

152 FERC ¶ 61,043
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

International Transmission Company

Docket No. ER12-2170-001

ORDER ON REHEARING

(Issued July 16, 2015)

1. In this order, we deny Detroit Edison Company's (Detroit Edison) request for rehearing of the Commission's August 28, 2012 order in this proceeding,¹ and grant in part and deny in part International Transmission Company's (ITC) request for rehearing of the August 2012 Order. In the August 2012 Order, the Commission conditionally accepted ITC's filing of the Belle River Transmission Ownership and Operating Agreement (Belle River Agreement) between ITC and Michigan Public Power Agency (MPPA).² The agreement, which was originally entered into in 1982 between Detroit Edison and MPPA, was assigned to ITC in 2001 in conjunction with ITC's acquisition of Detroit Edison's transmission assets. In the August 2012 Order, the Commission also directed ITC to file a revised refund report.

I. Background

2. On June 29, 2012, pursuant to section 205 of the Federal Power Act (FPA)³ and Part 35 of the Commission's regulations,⁴ ITC filed the Belle River Agreement between

¹ *International Transmission Co.*, 140 FERC ¶ 61,151 (2012) (August 2012 Order).

² International Transmission Company, FERC Electric Tariff, ITCTransmission Agreements, [ITCTransmission RS 16, Belle River Transmission Ownership and Operating Agmt, 0.0.0.](#)

³ 16 U.S.C. § 824d (2012).

⁴ 18 C.F.R. pt. 35 (2014).

ITC and MPPA. ITC stated that, after a comprehensive review of all of its contracts, it identified the Belle River Agreement as never having been filed with the Commission. ITC stated that Detroit Edison assigned the Belle River Agreement to ITC in connection with ITC's acquisition of Detroit Edison's transmission assets in 2000.⁵

3. The Belle River Agreement sets forth the terms pursuant to which ITC and MPPA share joint ownership of certain 120 kV and higher voltage transmission lines (Designated Transmission Lines) that were constructed by Detroit Edison and placed in commercial operation prior to December 31, 1981 as part of Detroit Edison's transmission system. Under Section 2.2 of the agreement, Detroit Edison agreed to convey to MPPA, and MPPA agreed to purchase, an undivided interest in the Designated Transmission Lines. Under a formula set forth in Section 3.2 of the agreement, the purchase price for that interest was determined by multiplying Detroit Edison's gross investment in its transmission system, as of December 31, 1981, by a fraction whose numerator is MPPA's entitlement to capacity and energy (expressed in megawatts) from the Belle River generating station, which, under a separate agreement, MPPA and Detroit Edison had agreed to jointly own, and whose denominator is Detroit Edison's average system peak loads (also expressed in megawatts) over the three-year period 1980 – 1982.

4. Under Section 3.6 of the Belle River Agreement, the parties further agreed to share the costs of capital improvements to the Designated Transmission Lines made after the commencement of commercial operation in proportion to their ownership interests. Pursuant to Article 8 of the agreement, Detroit Edison (and now ITC) is responsible for the management, operation, and maintenance of the Designated Transmission Lines. Section 8.2 requires MPPA to pay Detroit Edison (and now ITC) for the operation and maintenance (O&M) and administrative and general expenses allocable to MPPA's ownership interest in the Designated Transmission Lines based on MPPA's proportion of investment in Detroit Edison's (and now ITC's) transmission system.⁶ The costs included in the O&M formula include supervision, engineering, employee payroll, and sales and use taxes.⁷ Under Section 10.2 of the agreement, the parties share property and other taxes arising out of the construction, ownership, operation, maintenance, and use of

⁵ ITC June 29, 2012 Filing at 2-3.

⁶ Under Section 8.2 of the agreement, MPPA's investment in Detroit Edison's (and now ITC's) transmission system is the sum of MPPA's original investment in its undivided interest in the Designated Transmission Lines, as determined under Section 3.2, and its share of the cost of capital improvements made after the Designated Transmission Lines commenced commercial operation, as determined under Section 3.6.

⁷ ITC June 29, 2012 Filing at 5-6.

the Designated Transmission Lines in proportion to their ownership interests in the lines. Likewise, under Section 11.1, the parties share the costs of insurance in proportion to their ownership interests in the Designated Transmission Lines.

5. Section 6.1 of the Belle River Agreement provides that MPPA is entitled to utilize, “without charge or cost, except as specifically set forth in this Agreement,” Detroit Edison’s (and now ITC’s) transmission system, which includes facilities that are not jointly-owned with MPPA, for the purpose of delivering electric capacity and energy to MPPA from various sources, provided that “the total amount of electric capacity and energy being delivered from the Bulk Transmission System in any calendar year . . . shall not exceed the difference between MPPA’s Electric Capability And Energy Entitlement in [the Belle River generating station], expressed in megawatts, and MPPA’s Planned Excess Electric Capability and Energy Entitlement for such calendar year.” Section 6.1 of the Belle River Agreement further provides that Detroit Edison “shall permit MPPA to utilize the Bulk Transmission System to receive electric capacity and energy from Municipal Systems and other utilities and to deliver electric capacity and energy to Municipal Systems and other utilities without regard to the source of the electric capacity and energy to be transferred, subject to mutual agreement regarding the proposed use, scope and utilization, all to be included in separate transmission service tariffs.”

6. ITC filed the Belle River Agreement as a new rate schedule. ITC acknowledged that, under the Commission’s *Prior Notice Order*, it must provide its customer with time value refunds of any amounts that it received under the late-filed agreement.⁸ ITC stated that, beginning in 2003, when Detroit Edison sold ITC to ITC Holdings Corp. (ITC Holdings), ITC invoiced MPPA for \$14,402,532.33. ITC calculated the time value of MPPA’s payments as \$2,895,023.79.⁹ However, ITC stated that, if ITC were required to make such time value refunds to MPPA, it will have performed services under the Belle River Agreement at a loss of approximately \$2.5 million. Therefore, ITC requested waiver of the requirement to make time value refunds.¹⁰ Detroit Edison and MPPA both

⁸ *Id.* at 6 (citing *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,979, *clarified*, 65 FERC ¶ 61,081 (1993) (*Prior Notice Order*)). The *Prior Notice Order* provides that, if a utility files an otherwise just and reasonable cost-based rate after new service has commenced, or if waiver is denied and the proposed rate goes into effect after service has commenced, the utility is required to refund to its customers the time value of the revenues collected, calculated pursuant to section 35.19a of the Commission’s regulations (18 C.F.R. §35.19a), for the entire period that the rate was collected without Commission authorization.

⁹ *Id.* at 7, Attachment D.

¹⁰ *Id.* at 7-8.

protested the filing. In its protest, Detroit Edison asked the Commission to dismiss the filing on the grounds that the Belle River Agreement is not jurisdictional, because it does not provide for rates or charges for jurisdictional services. MPPA argued that ITC did not properly compute the time value of all of MPPA's payments under the agreement prior to its filing or demonstrate that paying time value refunds would cause ITC to not recover its variable O&M expenses.

7. In the August 2012 Order, the Commission conditionally accepted for filing the Belle River Agreement, effective August 29, 2012, as requested. The Commission rejected Detroit Edison's jurisdictional challenge to the filing, finding that the Belle River Agreement provides for jurisdictional service and should be on file with the Commission.¹¹ The Commission noted that, in *PSI Energy*, it had held that its jurisdiction under section 205 extends to agreements that provide for operation and maintenance of jointly-owned jurisdictional facilities.¹² In addition, the Commission referred to the provisions of the agreement that permit MPPA to utilize Detroit Edison's (and now ITC's) entire transmission system, including facilities that are not jointly-owned with MPPA.

8. The Commission also agreed with MPPA that ITC's refund report was deficient. Among other things, the Commission determined that the appropriate date from which ITC should have calculated time value refunds is the date on which ITC succeeded Detroit Edison under the Belle River Agreement in 2001, rather than 2003, when ITC became an independent company under the ownership of ITC Holdings, as ITC had argued.¹³ Further, the Commission found that ITC had not demonstrated that providing time value refunds to MPPA would cause it to operate at a loss under the Belle River Agreement. Accordingly, the Commission directed ITC to 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 Belle River

¹¹ August 2012 Order, 140 FERC ¶ 61,151 at PP 22-24.

¹² *Id.* P 23 (citing *PSI Energy, Inc.*, 63 FERC ¶ 61,107, at 61,753 (1993) (*PSI Energy*)).

¹³ *Id.* P 25 (noting that the transfer of Detroit Edison's transmission assets to ITC became effective on January 1, 2001 and citing DTE Energy Co., Notice of Consummation, Docket No. EC00-86-000 at 4 (filed Dec. 15, 2000)).

Agreement from 2001 and demonstrating that it would be operating at a loss as a result of providing time value refunds.”¹⁴

9. On September 27, 2012, ITC filed a request for clarification, or in the alternative, rehearing, of the August 2012 Order, and Detroit Edison filed a request for rehearing.¹⁵ MPPA and Detroit Edison filed answers to ITC’s request for clarification, or, in the alternative, rehearing on October 10, 2012 and October 12, 2012, respectively.

II. Requests for Clarification/Rehearing of August 2012 Order

A. Procedural Matter

10. Rule 713(d)(1) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2014), prohibits an answer to a request for rehearing. Accordingly, we will reject MPPA’s and Detroit Edison’s answers.

B. ITC’s Request for Rehearing

11. ITC acknowledges that, under the Commission’s *Prior Notice Order*, when a utility files an agreement after service has commenced, it is required to pay time value refunds to the customer for payments received prior to filing, subject to a “floor” to ensure that the utility is not required to provide service at a loss.¹⁶ In its request, ITC states that it is concerned that the instructions contained in the August 2012 Order regarding the calculation of the “floor” for time value refunds do not account for the actual costs incurred by ITC in operating and maintaining a transmission system in general, nor do they account for how these costs are addressed under the Belle River Agreement.¹⁷

12. Specifically, ITC requests that the Commission find that the term “variable operations and maintenance costs” applies to ITC’s system O&M costs, as provided for under the Belle River Agreement. ITC argues that, although transmission O&M costs do

¹⁴ *Id.* P 26. As directed, on September 27, 2012, ITC submitted a revised refund report to provide more detail regarding costs incurred under the Belle River Agreement and to calculate the time value of amounts paid by MPPA beginning in 2001, in compliance with the August 2012 Order.

¹⁵ Although ITC styles its filing as a request for clarification or, in the alternative, rehearing, in substance it is a request for rehearing and we treat it as such.

¹⁶ ITC Request for Rehearing at 1.

¹⁷ *Id.* at 2.

not vary based on customer usage (as is the case with generation operation and maintenance costs), they are nevertheless “variable” because such costs vary on a monthly basis, depending on the system’s needs, the weather, and scheduled and unscheduled maintenance. ITC further argues that its calculation of transmission rates under the ITC Attachment O transmission formula supports the notion that transmission O&M costs are not “variable” in the same sense as generation operation and maintenance costs.¹⁸

13. ITC also requests that the Commission find that the term “out-of-pocket,” as used in the August 2012 Order, applies to allocated system costs provided for under the Belle River Agreement. ITC argues that whether costs are directly tracked and assigned (as they are for capital improvements under the Belle River Agreement), or proportionately allocated to MPPA (as in the case of O&M costs), does not change the fact that these are actual out-of-pocket costs ITC incurred in providing service. ITC adds that, because it does not recover O&M costs allocated to MPPA from other customers, these costs must act as a “floor” for time value refunds to ensure ITC has not provided service at a loss.¹⁹

14. ITC states that other utilities have used allocated costs for purposes of determining the “floor” for time value refunds, citing the Commission’s acceptance of a compliance filing made by Carolina Power & Light Co. (Carolina Power) in Docket No. ER98-3220-003.²⁰ ITC states that, like Carolina Power, for O&M charges under the Belle River Agreement, ITC does not separately track costs associated with specific facilities, but rather allocates to MPPA a portion of ITC’s out-of-pocket system costs. ITC explains that, under Section 8.2 of the Belle River Agreement, ITC calculates MPPA’s investment in the transmission system (i.e., its ownership of the jointly-owned facilities) as a percentage of ITC’s overall transmission system, and then multiplies ITC’s system O&M costs by that percentage to determine MPPA’s share of the costs. ITC states that the

¹⁸ *Id.* at 10-11. ITC references page 3 of ITC Attachment O and states that operations and maintenance costs are a single line item based on total system needs. ITC further notes that ITC’s transmission operations and maintenance costs are not “fixed” because they may vary year after year.

¹⁹ *Id.* at 12.

²⁰ *Id.* (citing *Carolina Power & Light Co.*, Docket No. ER98-3220-003 (Mar. 5, 2001) (delegated letter order)). ITC explains that, in that case, Carolina Power did not track the actual fuel, operations and maintenance, and transmission costs incurred to move power for the customer, but rather identified the costs it attributed to the transaction based on the terms of the agreement, and, in its refund report, described how it allocated fuel charges to the customer.

Belle River Agreement specifies that the O&M costs only include ITC's actual system costs: "operating and maintenance expenses and taxes, other than income taxes, associated with the Bulk Transmission System . . . [including] supervision, engineering, employee pensions and benefits and payroll, [and] sales and use taxes."²¹ ITC adds that there is no return or other profit margin built into the calculation of O&M costs under the Belle River Agreement. Therefore, ITC contends that, "[a]lthough MPPA bears only a share of ITC's system costs, they are nevertheless ITC's out-of-pocket costs incurred in operating and maintaining the jointly-owned facilities as part of ITC's overall transmission system maintenance."²²

15. Similarly, ITC requests that the Commission find that the term "out-of-pocket," as used in the August 2012 Order, should apply to administrative costs for purposes of determining the "floor" for time value refunds. ITC states that, as with O&M costs, these are costs allocated to MPPA based on its ownership percentage of the entire ITC transmission system. ITC further states that these are costs it incurs and must pay, and for which it will suffer a loss if required to pay time value refunds on the amounts received from MPPA.²³ ITC points out that the Commission has granted waiver of time value refunds for revenues collected under other late-filed transmission agreements where the utility included administrative and similar "overheads" in its calculation of actual costs under the agreement.²⁴

16. Finally, ITC requests that the Commission find that ITC's potential liability for time value refunds should be calculated from 2003, when ITC became a fully independent transmission company under ITC Holdings. ITC argues that the Commission must distinguish between when ITC was a subsidiary of Detroit Edison and DTE Energy Company (DTE) and when ITC was purchased by ITC Holdings in 2003. ITC claims that the record is undisputed that Detroit Edison administered the Belle River Agreement until the 2003 transfer of ITC to ITC Holdings.²⁵ Thus, ITC argues, the

²¹ *Id.* at 13 (citing to Section 8.2 of the Belle River Agreement).

²² *Id.*

²³ *Id.* at 13-14.

²⁴ *Id.* at 14 (referring to overhead construction costs in Florida Power & Light Co., Compliance Filing on Refund, Docket No. ER02-766-005 (Aug. 1, 2003) and in Consumers Energy Co., Filing of Facilities Agreement with Michigan Power Limited Partnership, Docket No. ER11-3957-000 (June 30, 2011)).

²⁵ *Id.* at 16. ITC states that this included Detroit Edison's administration of billing and receipt of payment from MPPA.

responsibility for any potential time value refunds due for amounts received during the 2001-2003 period should rest with DTE and Detroit Edison, not ITC.²⁶

17. To further demonstrate DTE and Detroit Edison's control of ITC during 2001-2003, ITC points to a provision in the Stock Purchase Agreement between ITC Holdings and DTE, regarding the sale of ITC to ITC Holdings. Specifically, ITC cites to Section 5.21 of the Stock Purchase Agreement, which states, in part: "In no event shall [DTE] have any obligation under this Section 5.21 with respect to refunds of any payments attributable to the provision of transmission services by [Midwest Independent Transmission System Operator, Inc.], ITC (or any ITC Successor) or Purchaser after the Closing."²⁷ ITC contends that, although this provision addresses refunds related to a specific, then on-going rate case, its terms belie DTE's role in controlling and benefitting from ITC's revenues during the period before ITC Holdings acquired ITC. ITC argues that, as the parent company, DTE, made the commitment to hold ITC Holdings harmless from refunds that might be due for service provided before ITC Holdings acquired ITC. ITC states that DTE felt the need to clarify that it would not be responsible to pay refunds for any services provided after closing. ITC speculates that, if ITC, as a subsidiary of DTE, clearly had control of the assets and agreements thereunder, then no such clarification would be required, unless DTE was the primary beneficiary of ITC's operations.²⁸

C. Detroit Edison's Request for Rehearing

18. In its request for rehearing, Detroit Edison states that the Commission erred in finding that ITC is providing jurisdictional service under the Belle River Agreement, for several reasons. First, Detroit Edison argues that the August 2012 Order fails to give effect to all of the language of Section 6.1 of the Belle River Agreement, which concerns MPPA's use of Detroit Edison's (and now ITC's) transmission system, and departs from prior policy without explanation. Detroit Edison states that the Commission's interpretation of Section 6.1 fails to ascribe meaning to express language specifying that MPPA's use of Detroit Edison's transmission system must occur under separate service

²⁶ *Id.*

²⁷ *Id.* (citing ITC Holdings Corp., Joint Application for Approval of Disposition of Jurisdictional Facilities, Stock Purchase Agreement by and between DTE Energy Co. and ITC Holdings Corp. § 5.21, Docket Nos. EC03-40-000 and ER03-343-000 (Dec. 24, 2002)).

²⁸ *Id.* at 16-17.

agreements, not the Belle River Agreement.²⁹ Detroit Edison also asserts that the Commission departed from prior policy in *PSI Energy* without explanation.³⁰ Detroit Edison states that, in *PSI Energy*, the Commission found that no filing under section 205 of the FPA is necessary where a contract provides for a transfer of ownership in, rather than use of, transmission facilities. Detroit Edison states that the Commission made it clear that, where an agreement provides for utilization fees for use of facilities beyond an entity's ownership interest, the agreement is jurisdictional; however, where it does not, as Detroit Edison states is the case with the Belle River Agreement, the agreement need not be filed under section 205 of the FPA.³¹

19. Second, Detroit Edison claims that the August 2012 Order ignores contemporaneous record evidence demonstrating that the Belle River Agreement does not provide for transmission service. Detroit Edison draws a comparison with the contemporaneous Consumers Energy Transmission Ownership and Operating Agreement (Consumers Agreement), which governs MPPA's ownership interest in, and use of, Consumers Energy Company's (Consumers Energy) transmission system. Detroit Edison states that, while much of the text of Section 6.1 of the Consumers Agreement mirrors that of Section 6.1 in the Belle River Agreement, the Consumers Agreement differs from the Belle River Agreement in two respects: (1) Section 6.1 of the Consumers Agreement does not include the second paragraph in Section 6.1 of the Belle River Agreement, which requires transmission service on Detroit Edison-owned facilities be taken under separate service agreements; and (2) the Belle River Agreement does not include two provisions contained in the Consumers Agreement that specify additional payments to Consumers Energy for MPPA's use of the Consumers Energy transmission system beyond its ownership interest.³² Detroit Edison contends that, unlike the Consumers

²⁹ Detroit Edison Request for Rehearing at 2, 4-5. Section 6.1 of the Belle River Agreement provides that:

EDISON shall permit MPPA to utilize the Bulk Transmission System to receive electric capacity and energy from Municipal Systems and other utilities and to deliver electric capacity and energy to Municipal Systems and other utilities without regard to the source of the electric capacity and energy to be transferred, subject to mutual agreement regarding the proposed use, scope and utilization, all to be included in separate transmission service tariffs.

³⁰ *Id.* at 5-6 (citing *PSI Energy*, 63 FERC ¶ 61,107 at 61,753).

³¹ *Id.* at 6.

³² *Id.*

Agreement, which provides for transmission service to MPPA and is jurisdictional, the parties to the Belle River Agreement specifically added language to clarify that use of Detroit Edison-owned facilities would be governed by separate service agreements. Furthermore, Detroit Edison asserts that the absence of the provisions included in the Consumers Agreement regarding payment for use of the transmission system confirms that the Belle River Agreement did not provide any rights to the Detroit Edison-owned transmission system.³³

20. Third, Detroit Edison asserts that the Commission erred in finding the Belle River Agreement jurisdictional because it obligated Detroit Edison to provide O&M services with respect to the Designated Transmission Lines. Detroit Edison states that the Belle River Agreement only provides MPPA with an ownership interest in the Designated Transmission Lines and obligates MPPA to pay O&M costs and other costs commensurate with its ownership interest.³⁴ Detroit Edison asserts that, although the August 2012 Order analogizes the Belle River Agreement to the operations and maintenance agreement in *PSI Energy*, which the Commission found to be jurisdictional, the facts in *PSI Energy* are fundamentally different. In *PSI Energy*, according to Detroit Edison, the Commission concluded that PSI Energy was providing transmission service to the other system owners in excess of their ownership interests, which is not the case under the Belle River Agreement.³⁵ Additionally, Detroit Edison contends that MPPA is not subject to the Commission's jurisdiction under section 205 of the FPA by reason of section 201(f) of the FPA,³⁶ and that, by extension, the facilities MPPA owns are not jurisdictional facilities and services it provides are not jurisdictional services. Therefore, Detroit Edison reasons that "the O&M services provided with respect to MPPA's ownership share in the Designated Transmission Lines cannot affect a jurisdictional service because there is no MPPA jurisdictional service to affect."³⁷

21. Finally, Detroit Edison states that the August 2012 Order failed to meaningfully address the objections raised by Detroit Edison with regard to the initial filing in its July 20, 2012 protest.

³³ *Id.* at 7.

³⁴ *Id.* at 7-8.

³⁵ *Id.* at 8.

³⁶ 16 U.S.C. § 824(f) (2012).

³⁷ Detroit Edison Request for Rehearing at 8.

D. Commission Determination

22. We deny ITC's request that the Commission grant rehearing on the issue of the date from which ITC's potential liability for time value refunds should be calculated. As the Commission found in the August 2012 Order, the appropriate date from which ITC's potential responsibility for refunds should be calculated is the date on which ITC, a corporate entity separate from Detroit Edison, succeeded Detroit Edison under the Belle River Agreement in 2001.³⁸ In the August 2012 Order, the Commission noted that, in 2000, it authorized the disposition to ITC of Detroit Edison's transmission assets, which included substantially all of its integrated transmission facilities with voltage ratings of 120 kV and above.³⁹ The Commission further noted that Detroit Edison had transferred to ITC all of its transmission assets including "all related tariffs, contracts, books and records" under a Separation and Subscription Agreement, dated December 5, 2000, between Detroit Edison and ITC.⁴⁰ As such, the revised refund report should show costs from 2001 forward.

23. ITC argues that, instead, 2003 is the appropriate date for the calculation of time value refunds because Detroit Edison and DTE had control over ITC during 2001-2003. ITC supports this assertion by referring to the Stock Purchase Agreement between ITC Holdings and DTE. However, the indemnification provisions in the Stock Purchase Agreement with respect to a then-ongoing rate case are not relevant to the instant proceeding or to the question of ITC's potential responsibility for time value refunds. Indeed, ITC points to no provision in the Stock Purchase Agreement that applies to the responsibility of either party to compensate the other for any refund liability related to the Belle River Agreement.

24. We also deny Detroit Edison's request for rehearing. Detroit Edison has not presented any argument on rehearing that persuades us that the Commission's previous determination that the Belle River Agreement provides for jurisdictional service was in error. In this regard, we also reject Detroit Edison's assertion that the Commission failed to "meaningfully address" arguments raised by Detroit Edison in its July 20, 2012 protest and its August 13, 2012 answer.⁴¹

³⁸ August 2012 Order, 140 FERC ¶ 61,151 at P 25. The transfer became effective on January 1, 2001. *See* DTE Energy Co., Notice of Consummation, Docket No. EC00-86-000 at 4 (filed Dec. 15, 2000).

³⁹ *Id.* (citing *DTE Energy Company*, 91 FERC ¶ 61,317 (2000)).

⁴⁰ *Id.*

⁴¹ Detroit Edison Request for Rehearing at 3-4, 9-11.

25. Detroit Edison states that, in determining that ITC provides jurisdictional service under the Belle River Agreement, the Commission ignored crucial language in Section 6.1 of the Belle River Agreement that makes MPPA's utilization of ITC's bulk transmission system "subject to mutual agreement regarding the proposed use, scope and utilization, all to be included in separate transmission service tariffs."⁴² However, as the Commission held in the August 2012 Order, it is clear from the first paragraph of Section 6.1 of the Belle River Agreement that MPPA is entitled to utilize, "without charge or cost, except as specifically set forth in this Agreement," Detroit Edison's (and now ITC's) transmission system, which includes facilities that are not jointly-owned with MPPA, for the purpose of delivering to MPPA, from various sources, electric capacity and energy associated with the Belle River generating station.⁴³ As noted above, the only limitation on MPPA's use of the transmission system under the first paragraph of Section 6.1 is that "the total amount of electric capacity and energy being delivered from the Bulk Transmission System in any calendar year . . . shall not exceed the difference between MPPA's Electric Capability And Energy Entitlement in [the Belle River generating station], expressed in megawatts, and MPPA's Planned Excess Electric Capability and Energy Entitlement for such calendar year." There appear to be no other preconditions to or limitations on MPPA's use of ITC's transmission system as contemplated in the first paragraph of Section 6.1 (except as provided in the third paragraph, which simply requires MPPA to give "reasonable advance notice" of its intent to use the transmission system in certain instances listed in the first paragraph). Detroit Edison's reading of the second paragraph of Section 6.1, which is qualified by the "subject to mutual agreement" clause, would essentially nullify everything the parties agreed to in the first paragraph, since all the details would remain to be worked out in separate transmission tariffs. And the second paragraph of Section 6.1, referencing "additional" service on the transmission system, would seem to apply to service over and above the level of service provided for in the first paragraph.⁴⁴ Moreover, Section 6.1's providing for separate transmission service tariffs do not make the Belle River

⁴² *Id.* at 1, 4.

⁴³ August 2012 Order, 140 FERC ¶ 61,151 at P 24. *See also, Michigan Electric Transmission Co.*, 115 FERC ¶ 61,105, at PP 14-15 (2006), *reh'g denied*, 119 FERC ¶ 61,101 (2007), in which the Commission found that there was jurisdictional transmission service provided under similar joint transmission ownership and operating agreements pursuant to which power was transmitted to the co-owners of the transmission facilities (certain public power agencies) over both the transmission facilities co-owned by the utility and the power agencies and over transmission facilities owned solely by the utility.

⁴⁴ *Id.* P 15.

Agreement any less jurisdictional; the fact that there could be other jurisdictional documents does not diminish the fact that the Belle River Agreement should have been filed.

26. We also disagree with Detroit Edison's argument that the Commission departed from prior policy, as explained in *PSI Energy*, that no filing under section 205 of the FPA is necessary where a contract provides for a transfer of ownership in, rather than use of, transmission facilities.⁴⁵ In *PSI Energy*, the Commission explained that, if the matching of an owner's costs and usage of a joint transmission system were achieved through the transfer of an interest in the joint transmission system, no filing would be required under section 205 of the FPA, only a filing under section 203. However, the Commission explained that, if an owner's utilization of the joint transmission system exceeds its ownership, thereby resulting in the use of another owner's share of the system, any charge for such use must be filed under section 205.⁴⁶ Detroit Edison interprets these statements to mean that where an agreement does not provide for utilization fees for use of facilities beyond an entity's ownership interest in them, as it claims is the case under the Belle River Agreement, the agreement is not jurisdictional.⁴⁷

27. Detroit Edison's reliance on *PSI Energy* is misplaced, for two reasons. First, as already noted, under the first paragraph of Section 6.1 of the Belle River Agreement, MPPA is entitled to use all of ITC's bulk transmission system, not just the facilities that are jointly-owned with ITC, up to an amount necessary to deliver to the MPPA system the capacity and energy associated with MPPA's interest in the Belle River generating plant. Second, in *PSI Energy*, the Commission also held that its jurisdiction under section 205 of the FPA extends to agreements that contain rates and charges for operation and maintenance of jointly-owned jurisdictional facilities. In the August 2012 Order, the Commission found no basis to distinguish the ongoing O&M services provided by ITC under the Belle River Agreement from those provided under the agreements in *PSI Energy*.⁴⁸ Finally, we find no merit in Detroit Edison's argument that, because MPPA is not subject to the Commission's jurisdiction under section 205 of the FPA by reason of section 201(f) of the FPA and, by extension, the facilities that MPPA owns are not jurisdictional facilities and the services MPPA provides are not jurisdictional services, ITC's O&M services provided with respect to MPPA's interest in the

⁴⁵ Detroit Edison Request for Rehearing at 2 (citing *PSI Energy*, 63 FERC ¶ 61,107).

⁴⁶ *Id.* at 6 (citing *PSI Energy*, 63 FERC ¶ 61,107 at 61,753).

⁴⁷ *Id.*

⁴⁸ August 2012 Order, 140 FERC ¶ 61,151 at P 23.

Designated Transmission Lines cannot affect a jurisdictional rate.⁴⁹ Under section 205 of the FPA, the Commission's jurisdiction over transmission service does not depend on the status of the customer; there is nothing in the language of section 205 that would suggest otherwise.⁵⁰

28. Detroit Edison also states that the Commission failed to consider contemporaneous record evidence that the Belle River Agreement does not provide for transmission service, specifically, the distinction that Detroit Edison draws between the terms of MPPA's use of Detroit Edison's (and now ITC's) transmission system under the Belle River Agreement and MPPA's use of Consumers Energy's system under the Consumers Agreement.⁵¹ However, "[w]here the language used [in an agreement] is clear and unambiguous, its interpretation needs no extrinsic evidence as to intent, previous interpretation, or history."⁵² To determine whether an agreement is ambiguous, the Commission must look within the four corners of the agreement and not to outside sources.⁵³ An agreement is ambiguous where it "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business."⁵⁴ In this case, we see no such ambiguity. The distinction Detroit Edison makes between the terms of the Belle River Agreement and the Consumers Agreement turns upon its reading of the second paragraph of Section 6.1 of the Belle River Agreement in relation to the first, which we have already found to be a flawed reading.

29. We will, however, grant ITC's request for rehearing that, for purposes of determining the "floor" for time value refunds under the Belle River Agreement, ITC's

⁴⁹ See Detroit Edison Request for Rehearing at 3, 8.

⁵⁰ 16 U.S.C. § 824d (2012); *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,986 ("The identity of the purchaser of wholesale energy or transmission service, whether publicly-owned or privately-owned, does not affect the Commission's jurisdiction under Part II of the FPA."); *Pacific Gas and Electric Co.*, 109 FERC ¶ 61,392 at P 56 (2004).

⁵¹ Detroit Edison Request for Rehearing at 6; August 2012 Order, 140 FERC ¶ 61,151 at P 11.

⁵² *Columbia Gas Transmission Corp.*, 27 FERC ¶ 61,089, at 61,166 (1984).

⁵³ *Duquesne Light Co.*, 138 FERC ¶ 61,111, at P 27 (2012) (citing *Ophthalmic Surgeons, Ltd. v. Paychex, Inc.*, 632 F.3d 31, 35 (1st Cir. 2011)).

⁵⁴ *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 914 (2d Cir. 2010).

costs are not limited to usage-based variable O&M costs, but also includes other costs, whether fixed or variable, incurred by ITC to operate and maintain the Designated Transmission Lines, including O&M and administrative costs that ITC allocates to MPPA under the Belle River Agreement based on MPPA's investment in ITC's bulk transmission system. Upon review of our precedents, we conclude that ITC would operate at a loss under the Belle River Agreement if it were obligated to make time value refunds to MPPA with respect to amounts collected under the Belle River Agreement prior to its filing. In this regard, we note that the rates under the agreement reflect no contribution to sunk costs, return or other profit margin.

30. In the *Prior Notice Order*, the Commission explained its policy of ordering time value refunds of amounts collected under jurisdictional agreements prior to their filing as follows: "If a utility files an otherwise just and reasonable cost-based rate after new service has commenced, or if waiver is denied and the proposed rate goes into effect after service has commenced, we will require the utility to refund to its customers the time value of the revenues collected . . . for the entire period that the rate was collected without Commission authorization."⁵⁵ The Commission made clear that such a remedy properly balances the competing concerns; it would "encourage respect for and compliance with the [FPA's] prior notice and filing requirements, yet not impose . . . a severe financial burden on the utility filing rates that otherwise are just and reasonable."⁵⁶ The Commission has since reiterated that this remedy 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.⁵⁷

31. However, when applied to transactions, such as power sales, in which the public utility incurred significant variable costs, the remedy may result in unintended consequences, and produce a harsh result. This occurred in *Carolina Power*,⁵⁸ and the Commission responded by establishing a time value refund "floor" to prevent a company from operating at a loss for such power sales. Under this formulation, where the Commission imposes a time value refund, it would limit the refund to an amount that permits a public utility to recover at least its variable costs, which, the Commission stated, would normally include fuel costs and variable O&M expenses. The Commission

⁵⁵ *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,979.

⁵⁶ *Id.* at 61,980.

⁵⁷ *El Paso Electric Co.*, 101 FERC ¶ 61,276 (2002), *reh'g denied*, 105 FERC ¶ 61,131, at PP 19, 38 (2003) (*El Paso*).

⁵⁸ *Carolina Power & Light Co.*, 87 FERC ¶ 61,083 (1999) (*Carolina Power*).

explained that permitting the late-filing 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.”⁵⁹

32. In subsequent orders accepting late-filed agreements, the Commission has reiterated this explanation,⁶⁰ and has spelled out that its refund floor does not include fixed costs.⁶¹ In this regard, however, in contrast to a power sales agreement, under which a generator would normally incur fuel and other O&M expenses that vary depending on the level of service to the customer, a contract providing for transmission service over existing network transmission facilities would normally have little or no variable costs because the utility’s costs, consisting primarily of its sunk investment in the transmission system and fixed O&M expenses, would not vary depending on the level of service to a particular customer. In such cases, in accordance with the *Prior Notice Order*, the Commission has required a late-filing utility that has collected unauthorized revenues to refund interest on the full amount of such revenues. In *El Paso*, for example, the Commission required El Paso Electric Company (El Paso Electric) to refund the time value of all revenues collected under 17 late-filed point-to-point transmission service agreements. In response to the company’s contention that such a remedy was inequitable and disproportionate to the infraction, the Commission pointed out that El Paso Electric was not being ordered to refund the revenues collected, just the time value, i.e., interest on, the amounts collected.⁶² Moreover, the Commission observed that, in that instance, the ordered refunds would not cause El Paso Electric to operate at a loss, just that its profits would be reduced.⁶³

⁵⁹ *Id.* at 61,357.

⁶⁰ *Braintree Elec. Light Dep’t*, 116 FERC ¶ 61,121(2006), *reh’g denied*, 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) (*Braintree Electric*).

⁶¹ *Braintree Electric*, 116 FERC ¶ 61,121 at P 22 & n.12 (“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.)

⁶² *El Paso*, 105 FERC ¶ 61,131 at P 35.

⁶³ *Id.* P 41.

33. In referring to the time value refund floor as a “variable cost” floor that excludes “fixed” costs, the Commission’s orders have caused some confusion as to the types of costs that may be taken into consideration in the time value refund floor, as evidenced by the pleadings in the instant proceedings. For traditional ratemaking purposes, costs are classified as “variable” or “fixed” to determine whether they should be recovered through a commodity or usage charge (e.g., per MWh sold or transmitted), or through a demand or other type of fixed charge. Variable costs are those costs that vary primarily with the MWh of energy produced or transmitted. The Commission classifies certain production O&M accounts as variable (e.g., fuel) and other production O&M accounts as fixed.⁶⁴ By contrast, all transmission O&M is generally classified as fixed.

34. Nevertheless, while still often referring to the time value refund floor as a “variable cost” floor, the Commission has recognized that a utility could be operating at a loss if ordered to refund the time value of amounts collected under a late-filed agreement, even though most or all of the utility’s costs of providing the service are fixed rather than variable. In *FP&L I*⁶⁵ and *Southern California*,⁶⁶ the Commission thus directed the two utilities to return the interest on monies that they were never authorized to receive under unfiled generator interconnection agreements, with a floor to protect the companies from constructing the interconnection facilities at a loss. Likewise, in *FP&L II*, the Commission held that a utility would be operating at a loss if it were ordered to refund the time value of amounts collected under two late-filed generator interconnection agreements representing the actual costs, without profit, of operating and maintaining the interconnection facilities.⁶⁷ The amounts collected by Florida Power included both direct and indirect costs of operating and maintaining the facilities, including an allocation of overhead costs, which, as noted above, are generally classified as fixed. Importantly, there was no discussion in any of these three orders of whether the construction and O&M costs incurred were “variable,” in the sense of being a function of the customer’s usage, as was true of the fuel costs in *Carolina Power*, and the Commission subsequently accepted refund reports in all three cases demonstrating that

⁶⁴ See *Arizona Public Service Co.*, 4 FERC ¶ 61,101, at 61,209-61,210 (1978), in which the Commission adopted the “predominance” method for classifying production O&M expenses.

⁶⁵ *Florida Power & Light Co.*, 98 FERC ¶ 61,276, *reh’g denied*, 99 FERC ¶ 61,320 (2002) (*FP&L I*).

⁶⁶ *Southern California Edison Co.*, 98 FERC ¶ 61,304 (2002) (*Southern California*).

⁶⁷ *Florida Power & Light Co.*, 133 FERC ¶ 61,120 (2010) (*FP&L II*).

any refund of the time value of the amounts collected from the interconnecting generators would cause the utilities to operate at a loss.

35. As noted above, the Belle River Agreement sets forth the terms pursuant to which ITC agreed to sell a partial ownership in the Designated Transmission Lines to MPPA and, thereafter, operate, manage and make capital improvements to the Designated Transmission Lines. Insofar as the agreement relates to ITC's ongoing obligations to operate, manage and make capital improvements to the Designated Transmission Lines, the agreement, in our view, is analogous to the interconnection/construction agreements in *FP&L I*, *FP&L II* and *Southern California*, in that MPPA's investment in the Designated Transmission Lines (which entitles MPPA to utilize Detroit Edison's (and now ITC's) transmission system, "without charge or cost"), was intended to enable MPPA to deliver capacity and energy to its system in amounts equivalent to MPPA's entitlement in the Belle River generating station. While other provisions of Articles 6 and 7 of the agreement appear to contemplate additional jurisdictional transactions and agreements between the parties, the amounts collected by ITC that are at issue in this proceeding relate only to ITC's operation and management of and capital improvements to the Designated Transmission Lines.

36. In the August 2012 Order, the Commission found that ITC did not demonstrate that providing time value refunds to MPPA would have caused it to operate at a loss under the Belle River Agreement. Therefore, ITC was ordered to provide a revised refund report "detailing its actual *variable* out-of-pocket costs (e.g., *variable* operation and maintenance expenses and incremental construction costs) incurred to provide service under the Belle River Agreement from 2001 and demonstrating that it would be operating at a loss as a result of providing time value refunds."⁶⁸ ITC focuses, on rehearing, upon the Commission's policy of not requiring time value refunds if a late-filing utility only recovers its "out-of-pocket costs" incurred to provide the service, with no profit.

37. In retrospect, we recognize that the terminology used in the August 2012 Order to describe ITC's time value refund obligation was confusing and that the Commission has, in fact, applied different time value remedies for late-filed agreements depending on the facts and circumstances of the case before it. The costs incurred by ITC under the Belle River Agreement are not "variable," in the sense that they do not vary depending on the amount of energy produced or transmitted for MPPA. Rather, the costs incurred by ITC relate to operation, maintenance, improvement and ownership of a discrete group of transmission facilities that Detroit Edison sold to MPPA in order to ensure delivery to MPPA of capacity and energy associated with a generating station that the parties had also agreed to jointly-own. Thus, we agree with ITC that the appropriate time value

⁶⁸ August 2012 Order, 140 FERC ¶ 61,151 at P 26 (emphasis supplied).

refund methodology that should apply in this case is not the “variable cost floor” articulated in *Carolina Power*, which is more appropriately applicable to power sales, but instead the refund policy applied in cases such as *FP&L I*, *Southern California*, and *FP&L II*, which involved the construction, operation and maintenance of transmission facilities to serve the requirements of a single customer. In each of those three cases, the Commission ultimately accepted time value refund reports demonstrating that the utility would have operated at a loss if required to refund the time value of amounts collected due to the late filing of the interconnection agreements.

38. The Commission recently reached a consistent conclusion in *Tucson Electric Power Company*, a case involving joint ownership of transmission lines with analogous facts and circumstances.⁶⁹ In that case, the Commission determined that Tucson Electric Power Company (Tucson) did not owe time value refunds to Salt River Project Agricultural Improvement and Power District (Salt River) under four separate late-filed point-to-point transmission service agreements. Tucson explained that the agreements at issue were “stopgap” agreements designed to provide Salt River a means to transmit its owned or contracted power from certain generating facilities pending the sale by Tucson to Salt River of an undivided interest in an upgraded transmission line. Salt River agreed to pay for construction of certain facilities to expand the capacity of the transmission line in exchange for receiving an undivided ownership interest in the transmission line and the right to the capacity created by the facilities for which it paid. Tucson agreed to operate and maintain the line and Salt River agreed to pay its share of the O&M costs, including allocated overhead costs, based on its ownership percentage. Tucson explained that the transfer of the undivided ownership interest was delayed while details of the transaction were being finalized, and that the rates reflected in the agreements consisted of a carrying charge and Salt River’s proportionate share of O&M expenses as if Salt River were already an owner of the line, using the agreed-upon percentage ownership ratios.⁷⁰ The Commission agreed with Tucson that, since the transmission rates recovered only carrying charges and O&M costs, any time value refunds would result in Tucson operating at a loss.⁷¹

⁶⁹ *Tucson Electric Power Co.*, 151 FERC ¶ 61,088 (2015).

⁷⁰ *Id.* P 9. The carrying cost component was based on the amortization of and annual carrying charge on the book value of the portion of the transmission line to be transferred to Salt River.

⁷¹ *Id.* PP 27, 28.

The Commission orders:

(A) The request for rehearing filed by ITC is hereby granted in part and denied in part, as discussed in the body of this order.

(B) The rehearing request filed by Detroit Edison is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.