

140 FERC ¶ 61,100
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midwest Independent Transmission System
Operator, Inc.

Docket Nos. ER10-1814-000

Consumers Energy Company

ER12-420-000
(Not Consolidated)

ORDER DENYING STAY

(Issued August 2, 2012)

1. On April 30, 2012, Michigan Electric Transmission Company (Michigan Electric) filed a motion (Motion) asking the Commission to stay the effectiveness of two orders, that of September 17, 2010, in Docket No. ER10-1814-000,¹ and that of April 6, 2012, in Docket No. ER12-420-000,² until ultimate resolution of several inter-related proceedings pertaining to Michigan Electric's claim for unreimbursed costs incurred in connection with providing operation and maintenance services for interconnection facilities that connect a cogeneration plant (Midland Plant) owned by Midland Cogeneration Venture Limited Partnership (Midland) with the transmission system owned by Michigan Electric and operated by the Midwest Independent Transmission System Operator, Inc. (MISO). For the reasons discussed below, we will deny the Motion.

¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,241 (2010) (September 17 Order), *order on rehearing*, 138 FERC ¶ 61,204 (2012) (GIA Rehearing Order).

² *Consumers Energy Co.*, 139 FERC ¶ 61,014 (2012) (April 6 Order). Michigan Electric has requested rehearing of this order.

Background

2. On July 8, 1988, to enable Midland to connect the Midland Plant to the transmission system, owned then by Consumers Energy Company (Consumers Energy), the two companies executed a Facilities Agreement³ to govern construction and operation and maintenance of the interconnection facilities.⁴ Subsequently, in 2001, Consumers Energy transferred its transmission facilities (including the interconnection facilities here in question) to a predecessor of Michigan Electric.⁵

3. Because Midland declined to enter into a new agreement with Michigan Electric for operation and maintenance of the interconnection facilities, in view of Consumers Energy's transfer of the interconnection facilities to Michigan Electric, Consumers Energy and Michigan Electric entered into an Agency Agreement,⁶ on April 1, 2001. Under the Agency Agreement, Michigan Electric, as Consumers Energy's agent, agreed to perform Consumers Energy's operation and maintenance obligations under the Facilities Agreement. Since 2001, Michigan Electric has performed Consumers Energy's obligations under the Facilities Agreement with respect to the transferred facilities. However, beginning in November 2004, Midland ceased making any further payments under the Facilities Agreement. On October 18, 2010, in Docket No. EL11-2-000, Michigan Electric petitioned the Commission for a declaratory order directing Midland to reimburse it for these costs, which then exceeded \$1.7 million.⁷

³ The Commission accepted the late-filed Facilities Agreement in the September 17 Order (Docket No. ER10-2156-000).

⁴ At the time, Midland was a wholly-owned subsidiary of Consumers Energy.

⁵ Originally an affiliate of Consumers Energy, and formed in 2001, when Consumers Energy divested its transmission assets, Michigan Electric became an independent transmission company in 2002, and a subsidiary of ITC Holdings Corporation in 2006.

⁶ On December 17, 2010, in Docket No. ER11-136-000, the Commission accepted the late-filed Agency Agreement. *Michigan Elec. Transmission Co., LLC*, 133 FERC ¶ 61,238 (2010) (December 17 Order), *order on reh'g*, 138 FERC ¶ 61,203 (2012) (Agency Agreement Rehearing Order).

⁷ Michigan Electric, Petition for Declaratory Order, Docket No. EL11-2-000, at 19 (filed Oct. 18, 2010). On March 20, 2012, the Commission granted in part and denied in part Michigan Electric's petition. *Michigan Elec. Transmission Co.*, 138 FERC ¶ 61,202 (2012) (Petition Order). Midland has requested rehearing of this order.

4. On July 19, 2010, in Docket No. ER10-1814-000, MISO filed a partially executed generator interconnection agreement (GIA) that would govern the interconnection of the Midland Plant to the transmission facilities now owned by Michigan Electric. This GIA would supersede the Facilities Agreement. In the September 17 Order, the Commission accepted the GIA, subject to termination or amendment of the Facilities Agreement and to incorporation of certain other minor revisions.

5. On June 9, 2011, MISO filed a revised, fully executed GIA (Revised GIA) to satisfy the Commission's conditions in the September 17 Order. The Revised GIA was accepted, on July 20, 2011, under delegated authority, subject to termination or amendment of the Facilities Agreement.⁸

6. On November 15, 2011, in Docket No. ER12-420-000, Consumers Energy filed a notice of cancellation of the Facilities Agreement. The Commission accepted the notice of cancellation in the April 6 Order, effective January 15, 2012,⁹ notwithstanding that Michigan Electric had protested cancellation for fear that such cancellation would adversely affect its claims for reimbursement.

Stay Request

7. In its Motion, Michigan Electric states that without stay of the September 17 and April 6 Orders, once Midland installs the required metering equipment, the Revised GIA will provide Midland with substantial benefits, including increased interconnection capacity and reduced cost responsibility.¹⁰ According to Michigan Electric, Midland has indicated that it does not intend to pay the as-yet unpaid amounts billed to it under the Facilities Agreement until the proceedings in all the related dockets¹¹ have fully run their course, presumably including judicial review.¹² Therefore, Michigan Electric asks the Commission to stay the September 17 and April 6 Orders so that the Revised GIA, with its benefits to Midland, will not become operative, until the earlier of: (1) the date that Midland makes the required payments in compliance with the Commission's

⁸ *Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER11-3764-000 (July 20, 2011) (delegated letter order).

⁹ *See supra* note 2.

¹⁰ Michigan Electric, April 30, 2012 Motion at 6.

¹¹ Docket Nos. ER10-2156, EL11-2, ER10-1814, ER11-136, and ER12-420.

¹² Michigan Electric, April 30, 2012 Motion at 7.

March 20, 2012 order, in Docket No. ER10-2156-001;¹³ or (2) the date when all of the inter-related proceedings are finally resolved. Thus, Michigan Electric states, the stay will be effective only so long as Midland withholds payment.

8. Michigan Electric argues that it would be inequitable for Midland to be permitted to enjoy the benefits of the Revised GIA prior to making the payments that the Commission has ordered it to make.¹⁴ Michigan Electric acknowledges that this type of irreparable harm is unlike the irreparable harm typically involved in requests for stays. However, it argues, the Commission has also issued stays not only upon a showing of irreparable harm, but when “justice so requires,” the standard set forth in section 705 of the Administrative Procedure Act.¹⁵

Midland’s Opposition and Michigan Electric’s Answer

9. On May 15, 2012, Midland filed its opposition (Midland Protest) to the Motion. Midland asserts that the harm to which Michigan Electric points is purely financial, and that, under longstanding Commission precedent, such circumstances fall far short of warranting a stay. Moreover, Midland asserts that Michigan Electric has not addressed how a stay would serve the interests of justice nor how a stay would not prejudice the other parties to the Revised GIA. Midland also disputes the rationale offered by Michigan Electric for delaying the effectiveness of the Revised GIA, namely, that Midland has not complied with the GIA Rehearing Order and other orders issued on March 20, 2012 in related proceedings.

10. Midland states that it is delaying reimbursement of the Midland Plant’s operation and maintenance expenditures because the amount actually due has not yet been resolved.

¹³ See GIA Rehearing Order, 138 FERC ¶ 61,204 at P 30, in which the Commission ordered Midland to pay the charges provided for in the Facilities Agreement, charges that the Commission had found to be just and reasonable in the September 17 Order.

¹⁴ Michigan Electric, April 30, 2012 Motion at 8-9.

¹⁵ 5 U.S.C. § 705 (2006). Michigan Electric cites, in support, *City of Tacoma, Washington*, 89 FERC ¶ 61,273, at 61,795 n.10 (1999) (*Tacoma*) (irreparable harm is one factor that the Commission may consider in acting on a stay request, but not a necessary precondition). It cites also *Montana Power Co.*, 80 FERC ¶ 61,175, at 61,735 & n.7 (1997) (*Montana*) (in acting on stay requests, the Commission applies the Administrative Procedure Act’s standard “justice so requires,” and although pecuniary injury does not amount to irreparable harm, the Commission grants a stay not only on a showing of irreparable harm but “when justice so requires”).

In this regard, Midland notes that the Commission has not yet ruled on the revised refund report, which Consumers Energy filed in response to the Commission's directive in the GIA Rehearing Order, and on Midland's protest of this report.¹⁶ Further, continues Midland, the Commission recognized in the GIA Rehearing Order that the amounts claimed by Michigan Electric had not been itemized and may be contested, and further recognized that any disagreements over Michigan Electric's entitlement to the charges sought under the Facilities Agreement would be resolved under that agreement's dispute resolution provisions.¹⁷

11. On May 30, 2012, Michigan Electric filed a motion for leave to respond to Midland's Protest, and a response (Michigan Electric Response).

Discussion

A. Procedural Matters

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012) prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Michigan Electric's Response and will, therefore, reject it.

B. Stay Request

13. The Commission reviews requests for stay under the standard established by the Administrative Procedure Act and grants a stay when "justice so requires." In assessing a request for stay, the Commission considers several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable harm without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest. The Commission's general policy is to refrain from granting stays in order to assure definiteness and finality in proceedings. If the party requesting a stay is unable to demonstrate that it will suffer irreparable harm absent a stay, the

¹⁶ GIA Rehearing Order, 138 FERC ¶ 61,204 at P 32. Consumers Energy filed the ordered report on April 19, 2012, in Docket No. ER10-2156-002, and a correction on May 25, 2012. Michigan Electric filed comments on the April 19, 2012 report, and Midland filed a protest. Midland also filed comments on the May 25, 2012 correction.

¹⁷ Midland, May 15, 2012 Protest at 8-9 (citing GIA Rehearing Order, 138 FERC ¶ 61,204 at PP 31-32).

Commission need not examine the other factors.¹⁸ Further, as noted by Midland, the Commission has held that “economic loss alone does not constitute irreparable injury.”¹⁹

14. Michigan Electric has not shown that it will suffer irreparable injury if the requested stay is not granted. Rather, the financial harm that Michigan Electric alleges would appear to result solely from a delay in receiving payment for the operation and maintenance interconnection services that it provided to Midland as Consumers Energy’s agent, the exact amount of which, as we have noted, appears to be in dispute. We conclude, therefore, that the interests of justice do not require a stay of the Commission’s September 17 and April 6 Orders, and we will deny Michigan Electric’s request for stay.

The Commission orders:

Michigan Electric’s request for stay of the Commission’s orders of September 17, 2010, and April 6, 2012, in these proceedings, is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁸ *Nat’l Fuel Gas Supply Corp.*, 139 FERC ¶ 61,037, at PP 25-26 (2012).

¹⁹ *E.g.*, *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,003, at PP 29-30 (2012); *Grand Coulee Project Hydroelectric Auth.*, 136 FERC ¶ 61,178, at P 9 (2011). We note that the orders cited by Michigan Electric also concern hydroelectric projects. The statements there about irreparable harm, upon which Michigan Electric relies, pertain to payments that the licensee likely would not recover, which is not Michigan Electric’s situation. *See Tacoma*, 89 FERC ¶ 61, 273 at 61,795 (“the costs of implementing the minimum flow provisions pending judicial review are both substantial and unrecoverable”); *Montana*, 80 FERC ¶ 61,175 at 61,735 (mandatory conditions were stayed because implementation would cause negative net annual benefits and “monies paid . . . may not be recoverable, even should it later be determined that these monies need not have been paid”).