed joint requests for reconsideration, or in the alternative, rehearing of two delegated letter orders that were issued in these proceedings on January 9, 2012 (January 9 Letter Orders).¹ In this order, we grant the ITC Companies’ requests for rehearing and clarify our policy on the timing of when pre-interconnection agreements must be filed.

I. Background

2. On October 19, 2011, ITC entered into an engineering and procurement agreement (E&P agreement)² with The Detroit Edison Company (Detroit Edison), which provided for ITC to begin preliminary interconnection work by commencing equipment

¹ *Midwest Independent Transmission System Operator, Inc. and International Transmission Co.*, Docket No. ER12-424-000 (delegated letter order) (Jan. 9, 2012); *Midwest Independent Transmission System Operator, Inc. and Michigan Electric Transmission Co., LLC*, Docket No. ER12-425-000 (delegated letter order) (Jan. 9, 2012).

² The E&P agreement is designated as Service Agreement No. 2411 under *Midwest Independent Transmission System Operator, Inc.*, FERC FPA Electric Tariff, Midwest ISO Agreements, SA 2411, ITC Transmission-Detroit Edison E&P, 0.0.0.

procurement, engineering and design, and for Detroit Edison to pay for such work before execution of a Generator Interconnection Agreement (GIA). According to the E&P agreement, which was filed on November 16, 2011, ITC will design, engineer, procure equipment, and obtain the necessary right-of-ways to modify its transmission facilities once it receives the initial payment from Detroit Edison. The E&P agreement further provides that construction of any permanent interconnection facilities or network upgrades will not commence until after the parties have executed a GIA or the Commission accepts an unexecuted GIA. The parties stated that they were in the process of negotiating the GIA.

3. On October 24, 2011, METC entered into an E&P agreement³ with Beebe Renewable Energy, LLC (Beebe), which provided for METC to begin preliminary interconnection work by commencing equipment procurement, engineering and design, and for Beebe to pay for such work before execution of a GIA. According to the E&P agreement, which was filed on November 16, 2011, METC would begin to design and engineer the critical lead-time items after it received the initial payment from Beebe. The E&P agreement further provides that construction of any permanent interconnection facilities or network upgrades will not commence until after the parties have executed a GIA or the Commission accepts an unexecuted GIA. The parties stated that they were in the process of negotiating a GIA.

4. In both filings, the ITC Companies requested waiver of the Commission's 60-day prior notice requirement on the grounds that the Commission permits waiver of the prior notice requirement for uncontested filings that do not change rates.⁴ The ITC Companies stated that the requested effective dates, October 19, 2011 and October 24, 2011 respectively, would allow the parties to begin work on the interconnection facilities so that they could meet the November 2012 commercial operation dates.

5. On January 9, 2012, Commission staff, acting pursuant to delegated authority, issued the January 9 Letter Orders denying the ITC Companies' request for waiver of the Commission's 60-day prior notice requirement. The January 9 Letter Orders stated that the ITC Companies had not demonstrated the extraordinary circumstances required for such waiver. The January 9 Letter Orders required the ITC Companies to make time value refunds within 30 days of the date of the letter orders and to file refund reports with

³ The E&P agreement is designated as Service Agreement No. 2410 under Midwest Independent Transmission System Operator, Inc., FERC FPA Electric Tariff, Midwest ISO Agreements, [SA 2410, METC-Beebe Renewable E&P, 0.0.0.](#)

⁴ ITC Filing at 2; METC Filing at 2 (citing *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106 (1992) (*Central Hudson*) and *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,984, *reh'g granted in part*, 65 FERC ¶ 61,081 (1993) (*Prior Notice*)).

the Commission within 30 days thereafter or demonstrate that the time value refunds would result in a loss.

6. On March 8, 2012, the ITC Companies submitted refund reports regarding monies that each received pursuant to their respective E&P agreements.

II. Request for Rehearing and Responsive Pleadings

7. On February 8, 2012, the ITC Companies filed a joint request for reconsideration or in the alternative, rehearing of the January 9 Letter Orders. As discussed in greater detail below, they assert that the Commission should have granted their requested effective dates because the E&P agreements are service agreements under MISO's tariff and therefore were timely-filed, or, in the alternative, that their filings met the requirements for waiver of prior notice as outlined in *Central Hudson*.

III. Discussion

8. As discussed below, we grant rehearing of the January 9 Letter Orders and will take this opportunity to clarify the Commission's policy on the timing of when pre-interconnection agreements must be filed, as further discussed below.

A. Rehearing Requests

9. The ITC Companies request reconsideration, or in the alternative, rehearing of the January 9 Letter Orders on two alternative grounds. They first argue that the Commission should have granted their requested effective dates because the E&P agreements are service agreements under MISO's tariff and therefore were properly filed within 30 days after the ITC Companies began providing service.⁵ The ITC Companies state that the term "service agreement" means "an agreement that authorizes a customer to take electric service under the terms of a tariff"⁶ and note that the E&P agreements have been designated as service agreements under MISO's tariff. The ITC Companies argue that while the E&P agreements do not explicitly state that the interconnection customers are receiving service pursuant to a tariff, they incorporate the MISO tariff by reference and the service provided under the E&P agreements will eventually be rolled into the service provided under the finalized GIA. The ITC Companies further argue that MISO's Generator Interconnection Procedures specifically spell out the process for entering into an E&P agreement pending negotiations of a GIA.⁷

⁵ METC and ITC filed their E&P agreements 23 and 28 days, respectively, after service commenced.

⁶ Request for Rehearing at 10 (citing 18 C.F.R. § 35.2(c)(2) (2011)).

⁷ Request for Rehearing at 10 (citing Midwest Independent Transmission System

10. The ITC Companies acknowledge recent Commission orders which rejected proposals to incorporate *pro forma* E&P agreements under a transmission provider's tariff and stated that "E&P agreements are analogous to contribution in aid of construction agreements, which must be filed with the Commission prior to collecting money from the customer."⁸ However, they contend that the issue of whether E&P agreements should be *pro forma* agreements under a transmission provider's tariff is not dispositive of whether E&P agreements are considered "service agreements" under the MISO Tariff and the Commission's regulations.

11. In the alternative, the ITC Companies argue that their requested effective dates should have been granted because their filings met the requirements for waiver of prior notice as outlined in *Central Hudson*.⁹ Specifically, the ITC Companies argue that a showing of extraordinary circumstances is not the proper standard for granting waiver. Rather, according to the ITC Companies, in *Central Hudson*, the Commission stated that it would grant waiver of the prior notice requirements where (1) the customer does not object and the filing does not change rates, or (2) the filing reduces rates.¹⁰ The ITC Companies argue that they did not need to show extraordinary circumstances in support of their requests for waiver since neither customer objected to the filings, and the filings

Operator, Inc., FERC FPA Electric Tariff, FERC Electric Tariff, ATTACHMENT X, Generator Interconnection Procedures (GIP), 1.0.0). Section 9 provides, in part:

SECTION 9. ENGINEERING & PROCUREMENT ("E&P")

AGREEMENT. Prior to executing an GIA, an Interconnection Customer may, in order to advance the implementation of its interconnection, request and Transmission Provider shall offer Interconnection Customer, an E&P Agreement that authorizes Transmission Owner to begin engineering and procurement of long lead-time items necessary for the establishment of the interconnection. However, Transmission Provider shall not be obligated to offer an E&P Agreement if Interconnection Customer is in Dispute Resolution as a result of an allegation that Interconnection Customer has failed to meet any milestones or comply with any prerequisites specified in other parts of the GIP. The E&P Agreement is an optional procedure and it will not alter the Interconnection Customer's Queue Position or In-Service Date.

⁸ *Arizona Public Service Co.*, 137 FERC ¶ 61,099 (2011); *El Paso Electric Service Co.*, 137 FERC ¶ 61,101 (2011).

⁹ *See Central Hudson*, 60 FERC ¶ 61,106.

¹⁰ Request for Rehearing at 12 (citing *Central Hudson*, 60 FERC ¶ 61,106 at 61,338).

do not change rates. The ITC Companies further argue that good cause exists for granting the waiver requests because E&P agreements generally allow transmission owners to start acquiring materials, and engineering and design activities while the parties negotiate and finalize the GIA.¹¹

12. The ITC Companies assert that waiver is routinely granted for E&P agreements filed by other utilities. In support of their argument, the ITC Companies attached a chart to their rehearing request that identifies 20 E&P agreements where the Commission staff accepted the filed E&P agreements with the requested effective date on less than 60 days' prior notice.¹²

B. Commission Determination

13. The Commission will generally grant waiver of the 60-day prior notice requirements¹³ for service agreements implementing service under an “umbrella tariff”¹⁴ if the service agreement is filed within 30 days after service commences. Under the Commission’s regulations, a “service agreement” is defined as “an agreement that authorizes a customer to take electric service under the terms of a tariff.”¹⁵ Further, the Commission’s policy for waiver of prior notice also provides that the Commission will grant waiver of prior notice for new service that is not pursuant to an accepted contract if the party shows good cause and the filing was made before the commencement of service.¹⁶ However, absent extraordinary circumstances, the Commission will generally

¹¹ *Id.* at 13.

¹² *Id.* at 3, 12-13, Exh. A. ITC Companies attached an exhibit to their request for rehearing, pointing to 20 delegated letter orders in which the applicant’s request for waiver of prior notice when filing an E&P agreement was granted. Nine agreements were filed prior to the commencement of service, sometimes only by a day or two; eight agreements were filed after the commencement of service (but within 30 days of the commencement of such service) and three agreements were filed on the date that service commenced. In all cases, the request for waiver of prior notice was granted.

¹³ *See Prior Notice*, 64 FERC ¶ 61,139 at 61,983-84.

¹⁴ An umbrella tariff is defined as a “tariff of general applicability which a utility may file with the Commission.” *Prior Notice*, 64 FERC ¶ 61,139 at 61,983-84.

¹⁵ 18 C.F.R. § 35.3(a)(2) (2011).

¹⁶ *See Central Hudson*, 60 FERC ¶ 61,106, at 61,339 (“When considering requests for waiver related to the provision of new service, we must balance the requirement that utilities promptly file their rates as embodied in the Federal Power Act and the need of utilities to transact business on short notice. Accordingly, we will grant waiver of notice

not grant waiver if the filing is made on or after the date that service commences, and the service is not provided pursuant to a service agreement under the terms of a generally applicable tariff.¹⁷

14. We clarify that pre-interconnection agreements¹⁸ should be treated as service agreements that may be filed within 30 days of service commencing. While we recognize that pre-interconnection agreements do not provide for service conforming to the *pro forma* terms and conditions of a tariff, Order No. 2003 and the *pro forma* Large Generator Interconnection Procedures (LGIP) expressly contemplate that such agreements may be part of generator interconnection service, provided under the tariff. We are also persuaded by the ITC Companies' argument that allowing pre-interconnection agreements to be filed without 60 days' prior notice, and within 30 days of service commencing, may make the interconnection process faster for parties by saving time and furthers the goal of streamlining the interconnection process. Such treatment also recognizes that pre-interconnection agreements are similar to other non-conforming agreements under the OATT, which the Commission allows to be filed within 30 days of service commencing.¹⁹

if good cause is shown and the agreement is filed prior to the commencement of service.”).

¹⁷ *Prior Notice*, 64 FERC ¶ 61,139 at 61,983-84.

¹⁸ The Commission has indicated the pre-interconnection activities include procurement, engineering and limited construction for interconnection. *See So. Cal. Edison Co.*, 98 FERC ¶ 61,304 (2002); *Pacific Gas & Electric Co.*, 115 FERC ¶ 61,373 (2006).

¹⁹ *See, e.g., Central Maine Power Company*, 96 FERC ¶ 61,057, at 61,170-71 (2001) (granting waiver of prior notice and accepting a generator interconnection agreement filed after, but within 30 days of, commencement of service, explaining that “[b]ecause the [interconnection agreement] can be classified as a service agreement under open access tariffs, and because Central Maine filed the service agreement within 30 days after service commenced, we will grant waiver of the prior notice requirement to permit the [interconnection agreement] to become effective as requested...”). At the time this interconnection agreement was filed, the applicable open access transmission tariff did not contain *pro forma* generator interconnection procedures or a *pro forma* generator interconnection agreement. *See also Midwest Indep. Transmission Sys. Operator, Inc.*, 113 FERC ¶ 61,048, at P 19 (2005) (granting waiver of prior notice and accepting agreement for construction of “Affected System” network upgrades associated with generator interconnection service filed after, but within 30 days of, commencement of service). While “Affected System” upgrades are contemplated under Order No. 2003, the *pro forma* LGIP does not include a *pro forma* agreement for such upgrades. *See also*

15. Although ITC Companies requested waiver on the basis that the agreements do not change rates, we grant rehearing given our finding that pre-interconnection agreements may be treated as service agreements for purposes of the Commission's filing requirements. We therefore grant ITC Companies' request for waiver of prior notice to the extent necessary, and allow the agreements to be effective as of October 19, 2011 and October 24, 2011, respectively. Further, given that we are granting the ITC Companies' requested effective dates, we will no longer require refunds.

The Commission orders:

(A) The requests for rehearing and the requested waiver to allow effective dates of October 19, 2011 and October 24, 2011 for the E&P agreements are hereby granted, as discussed in the body of this order.

(B) The ITC Companies' refund reports are hereby rejected as moot, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Duke Energy Kentucky, Inc., 122 FERC ¶ 61,182, at P 26 (2008) (granting waiver of prior notice and accepting wholesale distribution service agreement providing for Direct Assignment Facilities service filed after, but within 30 days of, commencement of service). While Direct Assignment Facilities service is contemplated under the *pro forma* OATT, the *pro forma* OATT does not include *pro forma* rates, terms and conditions, or a *pro forma* agreement, for such service.