

I. Background

3. The Facilities Agreement, dated July 8, 1988, governed the interconnection of Midland's gas-fired cogeneration plant (Midland Plant), a qualifying facility under the Commission's regulations,³ to the transmission system formerly owned by Consumers Energy and now owned by Michigan Electric.⁴ The Facilities Agreement described the facilities required to complete the interconnection, allocated to the parties their responsibility for the cost of those facilities, and provided for Midland to convey to Consumers Energy ownership of certain facilities provided by Midland (Transferred Facilities). In addition, section 3.1 of the Facilities Agreement obligated Consumers Energy to operate and maintain the Transferred Facilities and obligated Midland to reimburse Consumers Energy for all direct and indirect costs and expenses (including property taxes) incurred by Consumers Energy in owning and operating the Transferred Facilities.

4. In 2001, in connection with divestiture of its transmission business, Consumers Energy conveyed its transmission assets, including the Transferred Facilities, to Michigan Electric's predecessor, which was, at the time, a wholly-owned subsidiary of Consumers Energy.⁵ As part of that transaction, Consumers Energy and Michigan Electric entered into an agency agreement, dated April 1, 2001 (Agency Agreement), pursuant to which Consumers Energy delegated to Michigan Electric, as its agent, operating responsibility with respect to the Transferred Facilities.

5. Until 2004, in accordance with section 10 of the Facilities Agreement, Midland reimbursed Consumers Energy, and then Michigan Electric, for the costs (including property taxes) incurred by those companies in operating and owning the Transferred Facilities. Since November 2004, however, Midland has not paid the amounts invoiced

³ 18 C.F.R. Part 292 (2012); see *CMS Midland, Inc.*, 38 FERC ¶ 61,244, at 61,826-27 (1987).

⁴ At the time of the Facilities Agreement's execution, Midland was owned by affiliates or subsidiaries of Consumers Energy and Dow Chemical Company (Dow Chemical), the steam host for the Midland Plant and a purchaser of a small portion of Midland Plant electric energy for its own use. The bulk of the electric energy output is sold to Consumers Energy pursuant to a 1986 power purchase agreement, which has since been amended. Midland is now owned by EQT Infrastructure, a Swedish private equity firm, and Fortistar, an American energy investment group.

⁵ *Consumers Energy Co.*, 94 FERC ¶ 61,018 (2001). In 2002, Michigan Electric was spun off by Consumers Energy as an independent, stand-alone transmission company. In 2006, Michigan Electric was acquired by International Transmission Company.

by Michigan Electric for the services performed by Michigan Electric, as agent for Consumers Energy, under the Facilities Agreement.

6. On January 19, 2010, Michigan Electric filed suit against Midland, in Midland County Circuit Court, seeking reimbursement of its costs to carry out Consumers Energy's duties and obligations under the Facilities Agreement. On February 16, 2010, Midland removed the case to the U.S. District Court for the Eastern District of Michigan, Northern Division (District Court), invoking that court's federal question subject matter jurisdiction. On August 25, 2010, the District Court denied Midland's motion to dismiss and Michigan Electric's motion to remand. The District Court directed the parties to brief the issue of whether this Commission might have either exclusive or primary jurisdiction over the matter.⁶

7. On July 19, 2010, in Docket No. ER10-1814-000, Midwest Independent Transmission System Operator, Inc. (MISO) filed a partially executed generator interconnection agreement (GIA) among itself, Midland, and Michigan Electric that would enable Midland to increase the generating capacity of the Midland Plant. For such increase, MISO required a GIA conforming to MISO's *pro forma* GIA. By its terms, the GIA requires amendment or termination of the Facilities Agreement so that Midland's interconnection service would be governed by only one agreement. In connection with MISO's filing the GIA, Consumers Energy submitted for filing, on August 6, 2010, the previously unfiled Facilities Agreement.

8. In the September 17, 2010 Facilities Agreement Order,⁷ comprising two unconsolidated proceedings, the Commission conditionally accepted the GIA, effective July 20, 2010 (Docket No. ER10-1814-000), and accepted the late-filed Facilities Agreement, effective October 5, 2010 (Docket No. ER10-2156-000). The Commission conditioned its acceptance of the GIA on termination or amendment of the Facilities Agreement. In effect, Midland was given the choice to increase the Midland Plant's capacity under the terms of the GIA or to retain the Midland Plant's existing capacity and the terms and conditions of the Facilities Agreement. The Commission found that the Facilities Agreement became jurisdictional when Midland was first authorized (by contract or otherwise) to make third-party sales of residual capacity and energy, which, under the terms of the original power purchase agreement between Midland and Consumers Energy, was at the Facilities Agreement's inception. Because of the late filing of the Facilities Agreement, the Commission directed Consumers Energy to refund

⁶ *Mich. Elec. Transmission Co. v. Midland Cogeneration Venture, L.P.*, 737 F. Supp. 2d 715 (2010). On September 19, 2012, the District Court stayed its proceedings until termination of this Commission's proceedings or the stay is lifted.

⁷ *Supra* n.2.

the time-value of money collected under the Facilities Agreement for the entire period when it collected revenues without Commission authorization, i.e., up to the Commission-accepted effective date of the Facilities Agreement, October 5, 2010, and to file a report of these refunds. The Commission also directed Michigan Electric to file the Agency Agreement, a jurisdictional agreement.

9. On October 18, 2010, Michigan Electric filed the Agency Agreement (Docket No. ER11-136-000), which the Commission accepted on December 17, 2010.⁸ Michigan Electric also petitioned the Commission for a declaratory order to determine the respective rights and obligations of itself and Midland under the Facilities Agreement and the Agency Agreement, and to require Midland to reimburse Michigan Electric for its costs (including property taxes) in operating and maintaining the Transferred Facilities as provided by the Facilities Agreement (Michigan Electric Petition) (Docket No. EL11-2-000).

10. On December 16, 2010, in Docket No. ER10-2156-002, Consumers Energy filed the refund report required by the Facilities Agreement Order (2010 Refund Report). On October 28, 2011, pursuant to a settlement agreement, dated August 12, 2011, with Midland (Settlement Agreement), which had protested the 2010 Refund Report, Consumers Energy filed a revised refund report (2011 Refund Report), indicating that it had agreed to pay Midland \$250,000 in settlement of their dispute over the amount to be refunded, without resolving any of the underlying issues, and asked the Commission to accept the 2011 Refund Report and this disposition of proceedings in this case.⁹

11. Shortly thereafter, on November 15, 2011, in Docket No. ER12-420-000, Consumers Energy filed a notice of cancellation of the Facilities Agreement (Notice of Cancellation), indicating that prompt cancellation of the Facilities Agreement was consistent with Midland's desire to transition to the new GIA as soon as possible. On January 12, 2012, Commission Staff advised Consumers Energy that the Notice of Cancellation was deficient in that it referenced but did not include the Settlement Agreement between Consumers Energy and Midland.¹⁰ In response, Consumers Energy filed the required information on February 8, 2012. Consumers Energy requested confidential treatment for the Settlement Agreement, however.

⁸ *Mich. Elec. Transmission Co., LLC*, 133 FERC ¶ 61,238 (2010) (Agency Agreement Order). Midland has since requested clarification or, in the alternative, rehearing concerning the viability of Midland's defenses to Michigan Electric's claims for reimbursement. *See infra* P 13.

⁹ Consumers Energy 2011 Refund Report, Transmittal at 2.

¹⁰ *Consumers Energy Co.*, Docket No. ER12-420-000 (January 12, 2012) (January 12 Deficiency Letter).

12. On March 20, 2012, the Commission issued three orders in these proceedings. In Docket No. EL11-2-000, the Commission granted in part and denied in part Michigan Electric's petition for declaratory order.¹¹ The Commission held that the Facilities and Agency Agreements were valid and enforceable during the period before they were filed. The Commission further held that Consumers Energy is entitled to recover from Midland the rates authorized in the Facilities Agreement during the entire period that the agreement was jurisdictional, and Midland was likewise obligated to reimburse Consumers Energy for the costs (including property taxes) that were properly incurred under the Facilities Agreement, to provide operation and maintenance services for the Transferred Facilities. The Commission denied Michigan Electric's request that Midland be directed to pay Michigan Electric directly, noting that, because Midland and Michigan Electric are not themselves parties to an agreement, it is unclear what the contractual basis would be for any such order.¹²

13. In the second order, in Docket No. ER11-136-001, the Commission denied Midland's request for rehearing of the Agency Agreement Order.¹³ The Commission confirmed its earlier finding that the Agency Agreement does not establish the rates chargeable under the Facilities Agreement. Rather, it establishes the rate that Consumers Energy agreed to pay Michigan Electric to perform the former's duties under the Facilities Agreement, as its agent, with Consumers Energy remaining the responsible party for performance of these duties. The Commission rejected Midland's arguments that the rates charged by Consumers Energy under the Facilities Agreement differ from the rates that Michigan Electric seeks to collect under the Agency Agreement, and that Michigan Electric's attempt to recover operation and maintenance expenses related to the interconnection facilities amounts to a direct assignment of transmission costs to an individual interconnection customer in contravention of Commission policy. The Commission also rejected Midland's argument that, because Midland had no reason to object to reimbursing Consumers Energy for the costs incurred by Consumers Energy related to the Dow Chemical meters and equipment, it had no reason to protest the rates contained in the Facilities Agreement in Docket No. ER10-2156-000, as well as Midland's alternative argument that the Facilities Agreement rates are incorporated by reference in the Agency Agreement. Accordingly, the Commission confirmed its earlier finding that, because Midland did not contest the justness and reasonableness of the Facilities Agreement rates in Docket No. ER10-2156-000, it was precluded from doing so

¹¹ *Mich. Elec. Transmission Co., LLC*, 138 FERC ¶ 61,202 (2012) (Declaratory Petition Order).

¹² *Id.* PP 20-23.

¹³ *Mich. Elec. Transmission Co., LLC*, 138 FERC ¶ 61,203 (2012) (Agency Agreement Rehearing Order).

in the Agency Agreement proceeding, and that Midland is therefore obligated to pay the rates and charges set forth in the accepted Facilities Agreement.¹⁴

14. In the third order, in Docket No. ER10-2156-001, the Commission denied the requests for rehearing of the Facilities Agreement Order filed by Consumers Energy and by Michigan Electric, but granted Michigan Electric's request for clarification.¹⁵ The Commission confirmed that its jurisdiction over the Facilities Agreement began when Midland was first authorized, by contract or otherwise, to make third-party sales, in this case, at the time of the Facilities Agreement's execution in 1988. The Commission clarified that the late filings of the Facilities Agreement and the Agency Agreement did not affect the validity and enforceability of these agreements, and that the Facilities Agreement Order did not modify the Commission's precedent regarding time-value refunds. The Commission stated that the terms of the Facilities Agreement do not permit Midland to stop paying the contractual rate contained in the Facilities Agreement, especially when Midland did not assert non-performance by Consumers Energy or refuse to accept performance by Michigan Electric, Consumers Energy's agent.¹⁶

15. In the same order, in Docket No. ER10-2156-002, the Commission noted that the 2010 Refund Report and the 2011 Refund Report did not appear to reflect any amounts billed after 2004 by Michigan Electric in its capacity as Consumers Energy's agent, and that the reports were unclear whether the amounts billed between 2001 and 2004 included only costs incurred by Consumers Energy or, as well, costs incurred by Michigan Electric as its agent.¹⁷ The Commission therefore directed Consumers Energy to file a revised refund report itemizing all amounts billed to Midland by Consumers Energy or by Michigan Electric as its agent, the amounts paid by Midland, and the amounts billed to Midland that remain unpaid.¹⁸

16. On April 6, 2012, in the Cancellation Order (Docket No. ER12-420-000), the Commission accepted the cancellation of the Facilities Agreement, effective January 15, 2012, and denied Michigan Electric's motion and protest asking the Commission to order Consumers Energy to provide it with a copy of the Settlement Agreement between Midland and Consumers Energy. The Commission stated that its acceptance of

¹⁴ *Id.* PP 11-19.

¹⁵ *Midwest Indep. Transmission. Sys. Operator, Inc.*, 138 FERC ¶ 61,204 (2012) (Facilities Agreement Rehearing Order).

¹⁶ *Id.* P 30.

¹⁷ *Id.* P 7 n.14.

¹⁸ *Id.* P 32.

Consumers Energy's Notice of Cancellation did not affect Midland's monetary obligations for costs incurred by Michigan Electric, as Consumers Energy's agent, in providing services under the Facilities Agreement prior to its termination.¹⁹

17. On April 19, 2012, in Docket No. ER10-2156-002, Consumers Energy, in response to the Commission's directive in the Facilities Agreement Rehearing Order,²⁰ filed a further revised refund report (April 19 Refund Report) that included all amounts billed to Midland by both Consumers Energy and Michigan Electric. Consumers Energy filed a corrected refund report on May 25, 2012 (May 25 Refund Report), asking the Commission to substitute the May 25 Refund Report for the April 19 Refund Report. According to Consumers Energy, the May 25 Refund Report reflects all of the billings from Michigan Electric to Midland through the January 15, 2012 termination date.

18. On April 30, 2012, Michigan Electric filed a motion asking the Commission "for an order staying the effectiveness of the orders issued by it on September 17, 2010 in Docket No. ER10-1814[-000] and on April 6, 2012 in Docket No. ER12-420[-000]"²¹ until the earlier of payment by Midland of the amounts it was explicitly ordered by the Commission to pay in the order issued on March 20, 2012 in Docket No. ER10-2156[-002], or final resolution of all the inter-related proceedings in Docket Nos. ER10-1814, ER10-2156, EL11-2, ER11-136 and ER12-410."²² Michigan Electric states that, without the stay, once the conditions to activation of the GIA are satisfied so that the GIA goes into effect, Midland will receive substantial benefits including increased interconnection capacity and reduced cost responsibility. Michigan Electric states also that the interests of justice require the stay because, despite Midland's clear obligation to pay the unpaid amounts billed to it, Midland has indicated that it does not intend to make any such payments until the proceedings in all the related dockets have fully run their course.²³

¹⁹ Cancellation Order, 139 FERC ¶ 61,014 at P 22.

²⁰ Facilities Agreement Rehearing Order, 138 FERC ¶ 61,204 at P 32. *See supra* P 15.

²¹ *See supra* P 8. Michigan Electric refers to the September 17, 2010 Facilities Agreement Order, which addresses two unconsolidated proceedings, Docket No. ER10-2156-000 concerning Commission acceptance of the Facilities Agreement, and, pertinent here, Docket No. ER10-1814-000, Commission conditional acceptance of the GIA. The second reference is to the April 6, 2012 Cancellation Order.

²² Michigan Electric, Motion for Stay, Docket Nos. ER10-1814-000 and ER12-420-000, at 1 (filed April 30, 2012).

²³ *Id.* at 6-7.

19. On May 15, 2012, Midland filed in opposition to Michigan Electric's stay request, and, on May 30, 2012, Michigan Electric filed for leave to answer Midland's opposition. On August 2, 2012, the Commission denied Michigan Electric's stay request.²⁴

20. On May 7, 2012, in Docket No. ER12-420-002, Michigan Electric filed a request for rehearing of the Cancellation Order. On May 22, 2012, Midland filed a motion for leave to answer Michigan Electric's request for rehearing and its answer (Midland's May 22, 2012 Answer).

II. Refund Reports (ER10-2156-002)

A. 2010 Refund Report

21. In the 2010 Refund Report, Consumers Energy claimed that, under Commission precedent, the appropriate refund amount was \$0. Citing *Carolina Power & Light Company*, Consumers Energy argued that, in those situations where the Commission imposes the time-value refund, it limits application of the time-value formula to an amount that permits a public utility to recover its variable costs; the public utility will return to its customers only the interest on monies that it was never authorized to receive, with a variable cost floor to protect the company from operating at a loss.²⁵ Further, citing *Florida Power & Light Company*, Consumers Energy argued that, while public utilities are admonished that interconnection and transmission facility construction-related agreements still must be filed on a timely basis, the Commission reduces or eliminates time-value refunds if a full time-value refund were to result in construction of interconnection and transmission facilities at a loss.²⁶ In a later *Florida Power & Light Company* proceeding, Consumers Energy noted that time value refunds were not required if the monies received did not include a profit and time-value refunds would result in a loss.²⁷

22. Consumers Energy stated that, because the Facilities Agreement provides only for the recovery of costs incurred in providing service and does not provide for payment of amounts beyond the costs and expenses incurred for construction, maintenance and operation of the interconnection facilities, any time-value refunds paid to Midland would

²⁴ *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,100 (2012).

²⁵ Consumers Energy 2010 Refund Report, Transmittal at 1-3 (citing *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,357 (1999)).

²⁶ *Id.* (citing *Florida Power & Light Co.*, 98 FERC ¶ 61,276 (2002)).

²⁷ *Id.* (citing *Florida Power & Light Co.*, 133 FERC ¶ 61,121 (2010)).

cause Consumers Energy to have provided service under the Facilities Agreement at a loss.²⁸

23. Notice of the 2010 Refund Report was published in the *Federal Register*, 75 Fed. Reg. 81,597 (2010), with interventions and protests due on or before January 6, 2011. Midland filed a protest, to which Consumers Energy filed an answer. Subsequently, Consumers Energy and Midland filed a request asking the Commission to defer action on the 2010 Refund Report. Michigan Electric filed comments stating that, while it did not oppose the requested deferral, it reserved the right to comment further on any forthcoming amendment to the 2010 Refund Report.

B. 2011 and 2012 Refund Reports

24. On October 28, 2011, Consumer Energy filed the 2011 Refund Report. Consumers Energy stated in that report that it had reached an agreement with Midland over the amount to be refunded (\$250,000), and that Midland had agreed to withdraw its protest of the 2010 Refund Report.²⁹ On November 2, 2011, Midland filed a motion asking to withdraw the protest.³⁰

25. Subsequently, in response to the Commission's directive in the Facilities Agreement Rehearing Order, Consumers Energy filed, on April 19, 2012, a supplement to the 2011 Report (April 19 Refund Report) to provide the information that the Commission had found lacking in the 2010 Refund Report. Notice of the April 19 Refund Report was published in the *Federal Register*, 77 Fed. Reg. 27,221 (2012), with interventions and protests due on or before May 10, 2012. On May 10, 2012, Michigan Electric filed comments (Michigan Electric 2012 Comments) and Midland filed a protest (Midland 2012 Protest).

26. In response to the Midland Protest of the April 19 Refund Report, Consumers Energy filed, on May 25, 2012, a correction to the April 19 Refund Report (May 25 Refund Report). Notice of the May 25 Refund Report was published in the *Federal Register*, 77 Fed. Reg. 33,209 (2012), with interventions and protests due on or before June 15, 2012. On June 15, 2012, Midland filed comments, and, on July 2, 2012, Consumers Energy filed an answer to Midland's comments.

²⁸ *Id.* at 4-5.

²⁹ *See supra* P 9.

³⁰ The Commission hereby grants Midland's request to withdraw its protest.

May 25 Refund Report

27. Consumers Energy filed the May 25 Refund Report and transmittal as a complete substitute for the April 19 Refund Report and transmittal. In the May 25 Refund Report, Consumers Energy divides its showing of the yearly billings and payments into two parts. It does so because, after conveyance of the Transferred Facilities to Michigan Electric, Consumers Energy continued to bill Midland a small portion of the amounts due under the Facilities Agreement. Part I presents all the amounts that Consumers Energy billed directly to Midland. Part II presents only the amounts that Michigan Electric billed directly to Midland.

28. Part I, Consumers Energy's expenses, itself has two sections. The first section shows \$1,406,085 as the amount billed and collected by Consumers Energy, from 1987 through 1989, to construct the interconnection facilities. The second section shows \$5,219,698 as the amount billed and collected by Consumers Energy for ongoing expenses under the Facilities Agreement from 1989 through January 15, 2012, the effective date of the Commission's acceptance of the Facilities Agreement's cancellation. Both sections show no unpaid amounts and no payments in excess of expenses.

29. Part II, Michigan Electric's ongoing expenses under the Facilities Agreement, extends from 2001 through January 15, 2012. Part II shows \$287,992 as payments made by Midland and \$2,138,649 as the amount remaining unpaid. The amount of Michigan Electric's total expenses, \$2,426,642, includes \$405,561 in interest charged from the time the invoices were due. The other charges are for materials and supplies (\$16,558), contract work (\$250,391), and personal property taxes (\$1,754,132).³¹

30. Consumers Energy states that, once billings are finalized to reflect the termination of the Facilities Agreement, it could, if desired by the Commission, provide updated 2012 information when it becomes available.³²

C. Comments/Protest on the April 19 and May 25 Refund Reports

31. In its May 10, 2012 comments on the April 19 Refund Report, Michigan Electric asks that, if the Commission revises the effective date of the termination of the Facilities Agreement, Michigan Electric should have the right to further supplement the refund

³¹ We assume that rounding causes the slight difference between amount of total expenses and the sum of payments received and payments remaining unpaid. Consumers Energy's figures showing the amount unpaid as of the conclusion of 2010 are close to the amount claimed by Michigan Electric in its October 18, 2010 Petition (Docket No. EL11-2-000). *See supra* P 9.

³² Consumers Energy May 25 Refund Report, Transmittal at 2.

report to cover the period between January 15, 2012 and the new effective termination date. Second, while stating that it agrees with Consumers Energy that no time-value refunds should be ordered under the Facilities Agreement, since the costs incurred and billed under that agreement are limited to out-of-pocket costs and include no profits, if the Commission concludes otherwise and orders time-value refunds, Michigan Electric asks that Consumers Energy be held solely responsible for such refunds. In this regard, Michigan Electric notes that, because it is not a party to the Facilities Agreement, it never had the ability or legal obligation to file the Facilities Agreement under section 205 of the Federal Power Act. Further, Michigan Electric notes that, since it is not a party to or familiar with the terms of the power purchase agreement between Consumers Energy and Midland, which was the factor that caused the Facilities Agreement to come under the Commission's jurisdiction, it was not aware of the third-party sales rights under that agreement.³³

32. In its May 10, 2012 protest to the April 19 Refund Report, Midland argues that Michigan Electric has no right to collect any sums from Midland because it has no contract with Midland. Midland protests the April 19 Refund Report's inclusion of interest and argues that, if Michigan Electric were to receive interest, Michigan Electric would have to refund that interest because the April 19 Refund Report does not indicate that disallowing interest would cause Michigan Electric to operate at a loss. Midland argues further that awarding interest would be inequitable because Michigan Electric is attempting to recover charges assessed on network upgrades on the Michigan Electric side of the interconnection. Midland continues that its settlement with Consumers Energy, which led to Consumers Energy filing the 2011 Refund Report, did not encompass the unpaid Michigan Electric charges, and that the issue of whether property taxes are properly included in the billings remains unresolved.³⁴

33. Midland further claims that some charges submitted by Consumers Energy and Michigan Electric are inaccurate or invalid. Despite the April 19 Report's showing that no overhead was added to Michigan Electric's charges, Midland presents invoices purportedly showing multiple charges for overhead. Also, Midland claims that Michigan Electric charged more for overhead under the Facilities Agreement than allowed under Consumers Energy's standard practices and policies. For example, Midland asserts that Michigan Electric billed for insurance charges, which Consumers Energy never did.

³³ Michigan Electric May 10, 2012 Comments at 1-3 (citing Facilities Agreement Rehearing Order, 138 FERC ¶ 61,204 at PP 30-32).

³⁴ Midland May 10, 2012 Protest at 8-9.

Similarly, Midland states that Michigan Electric billed for Office Support, Mileage, Equipment, Small Tools and Consumables, which Consumers Energy did not.³⁵

34. In its answer to Midland's protest, Consumers Energy argues that the interest to which Midland objects is the interest that Michigan Electric has billed and that Midland has not paid. It contends that no possible time-value refunds can be made of unpaid money, and Midland's arguments concerning interest are irrelevant to the purpose of the refund reports -- time-value refunds. Moreover, the Facilities Agreement specifically provides for interest charges for unpaid bills.³⁶

35. Consumers Energy addresses next the alleged inaccuracies in the report's data and the inconsistencies between charges assessed to Midland by Consumers Energy and charges assessed by Michigan Electric. Consumers Energy concludes that Midland's arguments are based on misinterpretations and mischaracterizations of the charges billed to Midland.³⁷

36. In its June 15, 2012 comments on the May 25 Refund Report, Midland continues to object to the assessment of interest on the grounds that interest paid to Michigan Electric would only have to be later disgorged as time-value refunds because of Michigan Electric's late filing of the Agency Agreement, and also that interest is inequitable because of the late filing. Midland also continues to argue that the May 25 Refund Report is inaccurate and miscalculated. Consumers Energy's July 2, 2012 answer to Midland's comments refutes the claimed inaccuracy and misrepresentation.³⁸

D. Commission Determination

37. Consumers Energy's May 25 Refund Report raises issues of material fact that cannot be resolved based on the record before us and thus are more appropriately addressed in the hearing and settlement judge procedures ordered below. The Commission found, in the Declaratory Petition Order, that Midland is obligated to reimburse Consumers Energy for the costs properly incurred (including property taxes)

³⁵ *Id.* at 9-11.

³⁶ Consumers Energy May 25, 2012 Answer at 2-5. The Facilities Agreement, at section 3.6.4, provides for interest on payments not made on before the due date. *See* Consumers Energy Facilities Agreement Filing, Docket No. ER10-2156-000 (filed August 16, 2010).

³⁷ *Id.* at 5-10.

³⁸ Midland June 15, 2012 Answer at 2-4.

under the Facilities Agreement to provide operation and maintenance services.³⁹ However, Midland disputes not just the inclusion of property taxes, but the dollar amounts of particular charges.⁴⁰ On the record before us, we cannot verify the accuracy of the charges reflected in the May 25 Refund Report. We find that these disputed issues of material fact are more appropriately addressed in the hearing and settlement procedures ordered below.

38. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2012). If the parties desire, they may by mutual agreement request a specific settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁴¹ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of appointment of the settlement judge concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge. If settlement judge discussions on these various issues ultimately prove unsuccessful, a trial-type hearing shall be held.

III. Rehearing of Facilities Agreement Cancellation (ER12-420-001)

A. Procedural Matter

39. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing.⁴² Accordingly, we reject Midland's May 22, 2012 Answer.

³⁹ Declaratory Petition Order, 138 FERC ¶ 61,202 at P 20.

⁴⁰ Midland May 10, 2012 Protest at 9-11.

⁴¹ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience. (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

⁴² 18 C.F.R. § 385.713(d)(1) (2012).

B. Michigan Electric's Rehearing Request

40. In its request for rehearing of the Cancellation Order, Michigan Electric contends that the Commission erred when it established January 15, 2012, as the effective date for termination of the Facilities Agreement. Michigan Electric states that the earliest practical date that cancellation of the Facilities Agreement could become effective is the date on which all pre-conditions to the effectiveness of the GIA have been satisfied. Otherwise, according to Michigan Electric, termination of the Facilities Agreement would result in an interruption in interconnection service.⁴³ In this regard, Michigan Electric states that the GIA's pre-conditions have not been satisfied because the new metering facilities required by the GIA have not yet been installed and tested.⁴⁴

41. Michigan Electric contends, alternatively, that April 9, 2012 should be the earliest effective date for cancellation of the Facilities Agreement because the Staff's January 12 Deficiency Letter stated that Consumers Energy's response "will constitute an amendment to your [November 15, 2011] filing" and that "a new filing date will be established . . . upon receipt of your response."⁴⁵ Consumers Energy filed its response on February 8, 2012. Michigan Electric points out that the Commission, in the Cancellation Order, denied Consumers Energy's request for waiver of the Commission's 60-day prior notice requirement.⁴⁶ Therefore, according to Michigan Electric, pursuant to the Commission's denial of the requested waiver, the effective date for Consumers Energy's February 8, 2012 filing can be no earlier than April 9, 2012, to fulfill the Commission's 60-day prior notice requirement.⁴⁷

42. Michigan Electric argues against the January 15, 2012 effective date because that date antedates the Commission's April 6, 2012 issuance of the Cancellation Order. According to Michigan Electric, none of the parties knew when the Commission's acceptance of cancellation of the Facilities Agreement would be effective. Michigan Electric, as agent for Consumers Energy, therefore had no choice but to continue to provide interconnection services to Midland under the Facilities Agreement. Michigan Electric speculates that Midland, which accepted those services after January 15, 2012, will maintain that its obligation to pay for those services ceased on that date and

⁴³ Michigan Electric Rehearing Request at 10 n.16.

⁴⁴ *Id.* at 11.

⁴⁵ January 12 Deficiency Letter at 2.

⁴⁶ Cancellation Order, 139 FERC ¶ 61,014 at P 20.

⁴⁷ Michigan Electric Rehearing Request at 9-10.

subsequent services were provided free of charge, which, according to Michigan Electric, would be unlawful, inequitable, and impermissible result.

43. Michigan Electric contends further that the Commission accepted cancellation of the Facilities Agreement without addressing or making any findings as to whether termination of that agreement will cause harm or is just and reasonable and not unduly discriminatory.⁴⁸ Lastly, it contends that the Commission erred by declining to provide Michigan Electric with access to the Settlement Agreement, effectively granting privileged and confidential status to the Settlement Agreement, without first addressing why it was entitled to such status. Michigan Electric states that Consumers Energy merely asserted that the information was commercially sensitive and confidential without supporting its assertion with the required specificity.⁴⁹

C. Commission Determination

44. We will grant rehearing as to the effective date for cancellation of the Facilities Agreement. We agree with Michigan Electric that the effective date for the cancellation should be the date that all conditions to the GIA have been satisfied so that interconnection service is provided under the GIA instead of under the Facilities Agreement. This will enable a seamless transition from the Facilities Agreement to the GIA, and only one interconnection agreement will be operative at any one time.

45. We will require the above-ordered hearing and settlement judge procedures to address the disputed issue of the actual date that the parties to the GIA satisfied the conditions that the Commission made prerequisite to the GIA taking effect. These conditions must be satisfied before interconnection services under the GIA may supersede interconnection services under the Facilities Agreement. Specifically, in its conditional acceptance of the GIA, the Commission required, in accordance with the terms of MISO's *pro forma* GIA, that Midland pay Michigan Electric's costs to install new meters at the six points that interconnect the Midland Plant to the transmission system.⁵⁰ These meters would have to be operational before the GIA could govern the Midland Plant's interconnection and transmission service.

46. The record, however, contains conflicting statements as to whether or when these meters became operational. In its May 7, 2012 request for rehearing of the Cancellation Order, Michigan Electric states that Midland had not yet installed the new metering

⁴⁸ *Id.* at 12.

⁴⁹ *Id.* at 13-15 (citing *KN Interstate Transmission Co.*, 82 FERC ¶ 61,186, at 61,679 (1998)).

⁵⁰ Facilities Agreement Order, 132 FERC ¶ 61,241 at PP 43-44.

facilities which it is required to install as a pre-requisite to activation of the GIA.⁵¹ On the other hand, Midland, in its May 15, 2012 opposition to Michigan Electric's stay request, states that it installed and programmed new meters on January 25, 2012, and conducted a successful test of these meters on April 23, 2012. Midland states further that, after a second, confirmatory test, to which Michigan Electric was invited (but declined to attend), the meters were put into service on May 1, 2012.⁵²

47. The issues in this case are particularly complicated because the parties to the Facilities Agreement and to the GIA are not the same. Thus, despite the fact that Michigan Electric, as agent, has been performing Consumers Energy's functions under the Facilities Agreement since 2001, from a contractual standpoint, Consumers Energy remained obligated to provide interconnection services to Midland under the Facilities Agreement until the date on which Michigan Electric became obligated to provide interconnection service under the GIA. That date cannot occur until the Commission's pre-conditions for the GIA to become operative have been satisfied. Likewise, Michigan Electric remains obligated to Consumers Energy under the Agency Agreement until the effective date of termination of the Facilities Agreement.

48. Article II of the Agency Agreement, "Scope of Delegation to [Michigan Electric]," at section 4, provides that Michigan Electric is to fulfill Consumers Energy's operating responsibility under the Facilities Agreement and references provisions of the separate Facilities Agreement under which Midland is obligated to reimburse Consumers Energy for all direct and indirect costs and expenses (including property taxes) incurred in owning and operating the interconnection facilities. Consumers Energy and Michigan Electric agree that they will cooperate in preparing the invoices to be sent to Midland for recovery of such costs, and that Consumers Energy will designate to Midland the bank and account number to which Midland's payments of these invoices are to be sent. Michigan Electric is also required to keep Consumers Energy informed, on a regular basis, of the status of payments received as well as outstanding or contested invoices.

49. Article II, section 17, of the Agency Agreement references Consumers Energy's right, under section 12 of the Facilities Agreement, to reimbursement from Midland for unpaid costs incurred while performing services in the event of the Facilities Agreement's termination. It then states that Michigan Electric will provide Consumers Energy with a list of such unpaid costs at the time of termination and that Consumers Energy will seek to collect these costs from Midland for the benefit of Michigan Electric.

⁵¹ Michigan Electric Rehearing Request, Docket No. ER12-420-001, at 11 (filed May 7, 2012).

⁵² Midland Opposition to Motion for Stay, Docket Nos. ER10-1814-000 and ER12-420-000, at 3 (filed May 15, 2012).

50. Article V, “Term,” provides that the Agency Agreement shall remain in effect as long as the Facilities Agreement remains in effect, but shall terminate coincidentally with the Facilities Agreement. It continues that, if the need for the Agency Agreement is removed, then Consumers Energy has the right to terminate the Agency Agreement by giving Michigan Electric 30-days’ notice.

51. We conclude that these provisions of the Agency Agreement express an understanding between the parties that, upon termination of the Facilities Agreement, if costs incurred by Michigan Electric have not been paid by Midland, then Consumers Energy will take appropriate action on Michigan Electric’s behalf so that Michigan Electric is reimbursed for any such unpaid costs.

52. Michigan Electric has stated that Consumers Energy did not provide it with the requisite 30-days’ notice before seeking to terminate the Facilities Agreement in its Notice of Cancellation, in which it requested an October 1, 2011 effective date.⁵³ Consumers Energy has not filed any contradictory statement. Further, it is not clear from the record whether, and to what effect, Michigan Electric is pursuing claims that it may have against Consumers Energy under the Agency Agreement.⁵⁴

53. We will deny rehearing on the remaining two issues raised by Michigan Electric, i.e., whether the Commission correctly declined to grant Michigan Electric access to the Settlement Agreement, and whether the Commission correctly accepted the Cancellation Notice without first finding that cancellation of the Facilities Agreement does not cause harm and is just and reasonable. As the Commission stated in the Cancellation Order, it is unclear how the Settlement Agreement between Consumers Energy and Midland could affect Michigan Electric’s claim for reimbursement of its past due costs that it incurred in the performance of Consumers Energy’s obligations under the Facilities Agreement. Moreover, the Cancellation Order neither accepts nor approves the Termination Agreement or the Settlement Agreement. As the Commission noted, Consumers Energy’s submittal of the Termination Agreement (and the Settlement Agreement to which it refers) was merely to demonstrate that Midland – the only customer under the Facilities Agreement – had agreed to its termination.⁵⁵

⁵³ Consumers Energy November 15, 2011 Notice of Cancellation of Facilities Agreement at 1; Michigan Electric December 7, 2011 Motion and Protest at 6.

⁵⁴ We note, in this regard, that Michigan Electric provided Midland with the interconnection services that Consumers Energy was obligated to provide. Had Michigan Electric not done so, it would have been in breach of the Agency Agreement and Consumers Energy would have been in breach of the Facilities Agreement.

⁵⁵ Cancellation Order, 139 FERC ¶ 61,014 at P 23.

54. Michigan Electric is correct in noting that the Commission did not make any specific finding in the Cancellation Order as to whether the cancellation of the Facilities Agreement would cause harm or is just and reasonable and not unduly discriminatory. However, Michigan Electric ignores the fact that the Commission had already accepted the GIA (under which Michigan Electric is the interconnection provider) in the Facilities Agreement Order, conditioned upon termination or amendment of the Facilities Agreement. In fact, in imposing this condition, the Commission was agreeing with arguments made by Michigan Electric and MISO that provisions of the Facilities Agreement were inconsistent with the GIA, and that allowing both the GIA and the Facilities Agreement, in its current form, to remain in effect would cause unnecessary confusion and uncertainty among the parties.⁵⁶ In addition, Michigan Electric has not demonstrated harm as a result of the Commission's acceptance of the termination of the Facilities Agreement.

The Commission orders:

(A) The rehearing request filed by Michigan Electric in Docket No. ER12-420-001 is hereby granted in part and denied in part, as discussed in the body of this order.

(B) We are setting the May 25 Refund Report, filed in Docket No. ER10-2156-002, for hearing and settlement judge procedures, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., chapter 1) a public hearing shall be held concerning the proper charges eligible for reimbursement pursuant to the Facilities Agreement and other matters as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2012), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

⁵⁶ See Facilities Agreement Order, 132 FERC ¶ 61,241 at P 34.

(E) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.