

148 FERC ¶ 63,012
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Consumers Energy Company

Docket No. No. ER10-2156-004

INITIAL DECISION

(Issued August 18, 2014)

APPEARANCES

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David H. Coffman, Presiding Administrative Law Judge

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I. STATEMENT OF THE CASE

1. By Order dated March 21, 2013, the Commission set the above-captioned proceeding for hearing and settlement judge procedures.¹ In that Order, the Commission asserted that this proceeding involves the time value refund reports filed by Consumers Energy Company (previously Consumers Power Company, hereinafter, “Consumers”) with respect to amounts billed and collected under an agreement (Facilities Agreement) between Consumers and Midland Cogeneration Venture Limited Partnership (Midland).

2. Specifically, the Commission set Consumers’ “May 25, 2012 refund report for hearing and settlement judge procedures to determine the time-value refunds that [Consumers] owes to Midland, and to address other matters related to these proceedings.”² Those “other matters” included: whether unpaid charges made by Michigan Electric to Midland, under the terms of the Facilities Agreement, and under authority of an agreement (Agency Agreement) making Michigan Electric Consumers’ agent under the Facilities Agreement, reflected costs that were properly incurred;³ and the date upon which a generator interconnection agreement (GIA) between Midcontinent Independent Transmission System Operator, Inc. (MISO),⁴ Michigan Electric and Midland, which terminated the Facilities and Agency Agreements, became effective.⁵

3. On November 12, 2013, the undersigned issued an Order Clarifying Issues Set for Hearing) (Order Clarifying Issues)⁶ in response to a motion by Michigan Electric Transmission Company, LLC (Michigan Electric) to clarify issues that the Commission had set for hearing. In that Order, the undersigned clarified that the Commission set three issues for hearing:

(1) On what date did the parties to the GIA satisfy the conditions the Commission made prerequisite to that agreement taking effect?

¹ *Consumers Energy Co.*, 142 FERC ¶ 61,193 (2013) (Hearing Order).

² *Id.* P 2.

³ *See id.* PP 32-37.

⁴ MISO was formerly called Midwest Independent Transmission System Operator, Inc.

⁵ Hearing Order, 142 FERC ¶ 61,193 at PP 44-50.

⁶ *Consumers Energy Co.*, Order Clarifying Issues Set for Hearing, Docket No. ER10-2156-004 (2013).

(2) What time-value refunds, if any, do Consumers and/or Michigan Electric owe to Midland for revenues collected, or to be collected, under the terms of the Facilities Agreement?

(3) What amounts listed in Consumers' May 25, 2012 refund report as billed to, but unpaid by, Midland reflect costs properly incurred under the Facilities Agreement?⁷

4. This initial decision determines as follows:

(1) The parties to the GIA satisfied the conditions the Commission made prerequisite to that agreement taking effect on September 27, 2012, and the agreement, therefore, became effective on that date, thereby terminating the Facilities and Agency Agreements.

(2) Consumers and Michigan Electric must each pay Midland the time value of the revenues each collected under the Facilities Agreement until October 5, 2010, the agreement's Commission-designated effective date, accrued through the date of payment and calculated in accordance with section 35.19a of the Commission's regulations.⁸

(3) The unpaid invoices from Michigan Electric to Midland that reflect costs properly incurred under the Facilities Agreement total \$2,021,085. Midland must pay Michigan Electric that amount, plus simple interest, accrued through the date of payment and otherwise calculated as set forth in this Initial Decision.

II. STATEMENT OF MATERIAL FACTS

5. The findings and rulings that constitute the material facts in this proceeding produce a tortuous narrative that encompasses four separate dockets. Because attempting to narrate these events chronologically is a recipe for confusion, the facts set out in sections B-D, *infra*, are grouped by the issue to which they relate.

A. Background: The Facilities and Agency Agreements

6. Consumers and Michigan Electric are "public utilities" within the meaning of section 201(e) of the Federal Power Act (FPA).⁹ Midland owns and operates an electrical

⁷ *Id.* P 2.

⁸ 18 C.F.R. § 35.19a (2014).

⁹ 16 U.S.C. § 824(e) (2012).

steam and cogeneration plant in Midland, Michigan (Midland Facility), and the Commission has certified it as a qualifying cogeneration facility under section 3(18)(B) of the FPA.¹⁰ A power purchase agreement between Consumers and Midland, dated July 17, 1986 and amended effective June 9, 2008 (collectively, “the Power Purchase Agreement”), entitled Consumers to call upon the bulk of the capacity and energy produced by the Midland Facility.¹¹

7. On July 8, 1988, Consumers and Midland entered into the Facilities Agreement, which governed the interconnection of the Midland Facility to Consumers’ transmission system.¹² The agreement detailed the duties of each party with respect to the construction, operation, and maintenance of the necessary transmission facilities and related equipment, and required Midland to convey ownership of certain facilities (Transferred Facilities) to Consumers. Section 3.1 required Consumers to operate and maintain the Transferred Facilities, and required Midland to reimburse Consumers for all direct and indirect costs and expenses, including property taxes, incurred by Consumers in owning and operating those facilities.¹³

8. In 2001, Consumers conveyed its transmission assets, including the Transferred Facilities, to Michigan Electric. Section 10 of the Facilities Agreement prohibited Consumers from assigning the agreement without Midland’s consent,¹⁴ and Midland would not consent to Consumers assigning the agreement to Michigan Electric.¹⁵ Accordingly, Consumers and Michigan Electric entered into the Agency Agreement, dated April 1, 2001, under which Consumers delegated to Michigan Electric, as its agent, responsibility for operating the Transferred Facilities.¹⁶

¹⁰ 16 U.S.C. § 796(18)(B) (2012); see *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,241 at P 3 & n.8 (2010) (Facilities Agreement Acceptance Order).

¹¹ See Facilities Agreement Acceptance Order, 132 FERC ¶ 61,241 at P 4 & n.9.

¹² Ex. C-2.

¹³ Ex. C-2 § 3.1.

¹⁴ Ex. C-2 § 10.

¹⁵ Facilities Agreement Acceptance Order, 132 FERC ¶ 61,241 at P 5.

¹⁶ Ex. C-4 at Art. II. At the time the transaction occurred, Michigan Electric was a wholly owned subsidiary of Consumers. During 2002, Consumers spun off Michigan Electric, which became a stand-alone transmission company. Hearing Order, 142 FERC ¶ 61,193 at P 4 n.5.

B. Effective Date of the GIA

9. On July 19, 2010, MISO filed with the Commission the partially executed GIA.¹⁷ The filing was assigned to Docket No. ER10-1814-000. On September 17, 2010, the Commission issued the Facilities Agreement Acceptance Order, which, for a number of reasons, conditioned acceptance of the GIA on the termination or amendment of the Facilities Agreement.¹⁸

10. The active participants¹⁹ (Participants) have stipulated that the six revenue meters installed by Midland in January 2012 became fully operational on September 27, 2012, the date they began providing MISO real-time data, and that the foregoing satisfied the Commission's remaining prerequisites to the GIA taking effect.²⁰

11. Accordingly, on that date, the GIA became effective. Because the Commission had conditioned acceptance of the GIA on the termination or amendment of the Facilities Agreement,²¹ the latter agreement terminated on that date. Because Article V of the Agency Agreement provided that the agreement would terminate upon termination of the Facilities Agreement,²² the Agency Agreement also terminated on that date.

C. Time-Value Refund Obligations of Consumers and Michigan Electric

12. From May 19, 1989 through June 20, 2010, Consumers collected revenues from Midland under the Facilities Agreement for costs incurred in owning and/or operating the Transferred Facilities Agreement.²³ From April 1, 2001 through February 27, 2014, Michigan Electric billed Midland under the terms prescribed in the Facilities Agreement,

¹⁷ MISO, Generator Interconnection Agreement, Docket No. ER10-1814-000 (filed July 19, 2010).

¹⁸ Facilities Agreement Acceptance Order, 132 FERC ¶ 61,241 at PP 33-35.

¹⁹ The active participants in this proceeding are Consumers, Michigan Electric, Midland and Commission Trial Staff (Staff).

²⁰ Ex. ALJ-4.

²¹ Facilities Agreement Acceptance Order, 132 FERC ¶ 61,241 at PP 33-35.

²² Ex. C-4 at Art. V; *see* Hearing Order, 142 FERC ¶ 61,193 at P 50.

²³ Ex. S-16.

and under authority delegated by the Agency Agreement, for costs incurred in acting as Consumers' agent.²⁴

13. On August 6, 2010, in apparent response to the filing of the GIA, Consumers filed the Facilities Agreement.²⁵ The filing was assigned to Docket No. ER10-2156-000. MISO, Midland, and Michigan Electric intervened.

14. The Facilities Agreement Acceptance Order, issued on September 17, 2010, made several rulings pertinent to the time-value refund obligations of Consumers and Michigan Electric. Specifically, that Order:

- a. Accepted the Facilities Agreement, effective October 5, 2010, and determined that the Facilities Agreement was subject to the Commission's jurisdiction from its inception;²⁶
- b. Determined that within sixty days of the Order's date, Consumers, or Michigan Electric as its agent, would have to refund the time value of all revenues collected under the terms of the Facilities Agreement prior to October 5, 2010, and directed Consumers to file a refund report 30 days after refunding the amount owed;²⁷ and
- c. Found Michigan Electric's services to Midland to be jurisdictional, and ordered Michigan Electric to file the Agency Agreement.²⁸

15. On October 18, 2010, Michigan Electric filed the Agency Agreement. By Order dated December 17, 2010, the Commission accepted the agreement, and deemed it effective as of that date.²⁹

²⁴ Exs. MET-4:1-2 and MET-12 at 5.

²⁵ Consumers Tariff Filing, Docket No. ER10-2156-000 (filed Aug. 6, 2010).

²⁶ Facilities Agreement Acceptance Order, 132 FERC ¶ 61,241 at P 26. The Commission grounded this determination on its finding that the Power Purchase Agreement at all times permitted Midland to sell its residual capacity and energy to parties other than Consumers. *Id.*

²⁷ *Id.*

²⁸ *Id.* P 27.

²⁹ *Michigan Elec. Transmission Co.*, 133 FERC ¶ 61,238, at P 8 (2010).

16. On December 16, 2010, Consumers, in purported compliance with the Facilities Agreement Acceptance Order, filed a refund report,³⁰ asserting that it owed Midland no refund. Midland initially protested the refund report, but later withdrew its protest. Consumers then filed a revised refund report on October 28, 2011,³¹ explaining that it had agreed to a “black box” settlement (Settlement Agreement) with Midland, which did not resolve any of the underlying issues, but required Consumers to pay Midland a sum of \$250,000.

17. By Order dated March 20, 2012, the Commission, as relevant here, denied Consumers’ request for rehearing of the Facilities Agreement Acceptance Order.³²

18. On January 8, 2014, the Commission issued an Order, which among other things, clarified that footnote 50 of the Facilities Agreement Clarification Order did not say that the Settlement Agreement resolved the issue of whether the property taxes levied on the Midland Interconnection Facilities are fixed or variable costs. Rather, this was an issue set for hearing.³³

19. At hearing, witness Veronica Vansco, sponsored by Staff, provided undisputed written testimony that prior to October 5, 2010, the Commission-designated effective date of the Facilities Agreement, Consumers collected revenues totaling \$5,130,978 from Midland for services rendered under that agreement.³⁴ The Participants have stipulated that Michigan Electric collected revenues totaling \$287,992 from Midland while acting as Consumers’ agent.³⁵

20. Ms. Vansco, an experienced energy and utilities analyst, also provided undisputed written testimony that all costs incurred by Consumers and Michigan Electric in

³⁰ Consumers Refund Report, Docket No. ER10-2156-000, at 5 (filed Dec. 16, 2010).

³¹ Consumers Revised Refund Report, Docket No. ER10-2156-002, at 1 (filed Oct. 28, 2011).

³² *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,204, at P 26 (2012) (Facilities Agreement Clarification Order).

³³ *Midwest Indep. Transmission Sys. Operator, Inc.*, 146 FERC ¶ 61,008, at P 31 (2014).

³⁴ Ex. S-1 at 21:17-19.

³⁵ Ex. ALJ-5, Ex. B.

providing service under the terms of the Facilities Agreement were fixed, rather than variable, in that they did not vary with the amount of service provided.³⁶

D. Failure of Midland to Reimburse Michigan Electric for Costs Properly Incurred in Providing Services under the Facilities and Agency Agreements

1. Invoices through 2012

21. After November 2004, Midland ceased to pay the amounts invoiced by Michigan Electric.³⁷

22. On October 18, 2010, Michigan Electric made two filings requesting similar relief. In Docket No. ER10-2156, Michigan Electric sought clarification, or in the alternative, rehearing, of the Facilities Agreement Acceptance Order. Michigan Electric asked the Commission to clarify that the Facilities and Agency Agreements were valid and enforceable prior to the date they were filed, and that the Facilities Agreement Acceptance Order did not determine otherwise.³⁸

23. In the second filing, Michigan Electric requested a declaratory order from the Commission, finding, among other things, (1) that Midland owed Michigan Electric \$1,703,886.78, plus interest, for costs that the latter incurred as a result of operating and maintaining the Transferred Facilities Agreement, and (2) that the delay in filing the Facilities and Agency Agreements did not render them null and void.³⁹ That pleading was assigned to Docket No. EL11-2-000. Midland filed a protest.

24. On March 20, 2012, the Commission issued three Orders, each of which related to Midland's obligation to pay for services it received under the terms of the Facilities Agreement. The Facilities Agreement Clarification Order, issued in Docket No. ER10-2156, clarified that the Commission's "acceptance of the late-filed Facilities Agreement ... and the late-filed Agency Agreement ... [did] not affect the validity and enforceability of those agreements during the period of non-filing, and [that]... nothing in the [Facilities Agreement Acceptance] Order was intended to modify the Commission's precedent

³⁶ Ex. S-1 at 19:8-9, 19:17-20:23.

³⁷ Hearing Order, 142 FERC ¶ 61,193 at P 5.

³⁸ Michigan Electric Request for Clarification or in the Alternative Rehearing, Docket No. ER10-2156-000, at 3-7, 9 (filed Oct. 18, 2010).

³⁹ Michigan Electric, Tariff Filing and Petition for Declaratory Order, Docket No. ER11-136-000, at 16 (filed Oct. 18, 2010).

regarding time-value refunds.”⁴⁰ The Commission ordered Midland “to pay the charges provided for in the Facilities Agreement, which ... the Facilities Agreement [Acceptance] Order ... already determined to be a just and reasonable rate.”⁴¹ Midland requested rehearing and clarification.

25. The second Order, issued in Docket No. EL11-2-000, responded to Michigan Electric’s petition for a declaratory order.⁴² The Commission echoed the conclusions it reached in the Facilities Agreement Clarification Order regarding the enforceability of the Facilities and Agency Agreements, and stated that those conclusions obviated the need to order Midland to make payment directly to Michigan Electric. Because no agreement existed to which Michigan Electric and Midland were both parties, the Commission found the contractual basis for such an order to be unclear.⁴³

26. The third Order, issued in Docket No. ER11-136-001, determined that Midland’s failure to seek rehearing of the Facilities Agreement Acceptance Order, or to otherwise contest the rates contained in the Facilities Agreement, precluded Midland from contesting the justness and reasonableness of those rates in subsequent proceedings.⁴⁴

27. The Facilities Agreement Clarification Order also directed Consumers to file a revised refund report itemizing “all amounts billed to Midland by Consumers ... (or by Michigan Electric as its agent) under the Facilities Agreement” and specifying which amounts had and had not been paid.⁴⁵ Accordingly, on April 19, 2012, Consumers filed a supplement to its prior refund reports, purporting to provide this information.⁴⁶ On May 25, 2012, in response to Midland’s protest, Consumers filed a corrected refund report.⁴⁷

⁴⁰ Facilities Agreement Clarification Order, 138 FERC ¶ 61,204 at P 26.

⁴¹ *Id.* P 30.

⁴² *Michigan Elec. Transmission Co., LLC*, 138 FERC ¶ 61,202 (2012) (Declaratory Petition Order).

⁴³ *Id.* P 20.

⁴⁴ *Michigan Elec. Transmission Co.*, 138 FERC ¶ 61,203, at P 14 (2012).

⁴⁵ Facilities Agreement Clarification Order, 138 FERC ¶ 61,204 at P 32.

⁴⁶ Consumers Supplement to Prior Refund Report Filings, Docket Nos. ER10-2156-001 and ER10-2156-002 (filed Apr. 19, 2012).

⁴⁷ Consumers Correction to April 19, 2012 Supplement to Prior Refund Report Filings, Docket Nos. ER10-2156-001 and ER10-2156-002 (filed May 25, 2012); *see* Ex. C-3.

On June 15, 2012, Midland filed comments on the May 25, 2012 Refund Report, continuing to challenge, among other things, the report's accuracy.⁴⁸

28. By Order dated January 8, 2014, the Commission denied Midland's request for rehearing of the Facilities Agreement Clarification Order and the Declaratory Petition Order.⁴⁹

2. Invoices after 2012

29. On November 15, 2011, Consumers filed a notice of cancellation of the Facilities Agreement, which it supplemented on February 8, 2012. These filings were assigned to Docket No. ER12-420-000. By Order dated April 6, 2012, the Commission accepted the cancellation of the Facilities Agreement, effective January 15, 2012.⁵⁰ Michigan Electric sought rehearing of this Order.

30. On March 21, 2013, the Hearing Order granted Michigan Electric's rehearing request. The Commission agreed with Michigan Electric that the cancellation date of the Facilities Agreement should be the date that all prerequisites to the GIA becoming effective had been met, and set for hearing the question of when that event occurred.⁵¹

31. On February 27, 2014, after the active participants stipulated September 27, 2012 as the effective date of the GIA,⁵² and the consequent termination date of the Facilities and Agency Agreements,⁵³ Michigan Electric sent Midland an invoice for services performed and taxes paid under the Facilities and Agency Agreements after January 2012. These invoices sought reimbursement for "property taxes of \$157,915.77 on the interconnection facilities for the period January 1, 2012 through September 27, 2012, and telemetry charges of \$2,206.96 for the months of February through September 2012."⁵⁴

⁴⁸ Hearing Order, 142 FERC ¶ 61,193 at P 36.

⁴⁹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 146 FERC ¶ 61,008 at ordering para. (A).

⁵⁰ *Consumers Energy Co.*, 139 FERC ¶ 61,014, at P 1 (2012) (Cancellation Order).

⁵¹ Hearing Order, 142 FERC ¶ 61,193 at P 45.

⁵² See Ex. ALJ-4.

⁵³ See P 11, *supra*.

⁵⁴ Ex. MET-12 at 5.

3. Total Unpaid Principal

32. The Participants have stipulated that Michigan Electric's unpaid invoices to Midland for \$1,891,631 in unreimbursed property taxes, and \$129,454 in unreimbursed O&M expenses, and the \$287,992 Michigan Electric collected from Midland were for costs properly incurred.⁵⁵

III. STATEMENT OF THE HEARING PROCEEDINGS

33. On September 25, 2013, after a series of settlement negotiations, the Chief Administrative Law Judge issued an Order Designating Presiding Administrative Law Judge, Establishing Track II Procedural Time Standards, and Continuing Settlement Procedures, designating the undersigned as the Presiding Judge.⁵⁶ On October 3, 2013, the parties convened for a prehearing conference.

34. On September 27, 2013, Michigan Electric filed a motion to clarify the issues set for hearing. Midland and Consumers responded on October 15, 2013. Oral argument on the merits was held on October 25, 2013. On November 12, 2013, the undersigned issued the Order Clarifying Issues.

35. On December 6, 2013, Midland, Consumers, and Michigan Electric each filed direct testimony. On February 4, 2014, Consumers and Midland each filed answering testimony, and Staff filed direct and answering testimony. On March 21, 2014, Consumers submitted rebuttal and cross-answering testimony, and Michigan Electric submitted answering and rebuttal testimony.

36. On January 24, 2014, the Participants submitted a Joint Motion to Approve Stipulation Regarding Operational Date of Meters, to which a Stipulation Regarding Operational Date of Meters⁵⁷ was attached. By Order dated January 28, 2014, the undersigned approved the stipulation.

37. On January 29, 2014, Midland moved to withdraw the testimony of Brian Vokal (Exhibit MCV-1) and supporting exhibits (Exhibits MCV-4 through MCV-7), which discussed the date upon which the meters installed by Midland became fully operational. The undersigned approved Midland's motion by Order dated January 31, 2014.

⁵⁵ Ex. ALJ-5.

⁵⁶ All pleadings and orders cited in this section were filed or issued in this docket. They are not footnoted. Some procedural developments that have no relevance to the outcome of this Initial Decision are omitted.

⁵⁷ See Ex. ALJ-4.

38. By Order dated March 24, 2014, the Chief Judge concluded that the parties in this proceeding reached an impasse in settlement discussions, and terminated the settlement proceeding.

39. On April 7, 2014, the Participants filed a Joint Motion to Approve Stipulation Regarding Principal Amounts Owed in which they sought approval of the Stipulation Regarding Principal Amounts Owed,⁵⁸ which was attached. By Order dated April 11, 2014, the undersigned approved the stipulation.

40. On April 9, 2014, the Participants submitted both a Joint Statement of Issues and a Joint Statement of Facts.⁵⁹ On April 16, 2014, they submitted the Joint Witness and Exhibit Lists.⁶⁰

41. On April 18, 2014, the Participants submitted a Joint Motion to Waive Cross-Examination and Hearing in this proceeding. In the motion, they requested that the undersigned remove the hearing and pre-trial brief dates, and instead hold a “paper hearing.” They jointly agreed to waive cross-examination of all witnesses and stipulate to the admission of all testimony, exhibits, and corrections to exhibits.

42. By Order dated April 22, 2014, the undersigned cancelled the hearing, stated that pre-trial briefs and transcript corrections were no longer necessary and directed the Participants to file, by May 7, 2014, as a part of the official record in this proceeding, two hard copies of: all exhibits and testimony identified in the Joint Exhibit and Joint Witness Lists; clean and redlined versions of all corrections to the testimony; and a stipulation to the admission of the foregoing documents.

43. On May 6, 2014, the Participants submitted the Stipulation Regarding Waiver of Cross Examination and Admission of Exhibits and Testimony. On May 7, 2014, they submitted the remaining documents required by the April 22, 2014 Order. Michigan Electric and Staff also submitted redlined versions of certain corrected or amended exhibits that they intend to use in this proceeding. By Order dated May 12, 2014, the undersigned approved the stipulation, and accepted the filed exhibits, both clean and redlined versions, into the record.

44. On June 11, 2014, Consumers, Midland, Michigan Electric, and Staff filed separate initial briefs. On July 2, 2014, these participants filed separate reply briefs. The undersigned conducted an oral argument on the merits on July 16, 2014.

⁵⁸ See Ex. ALJ-5.

⁵⁹ See Exs. ALJ-1 and ALJ-2.

⁶⁰ See Ex. ALJ-3.

45. On July 10, 2014, the undersigned issued an Order accepting the Joint Statement of Facts, the Joint Statement of Issues, and the Joint Witness and Exhibit Lists, and designating those three documents as Exhibits ALJ-1, ALJ-2, and ALJ-3, respectively.

46. By order dated July 24, 2014, the undersigned directed the active participants to submit supplemental briefs no later than July 31, 2014 addressing the Agency Agreement's relevance, if any, to Michigan Electric's obligation to make a time-value refund to Midland. On July 31, 2014, Consumers, Midland, Michigan Electric, and Staff filed separate supplemental briefs.

47. By Order dated August 15, 2014, the undersigned designated the Stipulation Regarding Operational Date of Meters, and the Stipulation Regarding Principal Amounts Owed as Exhibits ALJ-4 and ALJ-5, respectively.

IV. DECISION

A. On what date did the parties to the GIA satisfy the conditions the Commission made prerequisite to that agreement taking effect?

48. The active parties' stipulations (1) that the six revenue meters installed by Midland in January 2012 became fully operational on September 27, 2012, the date MISO began receiving real-time data from the meters, and (2) that these events satisfied the remaining conditions the Commission made prerequisite to the GIA taking effect,⁶¹ resolves this issue.

49. The GIA became effective on September 27, 2012, and because the GIA's effectiveness was conditioned on the termination or amendment of the Facilities Agreement,⁶² and the Agency Agreement contained a provision providing for its termination coincident with that of the Facilities Agreement,⁶³ the latter two agreements also terminated on that date.

B. What time-value refunds, if any, do Consumers and/or Michigan Electric owe to Midland for revenues collected, or to be collected, under the terms of the Facilities Agreement?

50. The time-value refund liability of Consumers and Michigan Electric turns on the following sub-issues: Are time-value refunds an appropriate means of remedying the

⁶¹ Ex. ALJ-4.

⁶² Facilities Agreement Acceptance Order, 132 FERC ¶ 61,241 at P 35.

⁶³ Ex. C-4 at Art. V; *see* Hearing Order, 142 FERC ¶ 61,193 at P 50.

unauthorized services provided under the terms of the Facilities Agreement? If so, what, if any, refunds are owed by Consumers and Michigan Electric?

1. Appropriateness of Time-Value Refunds as a Means of Remediating the Unauthorized Services Provided under the Terms of the Facilities Agreement

a. Positions of the Participants

51. The Participants agree that the Commission does not impose a time-value refund if such a refund would cause the public utility to sustain a loss from the unauthorized transactions.⁶⁴ At issue is what impact such a refund must have to cause what the Commission characterizes as a loss, and what the Commission has designated as the “refund floor” necessary to prevent the loss.

52. Staff and Midland argue that the Commission does not deem the public utility to have sustained a loss if the time-value refund permits the utility to retain revenues sufficient to cover the variable costs it incurred as a result of the unauthorized transaction.⁶⁵ Ms. Vansco testified that “[f]ixed costs are those that do not vary with the amount of service provided, while variable costs are those that do”, and that all costs incurred under the Facilities Agreement were fixed, not variable.⁶⁶

53. In contrast, Consumers and Michigan Electric contend that in the Commission’s view, a public utility that does not profit from the unauthorized transaction necessarily will sustain a loss if a time-value refund is imposed. For most types of agreements, they contend, the Commission limits time-value refunds to an amount that permits the public utility to retain all costs incurred as a result of the unauthorized activity. Thus, the refund cannot exceed the amount of the utility’s profit, and a utility need not make a refund if it did not profit from the unauthorized transaction. No Participant challenges the assertions of Consumers and Michigan Electric that the Facilities Agreement only permitted reimbursement of out-of-pocket costs, with no profit.⁶⁷

⁶⁴ See Consumers Initial Br. at 12; Michigan Electric Initial Br. at P 48; Staff Reply Br. at 10-17; Midland Reply Br. at 7-10.

⁶⁵ Staff Initial Br. at 20-21; Staff Reply Br. at 20-23; Midland Initial Br. at 11-13; Midland Reply Br. at 7-13.

⁶⁶ Ex. S-1 at 19:8-9, 19:17-20:23.

⁶⁷ See Consumers Initial Br. at 18-19; Michigan Electric Initial Br. at P 48.

54. In effect, Staff and Midland contend that the Commission has applied what could be called a “variable-costs floor” to prevent time-value refunds from causing public utilities to sustain losses. Consumers and Michigan Electric, on the other hand, assert that the Commission has applied what could be called an “all-costs floor” to achieve this end.

b. Legal Framework

55. Section 205(c) of the FPA requires each public utility to file with the Commission “schedules showing all rates and charges for any transmission ... subject to the jurisdiction of the Commission ... together with all contracts which in any manner affect or relate to such rates, charges ... and services”.⁶⁸ Section 35.2(b) of the Commission’s regulations⁶⁹ defines a “rate schedule” as, among other things, “a statement” that describes the service provided and sets out “the rates and charges for ... that service”.

56. Section 205(d) of the FPA prohibits a public utility from changing its “rates, charges ... or service” without providing sixty days’ notice to the Commission and the public by filing with the Commission “new schedules stating plainly the change or changes to be made”.⁷⁰ Section 35.3(a)(1) of the Commission’s regulations⁷¹ makes clear

⁶⁸ 16 U.S.C. § 824d(c) (2012). The provision states, in pertinent part:

[E]very public utility shall file with the Commission ... schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission ... together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services

⁶⁹ 18 C.F.R. § 35.2(b) (2014). The provision states, in pertinent part:

Rate schedule. The term *rate schedule* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing and may take the physical form of a contract, purchase or sale or other agreement, lease of facilities, or other writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof.

⁷⁰ 16 U.S.C. § 824d(d) (2012). The provision states, in pertinent part:

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges ... or service, or in any ... contract

that the Commission deems a public utility to have changed its overall scheme of services when it provides a new service at a new rate. The provision requires public utilities to file “[a]ll rate schedules ... not less than sixty days prior” to the commencement of service, including service “under an initial rate schedule”.

57. A public utility that provides jurisdictional services under an unfiled contract violates section 205(c) of the FPA by failing to file a contract that necessarily affects and relates to those services and the rates charged therefor, or even a “schedule” showing the “rates and charges” for the services provided. It violates section 205(d) of the FPA and section 35.3(a)(1) of the Commission’s regulations by charging new rates for a new service without filing the contract, or some other form of schedule, describing “the change or changes to be made” to the utility’s existing services and rates, with the Commission sixty days prior to the commencement of service.

58. Section 309 of the FPA, which authorizes the Commission “to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act”,⁷²

relating thereto, except after sixty days’ notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect.

⁷¹ 18 C.F.R. § 35.3(a)(1) (2014). The provision states, in pertinent part:

Rate schedules or tariffs. All rate schedules ... shall be tendered for filing with the Commission and posted not less than sixty days ... prior to the date on which the electric service is to commence and become effective under an initial rate schedule ... or the date on which the filing party proposes to make any change in electric service and/or rate, charge, ... or contract effective as a change in rate schedule....

⁷² 16 U.S.C. § 825h (2012). The provision states, in pertinent part:

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter....

empowers the Commission to remedy violations of the FPA and the Commission's rules and regulations thereunder by, among other things, ordering refunds.⁷³

c. Use of the Variable-Costs Floor in the Commission's Initial Enforcement of Federal Power Act Filing and Prior Notice Requirements

59. The Commission raised concerns about such violations as early as 1975.⁷⁴ These concerns increased in the early 1990s, as public utilities continued to commence jurisdictional services without first filing the authorizing agreements.⁷⁵

60. Accordingly, in *Central Maine Power Co.*,⁷⁶ the Commission announced, as relevant here, that any public utilities that continued to provide service under unfiled, jurisdictional contracts more than sixty days after the issuance of that decision would be required to file revised rates collecting no more than what was necessary to recover its variable operation and maintenance (O&M) costs, and would be required to refund the revenues it had collected in excess of those rates, with interest calculated under 18 C.F.R. § 35.19a.⁷⁷

61. Thus, from the beginning, the Commission utilized a version of the variable-costs floor to assure that remedies calculated to deter violations of FPA filing and prior notice requirements did not go too far. The Commission's application of the remedy over the

⁷³ See *Consolidated Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003) (Commission may remedy tariff violations by ordering refunds).

⁷⁴ See *New England Power Pool Agreement*, 54 F.P.C. 2994, 2994-95 (1975) (filing made over five months after service commenced).

⁷⁵ See *Nevada Power Co.*, 55 FERC ¶ 61,379, at 62,153 n.14 (1991) (“[W]e are concerned with Nevada Power's unexplained delay in filing the supplemental power agreements with this Commission. This is not a concern directed solely at Nevada Power. In recent months, we have witnessed an increasing number of rate filings made long after the parties have undertaken new obligations.”) (internal citation omitted); *Portland General Exchange, Inc.*, 51 FERC ¶ 61,108, at 61,246 n.67 (1990) (“We wish to emphasize that we do not look favorably upon utilities undertaking sales such as these in violation of the section 205 FPA requirement that a rate schedule be on file for any wholesale sale in interstate commerce.”).

⁷⁶ 56 FERC ¶ 61,200, *reh'g denied*, 57 FERC ¶ 61,083 (1991) (*Central Maine*).

⁷⁷ *Central Maine*, 56 FERC ¶ 61,200 at 61,818-19.

next two years varied, depending on the circumstances, but in appropriate circumstances, the Commission directed offending public utilities to refund all unauthorized revenues that they collected in excess of their variable O&M costs, plus interest on those revenues calculated under 18 C.F.R. § 35.19a.⁷⁸

d. Development of the Time-Value Refund as a Remedy for Filing and Prior Notice Violations

62. Subsequently, in *Prior Notice & Filing Requirements under Part II of the Federal Power Act*,⁷⁹ the Commission acknowledged that the *Central Maine* remedy could “have harsh effects, amounting in some cases to millions of dollars, as to rates to which customers have consented and which we may have found to be just and reasonable had they been filed timely.”⁸⁰ To mitigate this harshness, the Commission announced that a public utility that violated this filing requirement would have to refund only the time value of the unauthorized revenues that it collected.⁸¹ The Commission has since justified this remedy on the ground that it encourages respect for the Commission’s filing requirements without unduly burdening the utility, and redresses the injury to the Commission’s ability to carry out its statutory duties that violations of FPA filing and prior notice requirements inevitably cause.⁸²

63. The Time Value Order temporarily dispensed with the variable-costs floor. The Order did not limit the refund to the time value of revenues in excess of variable costs. Rather, the Commission replaced a remedy that required the utility to refund all revenues other than those necessary to recover its variable O&M costs, plus interest on those refunded revenues, with a remedy that required the utility to refund only interest, but interest on all revenues.

⁷⁸ See *Green Mountain Power Corp.*, 59 FERC ¶ 61,294, at 62,077, *reh’g denied*, 60 FERC ¶ 61,158, *order on compliance filing*, 61 FERC ¶ 61,203 (1992) (*Green Mountain*); *PacificCorp Elec. Operations*, 58 FERC ¶ 61,283, at ordering para. (D), *reh’g denied*, 60 FERC ¶ 61,292 (1992).

⁷⁹ 64 FERC ¶ 61,139 (1993) (Time Value Order).

⁸⁰ *Id.* at 61,979.

⁸¹ *Id.*

⁸² *El Paso Elec. Co.*, 105 FERC ¶ 61,131, at PP 19, 38 (2003) (*El Paso*).

e. Restoration of the Variable-Costs Floor

64. However, when applied to transactions in which the public utility incurred primarily variable costs, the remedy was to result in unintended consequences, and produce a harsher effect than the *Central Maine* remedy. This occurred in *Carolina Power & Light Co.*,⁸³ and the Commission responded by establishing a floor for time-value refunds that allowed public utilities to retain sufficient revenues to retain all variable costs incurred as a result of their unauthorized actions.

65. In *Carolina Power*, the Commission required a public utility that had provided service under three jurisdictional, unfiled agreements during 1995 and 1996 to refund the time value of revenues collected under each contract, from the commencement of service until sixty days after the filing date.⁸⁴ In its request for rehearing, the utility represented that the refund imposed would prevent it from recovering “the fuel and variable O&M costs” associated with one of the sales contracts.⁸⁵

66. The Commission granted rehearing in part, stating that it “would limit the application of the time value formula to an amount that permits the utility to recover its variable costs.”⁸⁶ The Commission explained that “[n]ormally these variable costs will include fuel costs and variable O&M expenses”, and directed the utility to submit cost data by way of a compliance filing to support its contentions.⁸⁷

67. In making this determination, the Commission reasoned that if the utility’s representations were true, “the time value formula in this instance” would be “more onerous than if we had applied our previous [*Central Maine*] remedy”.⁸⁸ In other words, in this instance, the time-value remedy would have put the utility in a worse position than if it had been required to refund all revenues in excess of its variable O&M costs, plus

⁸³ 84 FERC ¶ 61,103 (1998), *reh’g denied*, 87 FERC ¶ 61,083 (1999) (*Carolina Power*).

⁸⁴ *Carolina Power*, 84 FERC ¶ 61,103 at 61,522.

⁸⁵ *Carolina Power & Light Co.*, Request for Rehearing, Docket No. 98-3220-000 at 20 (filed Aug. 31, 1998).

⁸⁶ *Carolina Power*, 87 FERC ¶ 61,083 at 61,357.

⁸⁷ *Id.* at 61,355-57.

⁸⁸ *Id.* at 61,357.

interest.⁸⁹ In contrast, the variable-costs floor utilized by the Commission would assure that no public utility would “face the prospect of losing money on a sale under late-filed rates that otherwise are accepted for filing.”⁹⁰ Rather, the utility would be “returning to its customers only the interest on monies that it was never authorized to receive, with a floor to protect the company from operating at a loss.”⁹¹ Thus, the Commission explained that permitting an offending public utility to retain the variable costs incurred as a result of its unauthorized activity was the “floor” that would “protect the company from operating at a loss.”

68. In subsequent decisions, the Commission has reiterated this explanation,⁹² and has spelled out that its refund floor does not include fixed costs.⁹³ Other Commission decisions have applied and/or reiterated the variable-costs floor in a number of different contexts.⁹⁴ Of these, the Facilities Agreement Clarification Order and *ITC* deserve particular attention.

⁸⁹ See *Green Mountain*, 59 FERC ¶ 61,294 at 62,077; *PacificCorp Elec. Operations*, 58 FERC ¶ 61,283 at ordering para. (D).

⁹⁰ *Carolina Power*, 87 FERC ¶ 61,083 at 61,357.

⁹¹ *Id.*

⁹² *Braintree Elec. Light Dep’t*, 120 FERC ¶ 61,097, at P 14 (2007) (“As explained in *Carolina*, the awarding of variable costs provides a floor that ensures that the utility does not operate at a loss.”) (Citation omitted.)

⁹³ *Braintree Elec. Light Dep’t*, 116 FERC ¶ 61,121, at P 22 & n.12 (2006) (“To the extent that Braintree can show that the revenues it received through ISO-NE's markets did not meet its variable costs ... Braintree may seek additional compensation by submitting a compliance filing to the Commission. Braintree must provide enough data to demonstrate any revenue shortfall, *excluding fixed costs and opportunity costs.*”) (Internal citations omitted.) (Emphasis added.)

⁹⁴ *PacificCorp*, 141 FERC ¶ 61,150, at PP 19, 24 (2012) (electric “storage” agreement); *International Transmission Co.*, 140 FERC ¶ 61,151 (2012), *reh’g pending (ITC)* (transmission ownership and operating agreement); *OREG 1, Inc.*, 138 FERC ¶ 61,110, at P 19 (2012) (qualifying facility self-certifications); Facilities Agreement Clarification Order, 138 FERC ¶ 61,204 at 29; *Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,143, at P 18 (2008) (interconnection agreement); *Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,061, at P 19 (2008) (same); *El Paso*, 105 FERC ¶ 61,131 at P 22 (transmission agreements).

69. In clarifying that the Facilities Agreement was valid and enforceable prior to filing, the Facilities Agreement Clarification Order explained that it enforced its filing requirements not by retroactively invalidating jurisdictional agreements prior to their acceptance dates, but by requiring the public utility to refund the time value of revenues collected prior to that date.⁹⁵ That Order then explained that the Commission, “recognizing that refunds will result in a harsh result if payment of such refunds would result in a loss, has limited time value refunds to an amount that will permit a utility to recover its variable costs.”⁹⁶

70. That statement is significant for two reasons. First the Commission expressly endorsed the variable-costs floor in an Order addressing the Facilities Agreement. Second, the Commission identified the variable-costs floor to be the mechanism to prevent time-value refunds from causing public utilities to sustain losses from their unauthorized transactions. It logically follows that the Commission deems a time-value refund to have caused such a loss only when it prevents the public utility from retaining its variable costs.

71. *ITC* addressed the obligation of International Transmission Company (*ITC*), a public utility, to pay Michigan Public Power Agency (*MPPA*) the time value of revenues collected under an unfiled jurisdictional agreement involving the ownership and operation of certain high-voltage transmission lines.⁹⁷ The contract, which *ITC* acquired in 2000, provided that the two parties would share ownership of those lines, and that *ITC* would charge *MPPA*, in proportion to the latter’s partnership interest, for the costs *ITC* incurred in operating, maintaining and making capital improvements to the lines.⁹⁸ *ITC* advised the Commission that the agreement permitted it to recover only its “out-of-pocket costs”, with no profit.⁹⁹

72. *ITC* began implementing the agreement in 2001, but did not file it until June 29, 2012. In its filing, *ITC* represented that the time value of revenues collected from *MPPA* during the period *ITC* deemed relevant was almost \$2.9 million.¹⁰⁰

⁹⁵ Facilities Agreement Clarification Order, 138 FERC ¶ 61,204 at PP 27-28.

⁹⁶ *Id.* P 29.

⁹⁷ *ITC*, 140 FERC ¶ 61,151 at PP 3, 4.

⁹⁸ *Id.* P 5.

⁹⁹ *Id.* P 26.

¹⁰⁰ *Id.* P 7.

73. The pleadings in the proceeding are important because they raised issues virtually identical to those in the instant case. ITC sought to be excused from paying the refund, asserting that it had charged MPPA only for “capital improvements, O&M, ownership-related taxes, and insurance” and that “implementation of the time-value policy” would require it to “operate at a loss”.¹⁰¹ In response, MPPA cited *Carolina Power* and *El Paso*, for the proposition that the Commission has determined that time-value refunds will not cause utilities to operate at a loss if the refund permits the utility to retain recovery of its variable costs,¹⁰² and contended that ITC had failed to provide “documentation distinguishing between its fixed and variable costs.”¹⁰³

74. In response, ITC argued that whereas the *Carolina Power* and *El Paso* agreements authorized the utilities to charge rates based on their “fixed costs, plus variable costs associated with a specific customer and service provided, plus a return”, the ITC agreement with MPPA permitted ITC to charge only for costs that were “directly assignable to the customer, without any return or profit”.¹⁰⁴ When such agreements are involved, ITC contended, the Commission has permitted utilities to include not only their variable costs, but also all other costs recovered from the customer, in “determining whether time value refunds will result in a loss”.¹⁰⁵

75. The Commission agreed with MPPA that ITC had not established that it would operate at a loss. The Commission stated:

ITC states that the O&M expenses only reflect MPPA’s allocated share of out-of-pocket expenses incurred by ITC to operate and maintain the Designated Transmission Lines. However, we find that ITC has not demonstrated that it will operate at a loss under the ... Agreement. Therefore, ITC should provide a revised refund report detailing its actual variable out-of-pocket costs (*e.g.*, variable O&M expenses and incremental

¹⁰¹ *Id.*

¹⁰² Michigan Public Power Agency, Motion to Intervene and Protest, Docket No. ER12-2170-000, at 9 (filed Aug. 6 2012) (citing *El Paso*, 105 FERC ¶ 61,131 at P 22; *Carolina Power*, 87 FERC ¶ 61,083 at 61,357).

¹⁰³ *ITC*, 140 FERC ¶ 61,151 at P 13.

¹⁰⁴ International Transmission Co. d/b/a ITC Transmission, Motion for Leave to Answer and Answer, Docket No. ER12-2170-000, at 12 (filed Aug. 6 2012) (ITC Answer).

¹⁰⁵ ITC Answer at 15; *see ITC*, 140 FERC ¶ 61,151 at P 14.

construction costs) incurred to provide service under the ... Agreement from 2001 and demonstrating that it would be operating at a loss to as a result of providing time-value refunds.^[106]

76. The arguments made in *ITC* mirrored those in this proceeding. MPPA made the same argument that Staff and Midland are making: That the Commission has determined that time-value refunds will not cause a public utility to operate at a loss if the refund permits the utility to retain recovery of its variable costs. ITC essentially made Consumers' and Michigan Electric's argument: That it should retain sufficient revenues to cover all costs incurred in providing the service, and if permitted to do that, it would owe no refund, because its revenues covered only its costs. Thus, in effect, ITC argued that, under its particular kind of agreement,¹⁰⁷ only its profit should be subject to a time-value refund.

77. Accordingly, in *ITC*, the Commission plainly endorsed the variable-costs floor advocated by Staff and Midland over the all-costs floor standard advocated by Consumers and Michigan Electric. The Commission's determination that ITC would have to detail its variable out-of-pocket costs as a prerequisite to demonstrating that imposition of a time-value refund would result in its sustaining a loss demonstrates that the Commission would deem the refund to cause such a loss only if it prevented ITC from recovering those costs. Stated differently, the Commission reiterated that when a utility recovers the variable costs it incurred providing the unauthorized service, the utility does not incur a loss, regardless of whether it recovers its fixed costs.

f. Contentions of Consumers and Michigan Electric

78. Consumers and Michigan Electric assert that in cases involving jurisdictional agreements other than the power-sales agreements at issue in *Carolina Power*, the Commission has limited time-value refunds to an amount no larger than the utility's

¹⁰⁶ *ITC*, 140 FERC ¶ 61,151 at P 26.

¹⁰⁷ ITC appeared to assume the fixed costs allegedly recovered under the *Carolina Power* and *El Paso* agreements were rolled into the utilities' rates and recovered from all the utilities' ratepayers, whereas those utilities' variable costs were recovered only from the other parties to the agreements. In this way, ITC appears to have reasoned, the variable costs that constituted the refund floor in those cases were akin to the directly assigned costs that it charged MPPA. The Facilities Agreement, like ITC's agreement with MPPA, permits recovery of only directly assigned costs, but neither Consumers nor Michigan Electric has sought to distinguish *Carolina Power* and its progeny on this ground. Rather, they have argued that the Facilities Agreement is not heavily weighted with variable costs, whereas the *Carolina Power* agreements were.

profit, *i.e.*, has used an all-costs refund floor. However, the cases they cite do not support their assertions.

79. Consumers and Michigan Electric principally rely on two cases involving Florida Power and Light Company (FP&L)¹⁰⁸ in support of their position.¹⁰⁹ These cases suspended or eliminated FP&L's time-value refund obligation after FP&L represented, among other things, that it had made no profit from the unauthorized transactions.

80. *FP&L I* involved FP&L's filing of a proposed interconnection agreement with DeSoto County Generating Company, LLC (DeSoto). In its protest, DeSoto claimed that it was entitled to a refund of the time value of funds it had paid FP&L for construction of the interconnection facilities, because the agreements under which FP&L performed this service were jurisdictional, but unfiled.¹¹⁰ In its answer, FP&L contended that because it had performed all the work at cost, without profit, payment of time-value refunds would cause it to sustain a loss from the construction.¹¹¹

81. The Commission found that FP&L should have filed the construction agreements, but, in light of FP&L's representation that it did not profit from the transaction, deferred imposing a time-value refund until it could better evaluate whether such a refund would cause FP&L to have constructed the facility at a loss. The Commission explained:

In light of FP&L's claim that the monies it has or will receive ... for construction of the interconnection facilities did not include any profit, consistent with *Carolina Power*, we will limit time value refunds to ensure that FP&L will be returning ... only the interest on monies that it was never authorized to receive, with a floor to protect it from constructing the facilities at a loss. Accordingly, we will direct FP&L to make a compliance filing addressing whether time value refunds would result in FP&L constructing the interconnection at a loss. Once that compliance filing is accepted, we will direct time value refunds to the extent appropriate.^[112]

¹⁰⁸ *Florida Power & Light Co.*, 98 FERC ¶ 61,276, *reh'g denied*, 99 FERC ¶ 61,320 (2002) (*FP&L I*); *Florida Power & Light Co.*, 133 FERC ¶ 61,120 (2010) (*FP&L II*).

¹⁰⁹ Consumers Initial Br. at 13-16, 19-21; Michigan Electric Initial Br. at PP 48-49; Michigan Electric Reply Br. at 7-9.

¹¹⁰ *FP&L I*, 98 FERC ¶ 61,276 at 62,150.

¹¹¹ *Id.*

¹¹² *Id.* at 62,150-51.

82. In *FP&L II*, the Commission, on rehearing, excused FP&L from refunding the time value of revenues it collected while providing service under an unfiled, jurisdictional interconnection agreement, citing FP&L's representation in its refund report that it did not profit from the service. The Commission reasoned as follows:

[T]he Commission's policy is to require time-value refunds unless the monies received did not include any profit and time value refunds would result in a loss. [Citing *FP&L I*, 98 FERC ¶ 61,276 at 62,150-51]. We see from the filed refund reports that [FP&L] collected ... only the costs for actual operation and maintenance of the interconnection facilities and no profit. To require time-value refunds in these instances would result in [FP&L's] performing its obligations under the interconnection agreements at a loss.¹¹³

83. The Commission did not disavow the variable-costs floor in *FP&L I* or *FP&L II*, much less adopt the all-costs floor advocated by Consumers and Michigan Electric. In *FP&L I*, the Commission did not direct FP&L simply to substantiate its claim that it did not profit from the transaction, but to address whether imposition of a time-value refund would cause it to have constructed the facility at a loss.¹¹⁴ Thus, the Commission determined that FP&L had to show more than that it did not make a profit to substantiate its claim that it operated at a loss. Similarly, the Commission's statement in *FP&L II* that it did not impose time-value refunds if the utility did not make "any profit *and* time value refunds would result in a loss" made clear that to show that a time value refund would result in a loss, the utility would have to demonstrate more than that it did not make a profit from the transaction.¹¹⁵

84. In addition, as discussed *infra*, the text of *FP&L I* and *FP&L II*, the refund report to which *FP&L II* responded, and subsequent Commission orders indicate that the Commission considered the costs incurred in both cases to have been variable costs. Thus, finding that FP&L made no "profit" in those cases was equivalent to finding that FP&L's revenues did not exceed its variable costs.

85. In *FP&L I*, the Commission explicitly stated that *Carolina Power* applied, and did not in any way modify that decision's determination that in imposing time-value refunds, the Commission protected public utilities from sustaining a loss by permitting them to keep revenues sufficient to cover the variable costs incurred as a result of the

¹¹⁴ *FP&L I*, 98 FERC ¶ 61,276 at 62,150.

¹¹⁵ *FP&L II*, 133 FERC ¶ 61,120 at P 5 (emphasis added).

unauthorized activity.¹¹⁶ The Commission's unqualified application of *Carolina Power* to the facts presented in *FP&L I* indicates that the Commission considered the construction costs at issue, which necessarily varied with the amount of service provided, as variable costs. The Commission certainly did not decide, as argued by Consumers and Michigan Electric, to apply a standard different from the one articulated in *Carolina Power*. Had that been the case, the Commission would have distinguished, rather than applied, the earlier case.

86. *ITC* reinforces this conclusion. There the Commission noted MPPA's contention that in *FP&L I* "the public utility would not have constructed the underlying facilities but for the customer's request,"¹¹⁷ and appears to have agreed, because it included "incremental construction costs" among the "variable out-of-pocket costs" that it directed *ITC* to detail.

87. Michigan Electric argues that *ITC* actually supports its position, quoting the Commission's statement that its "time-value refund policy for late-filed agreements does not require the utility to operate at a loss; therefore, if the utility is only recovering its out-of-pocket costs incurred to provide the service, there is no requirement to make time-value refunds."¹¹⁸ However, Commission did not end the matter there. Rather, the

¹¹⁶ See *FP&L I*, 98 FERC ¶ 61,276 at 62,150-51 & nn.31 & 32. *FP&L I* was preceded by *American Elec. Power Service Corp.*, 95 FERC ¶ 61,012 (2001) (*AEP*), in which the Commission declined to apply the variable-costs floor articulated in *Carolina Power* to another time-value refund of revenues the public utility received for its unauthorized construction of a facility, on the ground that "[n]o variable costs" were "involved." *Id.* at 61,019. In *FP&L I*, which explicitly applied *Carolina Power* to time-value refunds of revenues collected from unauthorized construction costs, the Commission noted its departure from *AEP* in a footnote:

To the extent that in [*AEP*], we indicated that our *Carolina Power* did not apply to construction-related agreements ... we reverse that determination. We find that *Carolina Power* should apply to interconnection and transmission facility construction-related agreements (including [contribution-in-aid-of-construction] agreements), as public utilities should not be put in the position of having to construct interconnection and transmission facilities at a loss.

FP&L I, 98 FERC ¶ 61,276 at 62,151 n.32.

¹¹⁷ *ITC*, 140 FERC ¶ 61,151 at P 18.

¹¹⁸ Michigan Electric Reply Br. at 8 (quoting *ITC*, 140 FERC ¶ 61,151 at P 26).

Commission stated, just two sentences later, that ITC, having failed to demonstrate that providing time value refunds would have caused it to operate at a loss, should

provide a revised refund report detailing its actual *variable* out-of-pocket costs (*e.g.*, *variable* O&M expenses and incremental construction costs) incurred to provide service under the ... Agreement from 2001 and demonstrating that it would be operating at a loss as a result of providing time-value refunds.^[119]

Thus, the Commission made clear that the only out-of-pocket expenses that comprise a public utility's refund floor are variable out-of-pocket expenses.

88. Similarly, the Commission appears to have considered the costs FP&L incurred in providing the unauthorized service in *FP&L II* as variable. The Commission made a point of noting that FP&L had collected only the costs for actual operation and maintenance of the interconnection facilities".¹²⁰ Such costs can be fixed or variable,¹²¹ but the refund report on which the Commission relied indicated that these costs fell into the latter category, describing them as varying based on a number of factors, all of which were necessary to continue the facility's operations:

The costs have *varied* based on the work that was required, the personnel involved, and time needed for transmission work crews to perform both routine maintenance and repairs *as needed to allow the* [interconnection customer] *to continue delivering power to the grid.*^[122]

89. The Facilities Agreement Clarification Order reinforces the conclusion that the costs incurred by FP&L in *FP&L I* and *FP&L II* were variable. In that Order, the Commission cited both cases for the proposition that in the past, it had "limited time value refunds to an amount that will permit a utility to recover variable costs."¹²³

¹¹⁹ *ITC*, 140 FERC ¶ 61,151 at P 26 (emphasis added).

¹²⁰ *FP&L I*, 133 FERC ¶ 61,120 at P 5.

¹²¹ *Compare* Ex. S-1 at 19:17-20:23 (classifying O&M costs incurred under the Facilities Agreement as fixed) *with, e.g., Central Maine*, 56 FERC ¶ 61,200 at 61,818 (referring to "variable" O&M costs).

¹²² Docket No. ER10-251-000, Compliance Filing on Refunds at 2 (filed Feb. 12, 2010) (emphasis added).

¹²³ 138 FERC ¶ 61,204 at P 29 & n.46 (citing *FP&L I*, 98 FERC ¶ 61,276 at 62,150-51; *FP&L II*, 133 FERC ¶ 61,120 at P 5) (other citations omitted).

90. Consumers also cites *Granite State Elec. Co.*¹²⁴ as an example of the Commission excusing public utilities from a time-value refund where they did not profit from the unauthorized service.¹²⁵ In that case, the Commission excused two utilities that had made unauthorized sales of energy and capacity from refunding the time value of the sales revenues based, on the utilities' showing that their costs of purchasing the energy and capacity exceeded their sales revenues.

91. However, the energy and capacity costs that caused the loss were variable in that they necessarily varied with the amount of energy and capacity purchased. Therefore, the utilities' variable costs alone caused the utilities to sustain a loss from the sales, and the variable-cost cap eliminated any time-value refund obligation they might have had.

92. Even if *FP&L I*, *FP&L II*, and *Granite State* could not be reconciled with the Commission cases applying the variable-costs floor, those three decisions would not warrant using the all-costs refund floor advocated by Consumers and Michigan Electric. As discussed on the preceding pages, the Commission has applied, referred to and, to some extent discussed, the variable-costs floor in a number of cases. The three cases upon which Consumers and Michigan Electric principally rely do not discuss why the Commission would want to utilize an all-costs floor to assure that imposition of time-value refunds do not result in a loss. It is unlikely that the Commission would have departed from the variable-costs floor without explaining why.

93. The other cases relied upon by Consumers and Michigan Electric can quickly be dismissed. Consumers cites delegated Letter Orders, including those issued in *FP&L I* and *FP&L II*, in which Commission Staff, acting under delegated authority, excused refunds in response to pleadings that represented that the utility made no profit, and which enumerated costs, which Consumers and Michigan Electric argue, were fixed.¹²⁶ However, it is well established that delegated Letter Orders do not constitute binding precedent.¹²⁷

¹²⁴ 113 FERC ¶ 61,289 at P 16 (2005) (*Granite State*).

¹²⁵ Consumers Initial Br. at 17.

¹²⁶ Consumers Initial Br. at 15-17; Michigan Electric Initial Br. at 25.

¹²⁷ See *Millennium Pipeline Co.*, 145 FERC ¶ 61,088, at P 10 n.13 (2013); *Westar Energy, Inc.*, 122 FERC ¶ 61,057, at P 26 (2008) (an unpublished letter order "does not constitute legal precedent binding on the Commission"); *Norwalk Power, LLC*, 122 FERC ¶ 61,273, at P 25 (2008) (Norwalk erred in relying on "action taken by Commission staff in a letter order that explicitly disclaims any Commission approval of

94. Consumers and Michigan Electric cite other cases in which the Commission offered public utilities an opportunity to make a compliance filing to show why they shouldn't have to make a time-value refund.¹²⁸ However, the allegations described in the Commission decisions were only that making the refund would cause the utilities to lose money from the unauthorized transactions.¹²⁹ The Commission did not address whether the utilities' revenues included profits. Moreover, contrary to the claims of Consumers and Michigan Electric, the Commission has explicitly endorsed the variable-costs floor while requiring public utilities to refund the time of unauthorized services under agreements other than power sales agreements. These have included interconnection agreements,¹³⁰ and other cases where the variable-costs component of the service was substantially lower than in power sales agreements.¹³¹

g. Conclusion

95. Though its discussions of the matter have been somewhat terse, the Commission has limited time-value refunds only to the extent necessary to allow the utility to retain its variable costs. Put another way, it has applied a variable-costs floor to all such refunds, but has not otherwise limited their size. Because all costs incurred under the Facilities Agreement were fixed rather than variable,¹³² a refund of the time value of all unauthorized collections under that agreement is warranted.

96. As discussed, fixed costs are costs that a public utility would have incurred regardless of whether it had provided the unauthorized service, whereas variable costs are

any service, rate, charge, classification or any rule, regulation, or practice affecting such rate or service provided for in the filed documents.”).

¹²⁸ Consumers Initial Br. at 15, 18; Michigan Electric Initial Br. at P 49.

¹²⁹ See *ITC Midwest LLC*, 138 FERC ¶ 61,105, at P 17 (2012); *International Transmission Co.*, 139 FERC ¶ 61,022, at P 5 (2012); *Pacific Gas & Elec. Co.*, 117 FERC ¶ 61,336, at P 15 (2006); *Pacific Gas & Elec. Co.*, 115 FERC ¶ 61,373, at P 17 (2006); *Pacific Gas & Elec. Co.*, 102 FERC ¶ 61,232, at P 28 (2003); *Southern Calif. Edison Co.*, 98 FERC ¶ 61,304 (2002).

¹³⁰ *Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,141 at P 18; *Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,061 at P 19.

¹³¹ *ITC*, 140 FERC ¶ 61,151 (transmission ownership and operating agreement); *El Paso*, 105 FERC ¶ 61,131 at P 22 (transmission agreements).

¹³² Ex. S-1 at 19:17-20:23.

costs that the utility would not have incurred but-for its having provided the service. By assuring that the utility retains revenues sufficient to cover its variable costs, the Commission ensures that its remedy puts the utility in no worse a position that it would have been in had it not provided the unauthorized service: In that case, the utility would have neither collected the revenues nor incurred the variable costs, but would have incurred the fixed costs.

2. Consumers' Refund Obligation

a. Revenues Collected by Consumers

97. By commencing service and charging rates under the unfiled Facilities Agreement, Consumers violated section 205(c) of the FPA in that it failed to file a contract that related to its "rates, charges ... and services", or even a schedule disclosing the rates charged for the service.¹³³ Consumers violated section 205(d) of the FPA and section 35.3(a)(1) of the Commission's regulations by providing a new service at new rates without filing a "schedule" describing this change in its rates and services, with the Commission sixty days prior to commencement of service.¹³⁴ Accordingly, the Commission stated that Consumers, or Michigan Electric as its agent, would have to "refund the time value of revenues collected under the Facilities Agreement for the entire period during which Consumers Energy collected revenues without Commission approval."¹³⁵ Consumers' violations of the foregoing provisions persisted until October 5, 2010, the Facilities Agreement's Commission-designated effective date. Prior to that date, all of Consumers' collections under the Facilities Agreement were unauthorized.

98. During that period, Consumers collected revenues totaling \$5,130,978 from Midland.¹³⁶ Therefore, Consumers must refund the time value of that amount, calculated through the date of the refund.

99. While acknowledging that the Settlement Agreement, which it reached with Midland in 2011,¹³⁷ does not shield it from liability, Consumers argues that the fact that Midland is not asking for further compensation demonstrates that the \$250,000 it received from Consumers under the settlement adequately compensates it from any harm

¹³³ 16 U.S.C. § 824d(c).

¹³⁴ 16 U.S.C. § 824d(d).

¹³⁵ Facilities Agreement Acceptance Order, 132 FERC ¶ 61,241 at P 26.

¹³⁶ Ex. S-1 at 21:17-19.

¹³⁷ See Ex. C-6.

resulting from Consumers' unauthorized services, and obviates the need to impose an additional refund.¹³⁸

100. However, Midland's preferences are not dispositive. As the Commission stated, "The injury being remedied by refunds for late filing is not redress for that customer, but particularly 'the Commission's ability to enforce FPA section 205's requirement that there be prior notice'"¹³⁹ and "that the rates charged be just and reasonable at the time they are being charged."¹⁴⁰ The Commission's filing and notice requirement is "not to be taken lightly as a mere procedural requirement"¹⁴¹ and violations of that requirement are not to be considered "*de minimus*."¹⁴²

101. Finally, Consumers argues, "Costs under the Facilities Agreement are akin to traditional variable costs (*e.g.*, fuel supply) because they would not have been incurred but for the operation of [Midland's] interconnection facilities."¹⁴³ This argument does not warrant consideration for two reasons.

102. First, it is inconsistent with the evidentiary record. Ms. Vansco's distinction between fixed and variable costs—"[f]ixed costs are those that do not vary with the amount of service provided, while variable costs are those that do"¹⁴⁴—stands undisputed. Given this distinction, identifying which costs are fixed and which costs are variable will require expert testimony on some occasions, but not on others.

¹³⁸ Consumers Reply Br. at 4. Midland seeks a definitive ruling as to whether the Settlement Agreement shields Consumers from liability. Midland Initial Br. at 10. The absence of any participant claiming that it does obviates the need for such a ruling.

¹³⁹ *OREG-1, Inc.*, 138 FERC ¶ 61,110 at P 17 (quoting *El Paso*, 105 FERC ¶ 61,131 at P 21); *see also Entergy Servs., Inc.*, 121 FERC ¶ 61,040, at P 8 (2007) ("Entergy's argument that time value of revenues refunds are not appropriate because NRG did not protest the filing or affirmatively request refunds lacks merit.... Whether or not a party protested the filing or actually suffered any harm is irrelevant to our inquiry here.").

¹⁴⁰ *El Paso*, 105 FERC ¶ 61,131 at P 21 (internal citation omitted).

¹⁴¹ *El Paso Elec. Co.*, 60 FERC ¶ 61,292, at 62,036 (1992) (citing *Florida Power Corp.*, 60 FERC ¶ 61,003, at 61,023 (1992)).

¹⁴² *El Paso*, 105 FERC ¶ 61,131 at P 36.

¹⁴³ Consumers Reply Br. at 3.

¹⁴⁴ Ex. S-1 at 19:8-9.

103. Consumers' property tax expenses clearly fall into the latter category. The taxes Consumers' paid were attributable to its ownership of the Transferred Facilities and would have been the same regardless of whether Consumers had provided service on those facilities.

104. Consumers' O&M expenses fall into the former category. The Commission's use of the phrase "variable O&M expenses" in its discussions of refund floors¹⁴⁵ displays the Commission's recognition that O&M costs can be fixed as well as variable. Distinguishing between fixed and variable O&M costs requires a knowledge of utility operations that only an expert in the field can provide. In sworn testimony, Ms. Vansco established her competence to testify regarding that subject,¹⁴⁶ and then clearly explained why she believed all costs incurred under the Facilities Agreement were fixed, rather than variable.¹⁴⁷ No party disputed Ms. Vansco's competence to testify in this area or the validity of her testimony. Rather, each party, including Consumers, waived its right to cross-examine Ms. Vansco (and the other witnesses), and no party sponsored any expert testimony disputing Ms. Vansco's opinions in this regard. Counsel for Consumers may not now come forward and attempt to rebut her testimony in an unsworn statement addressing an area outside his expertise.

105. Second, as noted, Consumers did not raise this argument until it filed its reply brief. Thus, consideration of the argument is unfair to the Participants in that they have had no opportunity to respond.¹⁴⁸

106. Though the refund imposed on Consumers exceeds the amount of the revenues Consumers collected for its unauthorized service, and the size of the refund sought by Staff, it is not excessive. The Commission has stated that Consumers or Michigan

¹⁴⁵ See *Carolina Power*, 87 FERC ¶ 61,083 at 61,357; *Green Mountain*, 59 FERC ¶ 61,294 at 62,077; *PacificCorp Elec. Operations*, 58 FERC ¶ 61,283 at 61,983.

¹⁴⁶ Ex. S-1 at 1:8-3:4.

¹⁴⁷ *Id.* at 19:17-20:23.

¹⁴⁸ To be sure, the undersigned has considered Midland's assertion that Michigan Electric's failure to file the Agency Agreement provided a basis for ordering the public utility to refund the time value of revenues collected thereunder, which Midland raised for the first time in its reply brief. See Midland Reply Br. at 15. There, because of the potential significance of that issue, the undersigned addressed the participants' inability to respond by directing them to file supplemental briefs on the issue. Consumers' belated assertions regarding the nature of the costs incurred under the Facilities Agreement lack the weight that would justify similar treatment.

Electric must pay the time value of all unauthorized revenues collected,¹⁴⁹ and the Commission's variable-costs floor, which ensures that such refunds are not excessive, permits the refund imposed here.¹⁵⁰ The fact that a refund is large does not by itself make it inappropriate.¹⁵¹ Indeed the size of Consumers' refund is due solely to the magnitude and length of Consumers' violation, which Consumers could have ended at any time by filing the Facilities Agreement.¹⁵²

107. The refund actually leaves Consumers in a *better* position than it would have been had it complied with the law by not providing the unauthorized services. In that event, Consumers would not have collected the unauthorized revenues, much less enjoyed their use, but still would have incurred all the costs that it incurred as a result of owning and maintaining the Transferred Facilities. The remedy imposed here allows Consumers to keep the unauthorized revenues, while requiring it to refund only their time value. Under the remedy prescribed in *Central Maine*, Consumers would have had to refund all its revenues, plus interest.¹⁵³ In the instant proceeding, Consumers has to refund only the interest.

b. Revenues Collected by Michigan Electric

108. Consumers need not pay the time value of unauthorized revenues that Michigan Electric collected under the Facilities and Agency Agreements. These revenues, collected during 2003 and 2004, total \$287,992.¹⁵⁴ In the Time Value Order, the Commission stated, "If a utility files an otherwise reasonable cost-based rate after new

¹⁴⁹ Facilities Acceptance Order, 132 FERC ¶ 61,241 at P 26.

¹⁵⁰ Staff would require Consumers to refund the revenues that it collected without Commission authorization rather than the time value of those revenues. Staff Initial Br. at 23. However, the Commission's rule is to require the utility to refund the time-value of revenues collected in excess of their variable costs, not the revenues themselves, and neither Staff nor any other participant has explained why the fact that the former exceeds the latter in this case should dictate a different result.

¹⁵¹ *El Paso*, 105 FERC ¶ 61,131 at P 21.

¹⁵² *See id.*

¹⁵³ *See Green Mountain*, 59 FERC ¶ 61,294 at 62,077 (requiring utility to refund all unauthorized revenues collected in excess of its variable O&M costs, plus interest); *PacificCorp Elec. Operations*, 58 FERC ¶ 61,283 at 61,983 (same).

¹⁵⁴ Ex. ALJ-5, Ex. B.

service has commenced ... we will require the utility to refund ‘the time value of the revenues collected ... for the entire period that the rate was collected without Commission authorization.’”¹⁵⁵ The Commission recently held that a public utility that did not collect revenues for the unauthorized service it provided did not have to pay a time value refund, stating, “If no monies were collected ... then no refunds are necessary”.¹⁵⁶ Here, Consumers neither collected the revenues at issue nor provided the unauthorized service. Accordingly, the foregoing Commission precedent precludes requiring Consumers to refund the time value of those amounts.

109. Also, to require Consumers to refund the time value of revenues it never collected would be to require it to return what it never had, because Consumers never enjoyed the use of those funds. Thus, Consumers would actually be making a payment equivalent to the benefit another party, Michigan Electric, enjoyed as a result of collecting the unauthorized revenues. The Commission has never suggested that it intended to apply the time-value refund in such an unfair way, and no participant has cited any case in which a public utility has been required to refund the time value of revenues that it did not collect during the period of unauthorized service.

110. Nonetheless, Staff and Michigan Electric assert that Consumers should pay the time value of the unauthorized revenues collected by the latter. Staff argues that Consumers alone had the duty to file the Facilities Agreement, and, therefore, should refund the time value of all revenues collected thereunder, regardless of whether Consumers actually collected them.¹⁵⁷ Staff and Michigan Electric further argue that the fact that Consumers did not collect, or enjoy the time value of, the revenues is irrelevant, because the rationale underlying the time-value refund is to remedy harm. Staff asserts that the harm was to the Commission’s ability to ensure just and reasonable rates and to the customer’s loss of the time value of the revenues for which it paid, and that such harm occurred regardless of whether Consumers actually collected the revenues.¹⁵⁸ Michigan Electric contends that the time-value refund that Consumers must pay is “simply a

¹⁵⁵ Time Value Order, 64 FERC ¶ 61,136 at 61,979 (emphasis added); *see El Paso*, 105 FERC ¶ 61,276 at P 5 (directing the utility to refund the time value of “revenues actually collected”).

¹⁵⁶ *Northern States Power Co.*, 146 FERC ¶ 61,007, at P 9 (2014).

¹⁵⁷ Staff Initial Br. at 31-32.

¹⁵⁸ Staff Reply Br. at 28-29.

measure of the penalty to be imposed under the prior notice policy and the policy does not require the return to the customer of the actual dollars collected.”¹⁵⁹

111. These arguments are not persuasive. First, Consumers’ responsibility for filing the Facilities Agreement and the Commission’s description of the time-value refund as a mechanism to redress harm do not alter the Commission’s repeated statements, discussed *supra*, that public utilities need only refund the time value of unauthorized revenues that they have collected.

112. Second, Staff’s contention that the purpose of the time-value remedy is to redress harm to the Commission’s filing and notice requirements does not support requiring Consumers to refund amounts collected by Michigan Electric. Whatever its liability, Michigan Electric, rather than Consumers, provided the unauthorized service for which it collected the \$287,992, and, thus, compromised the Commission’s ability to assure the rates for that specific service were just and reasonable. Similarly, whatever the merits of Staff’s contention that Consumers must refund the time value of those revenues to redress Midland’s inability to enjoy their time value,¹⁶⁰ the argument overlooks that it was Michigan Electric that collected the revenues from Midland, and thereby caused whatever deprivation occurred.

113. Michigan Electric’s characterization of the time-value remedy as a penalty is incorrect. Responding to a similar argument, the Commission said, “[W]e do not agree that our remedy constitutes a penalty; rather, the Commission imposed a remedy to enforce the statutory requirement of prior notice and filing, the magnitude of which remedy was commensurate with the nature of Petitioner’s violation.”¹⁶¹ Indeed, FPA section 309 does not authorize the Commission to impose penalties.¹⁶²

¹⁵⁹ Michigan Electric Reply Br. at 14.

¹⁶⁰ *El Paso* notwithstanding, *see* 105 FERC ¶ 61,131 at P 40, it is difficult to characterize Midland’s loss of the time value of money paid under the Facilities Agreement as any kind of meaningful harm. Midland received exactly what it bargained for, and needed, reliable service at just and reasonable rates.

¹⁶¹ *See OREG-1, Inc.*, 138 FERC ¶ 61,110 at P 17.

¹⁶² *See Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986). There the court interpreted section 16 of the Natural Gas Act (NGA), 15 U.S.C. § 717o (2012), which contains wording substantially identical in all material respects to section 309 of the FPA. Decisions interpreting substantially identical provisions of the FPA and NGA are to be interpreted interchangeably. *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 589 n.7 (1981).

114. Finally, as is discussed *infra*, Michigan Electric is the public utility that should refund the time value of the \$287,992 it collected. Michigan Electric also had an obligation to file the Facilities Agreement, once that utility began to implement the agreement's terms. Indeed, by providing service to Midland as Consumers' agent, Michigan Electric violated both sections 205(c) and 205(d) of the FPA, and its collections from Midland during 2003 and 2004 were the direct result of those violations. Given that Michigan Electric rather than Consumers has enjoyed the time value of those unauthorized collections, Michigan Electric should be the public utility that refunds it.

3. Michigan Electric's Refund Obligation

a. Unauthorized Revenues Collected from Midland

115. In the Facilities Agreement Acceptance Order, the Commission determined that Michigan Electric's services to Midland were jurisdictional. The Commission explained that the Agency Agreement "encompasses terms and conditions related to the Facilities Agreement."¹⁶³ Therefore, "Michigan Electric by providing operation and maintenance services related to the transmission of electric energy in interstate commerce, is providing a jurisdictional service[]." ¹⁶⁴ Michigan Electric used its own facilities to provide the service, charged rates therefor, and retained the revenues it collected.

116. Putting aside for a moment Michigan Electric's duty to file the Facilities and Agency Agreements, sections 205(c) and (d) of the FPA and section 35.3 of the Commission's regulations required Michigan Electric to file a rate schedule—*i.e.*, a written schedule that described the service it was performing for Midland and the rates it was charging therefor.¹⁶⁵—in some form. Section 205(c) of the FPA required that Michigan Electric file a schedule showing the rate to be charged for each jurisdictional transmission service. The Commission has found Michigan Electric was providing such a service for Midland. Accordingly, Michigan Electric violated section 205(c) of the FPA by failing to file a schedule describing the service and the rates charged therefor.

117. Similarly, sections 205(d) of the FPA and 35.3(a)(1) of the Commission's regulations required Michigan Electric to file such a schedule at least sixty days prior to commencing service to Midland. As Consumers' agent, Michigan Electric provided what, for Michigan Electric, were new services at new rates. Sections 205(d) of the FPA

¹⁶³ Facilities Agreement Acceptance Order, 132 FERC ¶ 61,241 at P 27.

¹⁶⁴ *Id.* Indeed, the Commission would lack authority to compel Midland to pay for the service it received were that service not jurisdictional.

¹⁶⁵ See 18 C.F.R. § 35.2(b).

and 35.3(a)(1) of the Commission's regulations required Michigan Electric to file a schedule with the Commission describing these changes. Accordingly, Michigan Electric also violated these two provisions by commencing service without making such a filing.

118. Moreover, section 205(c) of the FPA did require Michigan Electric to file the Facilities and Agency Agreements once it began providing service under those agreements. Both agreements affected and related to Michigan Electric's rates, charges, and services to Midland: The Facilities Agreement governed what services Michigan Electric would provide, and what it would charge for them. The Agency Agreement contractually authorized Michigan Electric to provide those services and charge those rates. The Commission recognized this when it ordered Michigan Electric to file the Agency Agreement.¹⁶⁶

119. Michigan Electric committed separate violations of section 205(c) of the FPA by failing to file each of the agreements at the commencement of its service thereunder. Alternatively, the public utility violated that provision by failing to file some form of written schedule describing the rates it was charging Midland under the terms of the Facilities Agreement and the authority of the Agency Agreement. Each of these violations constitutes a separate basis for Michigan Electric's time-value refund obligation.

120. Michigan Electric violated sections 205(c) and (d) of the FPA from its commencement of this service until December 17, 2010, the Commission-designated effective date of the Agency Agreement.¹⁶⁷ Michigan Electric, therefore, must refund the time value of revenues collected from Midland for the unauthorized service during the violation period. The revenues, collected in 2003 and 2004, total \$287,992.¹⁶⁸

121. Michigan Electric argues that "[i]f time value refunds are ordered in this proceeding, it will be because the Facilities Agreement was not timely filed under Section 205 of the FPA." Not surprisingly, Michigan Electric contends that it had no duty to file

¹⁶⁶ Facilities Agreement Acceptance Order, 132 FERC ¶ 61,241 at P 27.

¹⁶⁷ See *Michigan Elec. Transmission Co.*, 133 FERC ¶ 61,238 at P 8. The Facilities Agreement, which became effective on October 5, 2010, described the service provided and the rates charged. However, it was the Agency Agreement that disclosed the delegation of authority to Michigan Electric to provide the service and charge the rates. See Ex. C-4 at Art. II § 1. Thus, the schedule describing the change in Michigan Electric's rates, charges and services was not complete until the Commission deemed the latter agreement effective.

¹⁶⁸ Ex. ALJ-5.

that agreement: Whereas Consumers was “the utility signatory to the Facilities Agreement” with “both the authority and the obligation to file it”, Michigan Electric was “not a party to the Facilities Agreement and had no obligation or authority to file it.”¹⁶⁹ Moreover, argues Michigan Electric, the Agency Agreement, to which Michigan Electric was a party, “did not authorize, much less obligate, Michigan Electric to make regulatory filings on Consumers’ behalf”.¹⁷⁰

122. Michigan Electric goes on to argue that its late filing of the Agency Agreement does not, by itself, obligate Michigan Electric to make a time-value refund. Michigan Electric urges that the only rate established in the Agency Agreement was the \$500 monthly fee that Consumers paid Michigan Electric for performing that service,¹⁷¹ and Michigan Electric has refunded the time value of the fees it collected.¹⁷² Whatever service it provided Midland, Michigan Electric contends, was only as Consumers’ agent under the Facilities Agreement. It was the Facilities Agreement that prescribed Michigan Electric’s services and rates to Midland, and that obligated Midland to pay those rates.¹⁷³ Moreover, contends Michigan Electric, its timely filing of the Agency Agreement would not have prevented the violations of the Commission’s filing requirement as long as the Facilities Agreement remained unfiled.¹⁷⁴

123. The undersigned is not aware of any decision, administrative or judicial, that addresses whether a public utility that implements an unfiled, jurisdictional contract to which it is not a party violates section 205 of the FPA. However, the language of sections 205(c) and 205(d) of the FPA dictates the conclusion that Michigan Electric’s providing of service under the terms of the Facilities Agreement violated both provisions.

¹⁶⁹ Michigan Electric Initial Br. at P 55.

¹⁷⁰ *Id.*; Michigan Electric Reply Br. at 13 (quoting Article II of the Agency Agreement, which states, “Responsibilities not expressly delegated in this Article, or elsewhere in this Agency Agreement, shall be retained by Consumers”, and which does not delegate Michigan Electric authority to make regulatory filings). *See* Staff Reply Br. at 13.

¹⁷¹ Michigan Electric Supplemental Br. at 4.

¹⁷² *Id.* at 2.

¹⁷³ *Id.* at 3, 4. Staff makes similar arguments. *See* Staff Supplemental Br. at 2-6.

¹⁷⁴ Michigan Electric Supplemental Br. at 5-6.

124. Michigan Electric is incorrect when it says that the failure to timely file the Facilities Agreement constitutes the sole predicate for ordering a time-value refund in this proceeding. Michigan Electric violated sections 205(c) and (d) of the FPA and section 35.3(a)(1) of the Commission's regulations by providing a jurisdictional service and charging rates for that service without filing a schedule, in any form, describing the services and rates. Those three provisions require each public utility to file rate schedules describing each of its jurisdictional services and the rates charged therefor. Even if Michigan Electric's non-party status had excused it from having to file the Facilities Agreement, the utility would have had to file some other kind of schedule that adequately described the services provided to Midland and the rates charged therefor. By performing a jurisdictional service and charging rates therefor without filing such a schedule, Michigan Electric violated all three of the foregoing provisions.

125. Michigan Electric's contention that it had no duty to file the Facilities Agreement also fails. Whether section 205(c) of the FPA required Michigan Electric to file the Facilities Agreement does not turn on whether Michigan Electric was a party thereto, but whether the agreement affected or related to Michigan Electric's "rates, charges" or "service". The Facilities Agreement fell into that category in that it governed Michigan Electric's service to Midland and the charges therefor.

126. Similarly, as Michigan Electric's duty to file the Facilities Agreement arose under section 205(c) of the FPA, the argument that the Agency Agreement did not authorize Michigan Electric to make such a filing is irrelevant. Section 205(c) of the FPA does not "grant utilities discretion to decide whether or when they must file."¹⁷⁵ This is particularly true in the case of the Agency Agreement, which the Commission did not deem effective until long after Michigan Electric's unauthorized collections had ceased. Therefore, prior to commencing service, Michigan Electric had a duty to file the Facilities Agreement.¹⁷⁶

¹⁷⁵ *Chehalis Power Generating, L.P.*, 141 FERC ¶ 61,116 at P 17 (2012).

¹⁷⁶ Staff's arguments on this issue do not merit extensive discussion. Staff argues that because the "onus" is on the public utility to comply with section 205 of the FPA, Consumers, and Consumers alone, had the duty to file the Facilities Agreement. Staff Initial Br. at 31. This line of argument ignores the fact Michigan Electric is also a public utility. Staff also appears to argue that Consumers' obligation to file the Facilities Agreement as early as 1988 excuses Michigan Electric from having had to file it after Michigan Electric began providing service as Consumers' agent. Staff Initial Br. at 32. There is no support in the language of section 205(c) of the FPA for such an assertion. Finally, Staff argues that Michigan Electric's unauthorized collections benefited Consumers, because Michigan Electric only collected the revenues as reimbursement for

127. Michigan Electric's contention that its failure to file the Agency Agreement in a timely manner does not constitute an independent predicate for a time-value refund is also incorrect. The question to be posed is: If the Facilities Agreement had been filed prior to Michigan Electric's commencement of service to Midland, would Michigan Electric's providing of that service without filing the Agency Agreement warrant imposition of such a refund? The answer is that it would.

128. In that hypothetical situation, Michigan Electric would have provided a new service at new rates without first filing a rate schedule with the Commission describing the change. The Facilities Agreement would have informed the Commission as to the change in Consumers' rates, charges and service, but would not, by itself, disclose the changes in those of Michigan Electric. Only the Agency Agreement would have provided the Commission this information. Accordingly, Michigan Electric's failure to file the Agency Agreement in a timely manner would have violated sections 205(c) and (d) of the FPA and 35.3(a)(1) of the Commission's regulations, and mandated imposition of a time-value refund even if the Facilities Agreement had been timely filed.

129. Michigan Electric's contention that it provided jurisdictional service to Midland solely under authority of the Facilities Agreement overlooks the fact that the Agency Agreement authorized Michigan Electric to provide the service and charge the rates prescribed in the Facilities Agreement,¹⁷⁷ and to collect payment therefor from Midland.¹⁷⁸ Michigan Electric would have lacked authority to implement the Facilities

its expenses. Staff Reply Br. at 5. However, Staff is seeking a time-value refund for Consumers for collecting revenues that served the same purpose.

Michigan Electric and Staff either quote or cite Ms. Vansco's testimony that Consumers rather than Michigan Electric was responsible for filing the Facilities Agreement. Michigan Electric Initial Br. at P 58, Reply Br. at 15 (both quoting Ex. S-1 at 22:1-9); Staff Initial Br. at 31-32 (citing Ex. S-1 at 22:6-9). However, that portion of Ms. Vansco's testimony is not entitled to any weight. As demonstrated, the question of Michigan Electric's duty to file the contracts turns on an interpretation of the language of section 205(c) of the FPA, which falls within the purview of counsel, and is not a proper subject for expert testimony. Moreover, Ms. Vansco does not claim to be a lawyer, *see* Ex. S-1 at 1:8-11, so this issue falls well outside her area of expertise. In contrast, her many years as a public utilities specialist and an energy industry analyst clearly qualify her to testify on technical utility matters such as whether to classify a public utility's costs as fixed or variable. *See id.* at 2:1-3:4, 18:16-20:23.

¹⁷⁷ *See* Ex. C-4, Art. II.

¹⁷⁸ *See* Ex. C-4, Art. II § 4, Art. III.

Agreement in this way had it not executed the Agency Agreement. Accordingly, the Agency Agreement affected and related to Michigan Electric's services to Midland, the public utility's rates and charges therefor, and its collection of the rates charged. Thus, Michigan Electric's failure to file that agreement stands as a separate ground for requiring Michigan Electric to refund the time value of those collections.

b. Revenues to Be Collected from Midland

130. Michigan Electric does not have to refund the time value of amount that it billed, but did not receive, for its unauthorized service, even though it will receive the bulk of that amount in the future, with interest. As discussed in connection with Consumers' refund obligation, public utilities that violate the Commission's prior notice policy do not have to refund the time value of revenues that were never collected during the period of violation.¹⁷⁹ Michigan Electric did not collect these revenues during the violation period, and will not receive them until long after the Commission's acceptance of both relevant agreements.

131. Midland argues that Michigan Electric should pay the time value of these as yet uncollected amounts for two reasons: First, the charges were made prior to October 5, 2010, the Commission-designated effective date of the Facilities Agreement. Second, Michigan Electric will eventually receive interest on those revenues, which will put it in a position comparable to the one it would have been in had it been if Midland had made its payments in a timely manner. Midland believes it is contradictory for Michigan Electric to demand and receive payment in full, with interest, for its services under the Facilities and Agency Agreements, yet pay no penalty for having performed those services without Commission authorization.¹⁸⁰

132. The Time Value Order only requires an offending public utility to refund the time value of revenues "collected without Commission authorization."¹⁸¹ Michigan Electric will collect the revenues at issue with full Commission authorization. The Commission has expressly directed Midland to pay Michigan Electric for those charges under the Facilities Agreement for costs that Michigan Electric properly incurred.¹⁸² The

¹⁷⁹ *Northern States Power Co.*, 146 FERC ¶ 61,007 at P 9; *Entergy Servs., Inc.*, 75 FERC ¶ 61,034, at 61,185-86 (1996).

¹⁸⁰ See Midland Initial Br. at 15.

¹⁸¹ Time Value Order, 64 FERC ¶ 61,139 at 61,979 (1993) (emphasis added).

¹⁸² Hearing Order, 142 FERC ¶ 61,193 at P 37 (citing Declaratory Petition Order, 138 FERC ¶ 61,202 at P 20).

Participants have stipulated that the revenues Michigan Electric is going to receive reflect such costs.¹⁸³ Accordingly, Michigan Electric owes no time value refund with respect to these revenues at issue.

133. The fact that the revenues that Michigan Electric will collect will contain an interest component does not support requiring it to pay a time-value refund. As discussed in the preceding paragraph, a necessary predicate of a time-value refund obligation is a public utility's lack of authority to collect the rate. The interest component at issue is simply part of a rate that the Commission has found just and reasonable and has authorized Michigan Electric to collect.¹⁸⁴

C. Which of Michigan Electric's unpaid invoices to Midland reflect costs properly incurred under the Facilities Agreement?

134. The Participants' stipulation that the unpaid principal amounts billed to Midland by Michigan Electric that reflected costs "properly incurred" consist of \$1,891,630.56 for property taxes and \$129,454.19 for O&M expenses¹⁸⁵ partially resolves this issue. As the Commission has directed Midland to pay for all charges reflecting costs properly incurred, Midland must pay the total of these two amounts, which amounts to \$2,021,084.75. However, other, subsidiary issues remain open.

1. Calculation of Late-Payment Interest

135. Two issues associated with any late-payment interest Midland may owe on that principal amount remain unresolved: (1) Does the Facilities Agreement provide that late-payment interest be simple or compound? (2) When should interest begin to accrue on costs incurred by Michigan Electric during 2012, but not invoiced until February 27, 2014?¹⁸⁶

¹⁸³ Ex. ALJ-5, Ex. B.

¹⁸⁴ See Facilities Agreement Clarification Order, 138 FERC ¶ 61,204 at P 36 ("Late payment interest is a component of the Facilities Agreement rates, which the Commission found to be just and reasonable in the Facilities Agreement Acceptance Order.") (Citation omitted.)

¹⁸⁵ Ex. ALJ-5.

¹⁸⁶ See Ex. ALJ-2.

a. Simple v. Compound

136. The pertinent provisions of the Facilities Agreement are contained in section 3.6. Section 3.6.1 requires Consumers to bill Midland for costs incurred during the previous month “as soon as practicable” after the close of that month. Section 3.6.2 requires Midland to pay each monthly invoice no later than twenty days after the invoice is sent. Section 3.6.4 provides (1) that “[a]ny payment not made on or before the due dates specified in section 3.6.2 shall bear interest until paid”, and (2) that the rate of interest that accrues on this non-payment shall be the prime rate established by the National Bank of Detroit at the close of business on the date the payment becomes due, plus one percent.¹⁸⁷

137. The Participants agree that the late payment interest prescribed by section 3.6.4 of the Facilities Agreement should be calculated using the prime interest rate of the JP Morgan Chase Bank, plus one percent, computed on a daily basis.¹⁸⁸ However, they disagree as to whether such late payment interest should be simple or compound. “Compound interest” has been defined as “interest on interest”;¹⁸⁹ “simple interest”, as “interest paid or computed on the original principal only of a loan or of the amount of an account....”¹⁹⁰

138. Michigan Electric contends the late-payment interest should be compounded quarterly, whereas Staff and Midland assert that the Facilities Agreement provides for simple interest only.¹⁹¹ The language of the Facilities Agreement and governing law dictate the conclusion that Michigan Electric is entitled to only simple interest.

139. The language of section 3.6.4 of the Facilities Agreement dictates the conclusion that the parties intended that simple interest be charged on late payments. When section 3.6.4 states that interest shall accrue on each “payment not made on or before the due

¹⁸⁷ See Ex. C-2 at §§ 3.6.1, 3.6.2 & 3.6.4.

¹⁸⁸ Compare Ex. S-10 at 9:12-12:5, 13:8-18 with Ex. MET-12 at 5-6. The Facilities Agreement pegs the late-payment interest rate to the prime rate of the Detroit National Bank; that bank is now the JP Morgan Chase Bank. Ex. C-2 at § 3.6.4; Ex. MET-4 at 7:3; Ex. S-10 at 10:1-6.

¹⁸⁹ *Nation v. W.D.E. Elec. Co.*, 563 N.W.2d 233, 235 (Mich. 1997).

¹⁹⁰ Webster’s Third International Dictionary at p. 2121 (3d ed. 1971).

¹⁹¹ Compare Michigan Electric Initial Br. at PP 35-40 with Staff Initial Br. at 11-13; Midland Initial Br. at 6-7.

dates set forth in Subsection 3.6.2”, the “payment” to which it refers is payment for the costs specified in Consumers’ invoice for the previous month’s work, *i.e.*, payment of principal. This principal is the only amount that is subject to the twenty-day due date specified in section 3.6.2. Interest accrued on previously unpaid bills does not have a specific “due date”, but rather is due every day it remains unpaid. Thus, the phrase “payment not made” refers only to non-payment of principal, and does not include non-payment of interest on previously unpaid bills.

140. Michigan Electric’s argument that the language of section 3.6.4 dictates a contrary result is unpersuasive. Michigan Electric asserts that the two phrases in section 3.6.4, “‘the payment not made’ and ‘the amount [that] becomes past due’” include “both the principal of any unpaid invoices and the late payment interest accrued on the unpaid amounts to date”; however, Michigan Electric does not explain the reasoning underlying this interpretation.¹⁹²

141. Michigan Electric’s contention that the phrase “the amount [that] becomes past due’ logically includes the additional interest accrued during the previous month”¹⁹³ is particularly problematic. The phrase does not relate to the compounding issue, but relates instead to the determination of the interest rate, which at the time the Facilities Agreement was drafted was the Detroit National Bank’s prime rate “at the close of business on the date the amount becomes past due”, plus one percent.

142. The law governing the Facilities Agreement also dictates the conclusion that it prescribes simple late-payment interest. The agreement unambiguously states that it is to be governed by Michigan law.¹⁹⁴ The Michigan courts have stated that in the absence of an applicable statute requiring compounding of late-payment interest, a contract that does not explicitly provide for such compounding, is deemed to require that only simple interest be charged on overdue debt.¹⁹⁵ No participant has identified any Michigan statute that would require compounding of late-payment interest under an agreement such

¹⁹² Michigan Electric Initial Br. at P 36 (citing Ex. MET-12 at 7).

¹⁹³ *Id.*

¹⁹⁴ Ex. C-2 at § 11 (“This Agreement shall be deemed to be a Michigan contract and shall be construed in accordance with and governed by the laws of Michigan.”).

¹⁹⁵ *See Norman v. Norman*, 201 Mich. App. 182, 184 (1993) (“As a general rule, the law disfavors compound interest and will allow for the payment of compound interest only in the presence of a statute or agreement providing for the payment of compound interest....”). *See also Nation v. W.D.E. Elec. Co.*, 563 N.W.2d at 235 (“The common law has long favored simple interest and disfavored compound interest....”).

as the Facilities Agreement. Accordingly, the fact that section 3.6.4, does not include the word “compound” or any derivative thereof compels one to interpret it as providing for simple interest only.

143. Michigan Electric invokes Order No. 47,¹⁹⁶ which required, as relevant here, compounding of interest in certain situations, arguing that the Commission’s reasons for requiring quarterly compounding in certain instances in that rulemaking support requiring compounding of late-payment interest here. This argument fails for two reasons.

144. First, as discussed, Michigan law, rather than Commission Orders or precedent governs this issue. The Commission has acknowledged that it is required to apply the choice of law selected by the parties in interpreting contracts.¹⁹⁷

145. Second, even if Michigan law did not govern, Order No. 47 would not apply here. With respect to electric transmission, Order No. 47, and the regulation it promulgated,¹⁹⁸ apply solely to refunds. Michigan Electric has not explained why an order addressing the calculation of interest for refunds, which is dictated by public-interest concerns, should guide the interpretation of a contract, which turns on the intent of the parties.

146. Accordingly, Michigan Electric’s assertions are rejected. Simple interest is to apply to the invoiced but unpaid amounts at issue here.

b. Accrual of Interest on Costs Incurred by Michigan Electric during 2012, but Not Invoiced until February 27, 2014

147. The Participants agree that interest should begin to accrue on charges for work performed by Michigan Electric through 2011 on the day after the charge became due, *i.e.*, the 21st day after the invoice was sent.¹⁹⁹ However, Michigan Electric contends that

¹⁹⁶ *Rate of Interest on Amounts Held Subject to Refund*, Order No. 47, FERC Stats. & Regs, *Regulations Preambles 1977-1981* ¶ 30,083, *order on reh’g*, Order No. 47-A, FERC Stats. & Regs, *Regulations Preambles 1977-1981* ¶ 30,099 (1979), *clarified*, Order No. 47-B, FERC Stats. & Regs, *Regulations Preambles 1977-1981* ¶ 30,121 (1980) (Order No. 47).

¹⁹⁷ *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,055, at P 21 n.38 (2012) (citing *Southern Calif. Edison Co. v. FERC*, 502 F.2d 176, 181-182 (D.C. Cir. 2007)).

¹⁹⁸ 18 C.F.R. § 35.19a.

¹⁹⁹ Michigan Electric Initial Br. at P 30; Staff Initial Br. at 10-11; Midland Initial Br. at 8; *see* Ex. C-2 at § 3.62, requiring Midland to ensure that Consumers receives the bill for the previous month’s work no later than twenty days after the bill is sent.

it should be permitted to collect late payment interest on charges for subsequent work done and taxes paid as if it had submitted the invoices in a timely manner, even though it did not actually submit them until February 27, 2014.²⁰⁰ These invoices seek reimbursement for “property taxes of \$157,915.77 on the interconnection facilities for the period January 1, 2012 through September 27, 2012 and telemetry charges of \$2,206.96 for the months of February through September 2012.”²⁰¹

148. Michigan Electric argues that it did not forward these invoices “in the normal course” because it relied on the Cancellation Order’s “erroneous ruling” that the Facilities Agreement had terminated on January 15, 2012.²⁰² To correct this alleged inequity, Michigan Electric has based its calculations of late-payment interest on the fiction (1) that it sent the invoices on the dates that it would have sent them “in the normal course, *i.e.*, April 15, 2013 for property taxes, and on the 15th day of the months of March through October 2012 for telemetry charges,”²⁰³ (2) that Midland did not pay them, and (3) that late payment interest began to accrue twenty one days after the imputed invoice dates.²⁰⁴

149. Michigan Electric does not dispute that the plain language of sections 3.6.2 and 3.6.4 of the Facilities Agreement makes sending an invoice a prerequisite to the accrual of late-payment interest on the principal due, and allows Midland to avoid such an accrual by paying the invoice within twenty days. Midland bargained for these protections, and they are integral to an agreement that the Commission found to be just and reasonable. Michigan Electric is asking the undersigned to eliminate these protections, and thereby modify this agreement retroactively on the ground that Michigan Electric’s omissions came about through reliance on an Order that the Commission later modified.

150. Michigan Electric has cited no authority that would permit such a modification. Even Michigan Electric’s claim of reliance is flawed: Its request for rehearing of the termination date in the Cancellation Order shows that it knew the Commission might modify the Facilities Agreement’s termination date, which is in fact what happened.

²⁰⁰ Michigan Electric Initial Br. at PP 32-34.

²⁰¹ Ex. MET-12 at 5.

²⁰² *Id.*

²⁰³ Michigan Electric Initial Br. at P 32.

²⁰⁴ Ex. MET-12 at 8; Ex. MET-18.

Michigan Electric could have protected itself by continuing to submit invoices until the termination-date issue was finally resolved.

151. Late-payment interest began to accrue on the February 27, 2014 invoice twenty-one days after it was sent. That date was March 20, 2014.

152. Staff witness Adrian Kimbrough has calculated Midland's liability for late-paid interest through February 2, 2014.²⁰⁵ Except for the Michigan Electric objections discussed and rejected *supra*, no party objects to Mr. Kimbrough's methodology. Accordingly, Midland shall use Mr. Kimbrough's methodology to calculate its interest obligations on the unpaid invoices listed in Exhibit ALJ-5 through the date of payment.²⁰⁶

2. Timing and Means of Midland's Payment

153. Ms. Vansco testified that Midland should pay the invoiced but previously unpaid amounts to Consumers, which should then pay Michigan Electric.²⁰⁷ However, the Facilities and Agency Agreements prescribe a simpler process.

²⁰⁵ See Exs. S-12 & S-13.

²⁰⁶ In making his interest calculations, Mr. Kimbrough appears to have departed from the methodology prescribed in section 3.6.4 of the Facilities Agreement in one respect. That provision 3.6.4 states that a payment not made by the applicable due date "shall bear interest until paid" at the applicable rate in effect "on the date the amount becomes past due". Ex. C-2 at § 3.6.4. Thus, the provision requires that each monthly unpaid amount shall continue to bear the same interest rate at the same rate, month after month, regardless of how rates may vary in the future. Thus, if Midland failed to make a payment of \$1,000 by the due date in January, and the applicable interest rate on the following day were 6 percent, the unpaid \$1,000 would continue to bear interest at 6 percent until paid. If Midland failed to make a payment of \$800 by the due date in February, and the applicable interest rate on the following day were 5%, the unpaid \$800 would continue to bear interest at five percent until paid. In other words, each unpaid amount would bear a different interest rate. Mr. Kimbrough has departed from this prescribed methodology, applying the applicable interest rate in effect on the date an amount becomes past due to the cumulative amount of invoices outstanding on that date. Thus, in the preceding example, Mr. Kimbrough would apply a six percent rate to the \$1,000 past due in January, but the next month would apply a rate of five percent to both the \$1,000 due in January and the \$800 due in February. However, the parties have not challenged this aspect of Mr. Kimbrough's calculations, and have thereby waived any objections they may have had in this regard.

²⁰⁷ Ex. S-1 at 17.

154. Section 3.6.3 of the Facilities Agreement requires Midland to mail payments to Consumers or to wire its payments to a bank designated by Consumers.²⁰⁸ Article II, section 4, of the Agency Agreement requires Consumers to designate a bank and account in the name of Michigan Electric to receive money wired by Midland.²⁰⁹

155. Together, the two agreements require (1) Consumers to establish a bank account in Michigan Electric's name, and direct Midland to wire funds to it, and (2) Midland to comply with Consumers' directive. Consumers and Midland are directed to follow that procedure.

156. Midland points out that in the Declaratory Petition Order, the Commission refused to order Midland to make direct payment to Michigan Electric, finding it "unclear what the contractual basis would be for such an order".²¹⁰ The method of payment directed herein does not run afoul of that directive, because it involves Consumers as well as Michigan Electric and Midland, and is based squarely on provisions of the Facilities and Agency Agreements.

157. Michigan Electric asks the undersigned to order Midland to pay the amounts it owes within thirty days of the decision.²¹¹ Midland opposes this request on a number of grounds²¹² that need not be reiterated here.

²⁰⁸ Ex. C-2 at § 3.6.3 ("All payments should be made payable to Consumers Power Company and shall be sent to Consumers Power Company..., *or by wire transfer to a bank designated by Consumers.*") (Emphasis added).

²⁰⁹ Ex. C-4 at Art. II § 4 ("Consumers shall designate to Seller a bank and an account therein in the name of Downstream Owner, as the place to which payments of invoices shall be sent by wire transfer by Seller."). The definitions in these agreements are nothing if not convoluted. The Agency Agreement incorporates the capitalized terms contained in the Facilities Agreement. *See id.* at Art. I. The Facilities Agreement, in turn, refers to Midland as the "Seller." Ex. C-2 at 1. The Agency Agreement refers to Michigan Electric as "METC", and articulates a definition of "Downstream Owner that includes METC. Ex. C-4 at 3, 4.

²¹⁰ Midland Reply Br. at 5 (citing Declaratory Petition Order, 138 FERC ¶ 61,202 at P 21).

²¹¹ Michigan Electric Initial Br. at P 43.

²¹² *See* Midland Reply Br. at 4-5.

158. Participants that wish to file exceptions to initial decisions must do so no later than thirty days after the decision's issuance.²¹³ Such a filing renders the initial decision non-final,²¹⁴ thereby staying all mandates contained therein.²¹⁵ The Commission Rules of Practice and Procedure thus contemplate permitting participants that are aggrieved by the initial decision to stay its mandates pending Commission review. To provide the parties deadlines for making the payments at issue that precede or are contemporaneous with the deadline for filing exceptions would amount to an attempt to circumvent the foregoing protection. Accordingly, the payments ordered in this Initial Decision will only be due after the thirty-day deadline for filing exceptions has passed.

159. One of Midland's arguments warrants a response. Midland claims that the Hearing Order did not empower the undersigned to order refunds, but only "to resolve the factual disputes over the amount claimed by [Michigan Electric] and responsibility for a time value refund."²¹⁶ Midland further argues that Michigan Electric will not suffer irreparable harm from a delay in payment, because the amounts it is owed will continue to accrue interest.²¹⁷

160. The Commission appears to implicitly authorize the presiding judge in this proceeding to order refunds. The Commission has already decided that Midland must pay for services rendered by Michigan Electric under the Facilities Agreement,²¹⁸ and has effectively directed the presiding judge to quantify the amount of Midland's obligation.²¹⁹

²¹³ 18 C.F.R. § 385.711(1)(i) (2014).

²¹⁴ *Id.* § 385.708(d)(1) (2014).

²¹⁵ *See Commonwealth Edison Co.*, 134 FERC ¶ 61,166, at P 2 (2011) ("No party in the proceeding has submitted a brief on exceptions to the Initial Decision... Thus, after ten day the Initial Decision would become a final Commission decision absent a stay.").

²¹⁶ Midland Reply Br. at 4.

²¹⁷ Midland Reply Br. at 5. Midland also claims that the Commission denied Michigan Electric's request for immediate payment when it denied the utility's request for a stay of the Facilities Agreement termination date pending Midland's paying what Michigan Electric alleged it was owed. *Id.* at 4 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,100, at PP 13-14 (2012)). Midland does not explain how the Commission's denial of the requested stay was in any way the equivalent of a denial of a request for early payment, and the equivalency is far from self-evident.

²¹⁸ Facilities Agreement Acceptance Order, 132 FERC ¶ 61,241 at P 27; Facilities Agreement Acceptance Clarification Order, 138 FERC ¶ 61,204 at P 30.

²¹⁹ *See* Hearing Order, 142 FERC ¶ 61,193 at P 37.

It seems unlikely that the Commission would direct the judge to determine what Midland owed, yet stop short of directing Midland to pay it.

V. ORDER

161. The omission from this Initial Decision of any argument raised by the participants at the hearing, the oral argument on the merits, or in their briefs does not mean that it has not been considered; rather, it has been evaluated and found to lack either merit or significance such that inclusion would only lengthen this Initial Decision without altering its substance or effect. In other words, all arguments made by the participants that have not been specifically discussed in this decision have been considered and rejected.

162. Within sixty days of the issuance of this Initial Decision, Consumers shall designate to Midland a bank and an account therein in the name of Michigan Electric, both as chosen by Michigan Electric, as the place to which \$2,021,084.75, plus simple interest, otherwise calculated as prescribed in the body of this Initial Decision through the date of payment, shall be sent by wire transfer by Midland. Immediately thereafter, Midland shall transfer the foregoing amounts to Michigan Electric.

163. Within sixty days of the issuance of this Initial Decision, Consumers shall refund the time value of the revenues it collected under the Facilities Agreement prior to October 5, 2010. The revenues so collected total \$5,130,978.

164. Within sixty days of the issuance of this Initial Decision, Michigan Electric shall refund the time value of the revenues it collected under the Facilities and Agency Agreements during 2003 and 2004. These revenues total \$287,992.

165. The refunds described in the two preceding Paragraphs shall be calculated in accordance with 18 C.F.R. § 35.19a through the date of payment.

David H. Coffman
Presiding Administrative Law Judge

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