

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Michigan Electric Transmission Company

Docket No. ER02-562-001

ORDER ACCEPTING COMPLIANCE FILING,
SUBJECT TO CONDITION

(Issued September 10, 2003)

1. On March 4, 2002, the Michigan Electric Transmission Company (METC) submitted a filing in compliance with the Commission Order issued on February 1, 2002.¹ In this order, we accept METC's compliance filing, subject to condition that METC revise its proposed pro forma Generator Interconnection and Operating Agreement (Interconnection Agreement). We find that the filing does not fully comply with our February 1 Order and direct METC to revise Section 4.12.3 of the Interconnection Agreement to clarify language concerning charges for taxes. This order benefits customers by insuring that they will be charged only their appropriate share of the costs incurred by METC.

Background

2. On December 13, 2001, METC filed revised tariff sheets for its Open Access Transmission Tariff (OATT).² The changes relate to Attachment J of the OATT, METC's

¹ Michigan Electric Transmission Co., 98 FERC & 61,111 (2002) (February 1 Order).

² Shortly after the February 1 Order was issued, the Commission conditionally authorized Consumers Energy Company (Consumers) to convert METC into a limited liability company, Michigan Electric Transmission Company, LLC (Michigan Transco, LLC) and to transfer Consumers' interest in Michigan Transco, LLC to an unaffiliated entity, Michigan Transco Holdings, LP, an indirect affiliate of Trans-Elect, Inc. See Trans-Elect, Inc., 98 FERC & 61,142; order on rehearing, 98 FERC & 61,368 (2002). On April 12, 2002, the Commission conditionally authorized the transfer of operational

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pro forma Generator Interconnection and Operating Agreement. METC stated that the changes are necessary since it might be subject to an income tax expense due to contributions by the generator for the construction of Interconnection Facilities. Therefore, it proposed to add a new Section 4.12 to its Interconnection Agreement and also to add language to the OATT discussing this potential income tax expense and how a Generator is to reimburse METC for it, and to clarify under what circumstances METC will seek private letter rulings from the Internal Revenue Service (IRS) concerning the proper treatment of interconnection payments for tax purposes and the disposition of interconnection payments in regard to those rulings.³ METC proposed to revise Exhibit B to state that costs associated with income tax reimbursement will be billed separately from other costs.

3. In the February 1 Order, the Commission accepted METC's revised tariff sheets subject to conditions and modifications described in the Order. Among other things, the February 1 Order directed METC to revise Section 4.12.3 of its Interconnection Agreement by adding a qualifier to clarify that METC does not have "unfettered discretion" to charge for taxes and to ensure that METC may not collect a tax gross-up from the generator unless METC has first received advice from tax counsel that the interconnection payments are taxable.

4. Now, METC has filed revised tariff sheets to comply with the February 1 Order.

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control of the jurisdictional transmission facilities acquired by Michigan Transco LLC to the Midwest Independent Transmission System Operator, Inc. Trans-Elect, Inc., 99 FERC & 61,068 (2002).

³Section 4.12 of the pro forma Interconnection Agreement, Reimbursement for Income Taxes, refers to the IRS' "Safe Harbor" Notices 88-129 and 2001-82. Under Notice 88-129, Qualifying Facilities (QF) are not customers of the utility and, therefore, payments for interconnection costs are not taxable Contribution in Aid of Construction (CIAC). In addition, the IRS stated that using the utility's transmission lines for wheeling purposes did not cause the contribution, payment or transfer of the interconnection to be a CIAC. Notice 2001-82 extends the safe harbor provisions of Notice 88-129 to include transfers of interties from non-QFs and to transactions in which there is no long-term power purchase contract between the utility and the power producer, but rather the intertie is transferred pursuant to a long-term interconnection agreement and is used for wheeling.

Notice of Filing, Interventions and Protests

5. Notice of the filing was published in the Federal Register, 67 Fed. Reg. 11,685 (March 15, 2002), with comments, protests, or motions to intervene due on or before March 25, 2002. On March 21, 2002, Covert Generating Company, LLC (Covert) and Duke Energy North America, LLC (DENA) (jointly, Covert/DENA) filed a joint protest. Covert/DENA claim that METC failed to comply with the February 1 Order since it did not delete or modify the language contained in Section 4.12.3(b) of the Interconnection Agreement.

Discussion

6. In the February 1 Order, the Commission found that Section 4.12.3 of the Interconnection Agreement gave METC "unfettered discretion" and directed METC to revise it with the qualifier that it would seek the advice of tax advisors, as METC had agreed to do,⁴ before it would seek to collect taxes from the Generator. In the instant filing, METC adds the phrase "based on the advice of tax counsel," but it adds this language only to the new subsection (e) of Section 4.12.3.

7. Covert/DENA argue that Section 4.12.3(b) language continues to give METC unfettered discretion to impose taxes upon the generator. Covert/DENA contend that METC should be required to delete Section 4.12.3(b), or to revise the language by providing that the generator may be required to pay a tax gross-up if, based on the advice of tax counsel, METC determines that the payments made by the generator are taxable income to METC.

8. In order to clarify that METC must obtain the advice of tax counsel before attempting to impose such taxes on the Generator, we direct METC to add to subsection (b) of Section 4.12.3 the qualifier, "based on the advice of tax counsel," and submit this change within 15 days of the date of this order.

⁴METC response, filed January 18, 2002, to the original joint protest of Covert/DENA in this docket.

The Commission orders:

(A) METC's revised tariff sheets are hereby accepted for filing, effective December 13, 2001, subject to the conditions and modifications discussed in the body of this order. Waiver of the 60-day prior notice requirement is hereby granted to permit a December 13, 2001 effective date.

(B) METC must file revised tariff sheets within 15 days of the date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.