153 FERC ¶ 61,185
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Consumers Energy Company Docket No. ER10-2156-004

OPINION NO. 540

ORDER ON INITIAL DECISION

(Issued November 19, 2015)

1. This case is before the Commission on exceptions to an Initial Decision[1] issued on August 18, 2014. The Initial Decision identified and resolved certain issues that the Commission had set for hearing in an order, issued on March 21, 2013, relating to a time value refund report filed by Consumers Energy Company (Consumers Energy) in these proceedings.[2] The principal issue set for hearing concerned the dollar amount of time value refunds, if any, to be paid to Midland Cogeneration Venture Limited Partnership (Midland) by Consumers Energy, and potentially by Michigan Electric Transmission Company, LLC (Michigan Electric), with respect to revenues collected from Midland under an interconnection agreement (Facilities Agreement) between Midland and Consumers Energy that was entered into in 1988 but not filed with the Commission until 2010. For the reasons discussed below, we reverse the findings of the Presiding Judge on the liability of Consumers Energy and Michigan Electric for payment of time value refunds. We affirm in part and reverse in part the findings of the Presiding Judge on other related issues.

[1] *Consumers Energy Co.*, 148 FERC ¶ 63,012 (2014) (Initial Decision).

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

I. Background

A. Facilities Agreement and Related Filings

2. The Facilities Agreement, which was executed on July 8, 1988, and amended on May 28, 2009, governed the interconnection of Midland's cogeneration plant (Midland Plant),[3] located in Midland, Michigan, to the transmission system previously owned by Consumers Energy and currently owned by Michigan Electric.[4] The Facilities Agreement effectuated a July 17, 1986 power purchase agreement (Power Purchase Agreement) between the two companies, pursuant to which Consumers Energy purchases most of the capacity and energy from the Midland Plant.[5] Dow Chemical also has a contractual right to capacity and energy from the plant.

3. The Facilities Agreement described the facilities required to complete the interconnection of the Midland Plant to Consumers Energy's transmission system, allocated to the parties responsibility for constructing, operating, and maintaining those facilities, and provided for the conveyance of ownership to Consumers Energy of certain of the interconnection facilities provided by Midland.[6] Section 3.1 of the Facilities Agreement obligated Consumers Energy to operate and maintain all of the interconnection facilities. Reciprocally, section 3.1 obligated Midland to reimburse Consumers Energy for all direct and indirect costs and expenses (including property

[3] On March 12, 1987, the Midland Plant was certified as a qualifying cogeneration facility (QF), pursuant to section 3(18)(B) of the Federal Power Act (FPA), 16 U.S.C. § 796(18)(B) (2012), and section 292.207 of the Commission's regulations, 18 C.F.R. § 292.207 (2015). *CMS Midland, Inc.*, 38 FERC ¶ 61,244 (1987), *recertified sub nom. Midland Cogeneration Venture Ltd. P'ship*, 124 FERC ¶ 62,060 (2008).

[4] When the Facilities Agreement was executed in 1988, Midland was owned by Consumers Energy and Dow Chemical Company (Dow Chemical) and their affiliates. Currently, Midland's ownership is independent of these companies.

[5] Amendment of the Power Purchase Agreement, on July 9, 2008, necessitated concomitant amendment of the Facilities Agreement on May 28, 2009. Section 3 of the Power Purchase Agreement permits Midland to sell to third parties any capacity and energy that might be available after priority sales to Consumers Energy and Dow Chemical.

[6] Those facilities, described in section 1.6 of the Facilities Agreement, include autotransformers, motor operated disconnect switches, billing meters, conductors, breakers and other related support structures.

taxes) incurred by Consumers Energy in owning, operating, and maintaining the interconnection facilities.

4. In 2001, Consumers Energy transferred its transmission assets, including the Midland Plant interconnection facilities, to Michigan Electric.[7] Because Midland objected to the assignment of the Facilities Agreement to Michigan Electric,[8] Consumers Energy and Michigan Electric entered into an agency agreement (Agency Agreement), under which Michigan Electric, acting as Consumers Energy's agent, fulfilled Consumers Energy's obligations to operate and maintain the Midland Plant interconnection facilities, per the terms of the Facilities Agreement.[9] Under the terms of the Agency Agreement, Consumers Energy authorized Michigan Electric to prepare and submit to Midland invoices for the costs incurred by Michigan Electric in performing Consumers Energy's obligations under the Facilities Agreement. As relevant here, Article III of the Agency Agreement provided that Michigan Electric "shall be entitled to the payments from [Midland] pursuant to the [Facilities Agreement]…." Nevertheless, Consumers Energy remained the party to the Facilities Agreement as well as the purchaser of most of the output of the Midland Plant.

5. At first, Midland paid Michigan Electric's invoices for reimbursement of Michigan Electric's costs in fulfilling Consumers Energy's obligations under the Facilities Agreement. Beginning in November 2004, however, Midland ceased making payments. On January 19, 2010, Michigan Electric sued Midland in state court to recover the unreimbursed expenditures. On February 16, 2010, Midland removed the case to the U.S. District Court for the Eastern District of Michigan (District Court).[10]

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[7] *Consumers Energy Co.*, 94 FERC ¶ 61,018 (2001).

[8] Midland withheld its consent to the assignment of the Facilities Agreement to Michigan Electric because of uncertainty over how such assignment would affect the Power Purchase Agreement, which, under the terms of the Facilities Agreement, was required to be assigned concurrently with any assignment of the Facilities Agreement, as well as under certain other agreements. Midland, Intervention and Protest, Docket Nos. ER11-136-000 and EL11-2-000, Exhibit A at P 6 (filed Nov. 8, 2010).

[9] Michigan Electric became Consumers Energy's agent on April 1, 2001. Thereafter, Michigan Electric sent Midland invoices for reimbursement of the interconnection service's costs and requested direct payment to Michigan Electric.

[10] On September 19, 2012, the District Court stayed its proceedings until termination of Commission proceedings or the District Court otherwise lifted the stay.

6. In 2010, Midland sought to increase the generating capacity of, and sales from, the Midland Plant. Because any such increase would require termination or amendment of the Facilities Agreement and its replacement by a new generator interconnection agreement based on the *pro forma* generator interconnection agreement of Midwest Independent Transmission System Operator, Inc. (since renamed Midcontinent Independent System Operator, Inc.) (MISO), Michigan Electric, Midland, and MISO undertook negotiations of a new generator interconnection agreement. On July 19, 2010, MISO filed a partially executed generator interconnection agreement (Midland GIA) in Docket No. ER10-1814. Midland did not execute the new agreement because it objected to termination or amendment of the Facilities Agreement and to paying for new revenue meters. On August 6, 2010, Consumers Energy filed the Facilities Agreement in Docket No. ER10-2156-000.[11]

7. On September 17, 2010, the Commission conditionally accepted the Midland GIA, effective July 20, 2010, conditioned on Midland's and Consumers Energy's agreement to amend or terminate the Facilities Agreement, on conformance of the Midland GIA to the *pro forma* MISO GIA in certain areas, and on Midland installing revenue meters at six interconnection points.[12] In this same order, the Commission also accepted the late-filed Facilities Agreement, effective October 5, 2010.[13]

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[11] In the transmittal letter to the August 6, 2010 filing, Consumers Energy stated that it first became aware that the Facilities Agreement was within the Commission's jurisdiction only upon the Commission's issuance of an order earlier in 2010 in an unrelated proceeding that clarified the scope of the Commission's jurisdiction over interconnection agreements between a utility and a QF. *See Florida Power & Light Co.*, 133 FERC ¶ 61,121 (2010).

[12] *Midwest Indep. Transmission Sys. Operator, Inc.*, 132 FERC ¶ 61,241, at PP 34-37, 43 (2010) (Facilities Agreement Order), *reh'g denied*, 138 FERC ¶ 61,204 (2012) (Facilities Agreement Rehearing Order), *reh'g denied and clarification granted*, 146 FERC ¶ 61,008 (2014) (January 2014 Order). MISO made compliance filings to fulfil the Commission's conditions for acceptance of the Midland GIA on November 16, 2010, (Docket No. ER11-2137-000) and on June 9, 2011 (Docket No. ER11-3764-000). The filings were accepted under delegated authority on January 28, 2011 and July 20, 2011, respectively. However, Midland and Michigan Electric continued to dispute when the new revenue meters required under the Midland GIA became operational, a precondition in fixing the date on which the Midland GIA became effective, thereby superseding the Facilities Agreement. This issue was resolved by stipulation at hearing. Initial Decision, 148 FERC ¶ 63,012 at PP 2, 48.

[13] Facilities Agreement Order, 132 FERC ¶ 61,241 at P 26.

8. The Commission determined that the Facilities Agreement became jurisdictional on the date that Midland was first authorized (by contract or otherwise) to make third-party sales (that is, sales other than to Consumers Energy or Dow Chemical) of residual capacity and energy from the Midland Plant. Since the original Power Purchase Agreement provided for such third-party sales, the Commission concluded that the Facilities Agreement became a jurisdictional agreement at its inception in 1988. The Commission directed Consumers Energy (or Michigan Electric, as Consumers Energy's agent), within 60 days of the date of its order, to refund the time value of revenues collected under the Facilities Agreement for the entire period during which Consumers Energy collected revenues without Commission approval. It also directed Consumers Energy to file a refund report within 30 days after the refunds were made showing that it had refunded the time value of the revenues collected without Commission approval.[14] Finally, the Commission held that Consumers Energy's filing of the Facilities Agreement did not relieve Michigan Electric of its obligation to file the Agency Agreement, pursuant to which Michigan Electric was providing a jurisdictional service. The Commission therefore directed Michigan Electric to file the agreement within 30 days of the date of the Facilities Agreement Order.[15]

9. On October 18, 2010, Michigan Electric filed the Agency Agreement, in Docket No. ER11-136-000, which the Commission accepted on December 17, 2010.[16] By its terms, the Agency Agreement terminates concurrently with termination of the Facilities Agreement.

10. Also on October 18, 2010, Michigan Electric filed a petition for a declaratory order (Petition), in Docket No. EL11-2-000, asking the Commission to determine the respective rights and obligations of the parties to the Facilities Agreement and of the parties to the Agency Agreement, and to order Midland to reimburse Michigan Electric for property taxes and operations and maintenance (O&M) costs incurred by Michigan Electric in fulfilling Consumers Energy's obligations under the Facilities Agreement.[17] Midland protested the Petition, arguing that Michigan Electric's charges are not just and reasonable because they constitute an impermissible direct assignment of network

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[14] *Id.*

[15] *Id*. P 27

[16] *Mich. Elec. Transmission Co.*, 133 FERC ¶ 61,238 (2010), *reh'g denied*, 138 FERC ¶ 61,203 (2012).

[17] Michigan Electric stated that Midland owed it $1,703,886.78 for property taxes and O&M costs and interest on the unpaid amounts. Petition at 2-3.

charges to individual customers, contrary to Order No. 2003,[18] which prohibits transmission providers from looking to interconnection customers to pay property taxes on transmission providers' equipment. Midland also argued that the charges represent double recovery on the part of Michigan Electric.[19]

11. On December 16, 2010, Consumers Energy filed a time value refund report, in Docket No. ER10-2156-002, in which it asserted that it did not have any obligation to pay time value refunds since the amounts collected from Midland simply reimbursed Consumers Energy for actual costs (including property taxes) incurred to construct, operate, and maintain the Midland Plant interconnection facilities. Midland protested the refund report. On October 11, 2011 and May 25, 2012, Consumers Energy filed revised refund reports, claiming in each case that no time value refunds were due. Midland protested these later filings. As discussed below, the Presiding Judge's findings in the Initial Decision are based on the May 25, 2012 refund report (2012 Refund Report).

12. On August 12, 2011, Consumers Energy and Midland entered into a settlement agreement (Midland Settlement) to resolve various disputes between them. Concerning Docket No. ER10-2156 and the late filing of the Facilities Agreement, Consumers Energy agreed to pay Midland $250,000 "as full settlement of all claims asserted by [Midland] in that docket." Consumers Energy referenced the Midland Settlement when it filed, on November 15, 2011, a notice of cancellation of the Facilities Agreement, in Docket No. ER12-240-000. On January 12, 2012, Commission staff sent Consumers Energy a deficiency letter asking Consumers Energy to provide a copy of the Midland Settlement. On February 8, 2012, Consumers Energy submitted the Midland Settlement

[18] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

[19] Midland, Protest, Docket No. EL11-2-000, at 11-17 (filed Nov. 8, 2010). The history of the dispute between Michigan Electric and Midland is summarized in the Initial Decision and also in the Commission's order on the Petition. *See Mich. Elec. Transmission Co., LLC*, 138 FERC ¶ 61,202, at PP 8-9 (2012) (Declaratory Petition Order), *reh'g denied*, January 2014 Order, 146 FERC ¶ 61,008. The January 2014 Order addressed Midland's requests for rehearing of both the Facilities Agreement Rehearing Order and the Declaratory Petition Order.

for informational purposes, requesting privileged treatment for it. Consumers Energy did not request Commission acceptance of the Midland Settlement.[20]

13. On March 20, 2012, in the Declaratory Petition Order, the Commission granted the Petition in part and denied it in part. The Commission denied Michigan Electric's request for an order directing Midland to pay Michigan Electric directly for the latter's unreimbursed costs, noting that, because the two companies were not parties to any agreement, it was unclear what the contractual basis would be for any such order.[21] The Commission noted that the Agency Agreement requires Consumers Energy and Michigan Electric to cooperate on billing and collection matters. Citing the concurrently issued Facilities Agreement Rehearing Order, the Commission stated that Midland is obligated to reimburse Consumers Energy for properly incurred costs under the Facilities Agreement for the entire period that the Facilities Agreement has been jurisdictional.[22]

14. On April 6, 2012, in Docket No. ER12-420-000, the Commission accepted Consumers Energy's notice of cancellation of the Facilities Agreement, effective January 15, 2012.[23] Michigan Electric, although it requested rehearing of the Facilities Agreement Cancellation Order, acted according to the effective date stated in that order and did not send invoices to Midland for 2012 property taxes and post-January 2012 telemetry charges until February 27, 2014 (Unsent Invoices).[24]

15. On March 21, 2013, the Commission granted in part and denied in part Michigan Electric's request for rehearing of the Facilities Agreement Cancellation Order (Docket No. ER12-420-001). It made the effective date of cancellation of the Facilities

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[20] Consumers Energy, Response to January 12, 2012 Deficiency Letter, Exhibit A, Settlement, Docket No. ER12-420-000 (filed Feb. 8, 2012). Consumers Energy also filed the Midland Settlement in the hearing proceedings as Exhibit C-6. Consumers Energy subsequently agreed that the Midland Settlement may be part of the public record. *See* Consumers Energy and Midland, Joint Motion to Lift Protective Order, Docket No. ER10-2156-004 (filed Apr. 17, 2014).

[21] Declaratory Petition Order, 138 FERC ¶ 61,202 at P 21.

[22] *Id*. P 20.

[23] *Consumers Energy Co.*, 139 FERC ¶ 61,014 (2012) (Facilities Agreement Cancellation Order), *stay denied*, 140 FERC ¶ 61,100 (2012), *order on reh'g*, Hearing Order, 142 FERC ¶ 61,193 at P 44.

[24] Michigan Electric June 6, 2014 Initial Post Hearing Brief at P 32.

Agreement dependent on satisfaction of all conditions prerequisite to the Midland GIA becoming effective. In the same order, which also addressed Consumers Energy's submittal of time value refund reports (Docket No. ER10-2156-002), the Commission set the 2012 Refund Report for hearing and settlement judge procedures. In the 2012 Refund Report, Consumers Energy listed all amounts billed to and collected from Midland between 1987 and 1989 for construction of the Midland Plant interconnection facilities and for ongoing O&M expenses (including property taxes) incurred by Consumers Energy and later by Michigan Electric during the period beginning in 1989 through the effective date of the Commission's acceptance of cancellation of the Facilities Agreement.[25]

16. Midland and Michigan Electric both filed protests to the 2012 Refund Report, raising various issues, including disagreement over the effective date of cancellation of the Facilities Agreement, whether the refund report's inclusion of interest on amounts that Midland had not paid was appropriate, and whether certain charges reflected on the refund report were inaccurate or invalid. The Commission determined that the 2012 Refund Report raised issues of material fact that could not be resolved on the record and, therefore, set the matter for hearing and settlement judge procedures to determine the time value refunds that Consumers Energy owes Midland, and to address other related matters raised by the parties.[26] Among the issues set for hearing, the Commission required that the hearing and settlement judge procedures address the date upon which the conditions to the Midland GIA had been satisfied so that the Facilities Agreement could be terminated.[27] This, in turn, required a determination of the date when six revenue meters required under the terms of the Midland GIA became operational,

[25] In the Facilities Agreement Rehearing Order, 138 FERC ¶ 61,204 at P 32, the Commission observed that the schedule to Consumers Energy's initial refund report was unclear as to whether it included amounts paid to Consumers Energy or Michigan Electric during the period 2001 to 2004, the period following conveyance of the Midland Plant interconnection facilities to Michigan Electric and before Midland ceased paying invoices sent by Michigan Electric. Additionally, the Commission required Consumers Energy to itemize all amounts that it had billed to Midland directly, the amounts billed by its agent, Michigan Electric, the amounts paid by Midland, and the amounts billed but unpaid. Accordingly, the Commission directed Consumers Energy to file a revised refund report. *Id.*

[26] Hearing Order, 142 FERC ¶ 61,193 at P 2.

[27] *Id.* PP 2, 32-36, 44-46.

thus permitting interconnection service to transition from under the Facilities Agreement to under the Midland GIA.[28]

17. In the January 2014 Order, the Commission denied Midland's requests for rehearing of both the Facilities Agreement Rehearing Order and the Declaratory Petition Order.[29] The Commission reaffirmed that the Facilities Agreement and the Agency Agreement were enforceable as of the date the signatories agreed to perform their respective obligations, and that Midland was obligated to pay the charges provided for in the Facilities Agreement.[30] The Commission clarified that neither the Facilities Agreement Rehearing Order nor the Midland Settlement resolved the issue of whether property taxes on the Midland Plant interconnection facilities were fixed costs or variable costs. Also, the Commission pointed out that time value refunds owing to Midland, if any, were the subject of the previously ordered hearing.[31]

B. Evidentiary Hearing

18. On September 20, 2013, the Settlement Judge reported that the parties had reached an impasse. On September 25, 2013, the Chief Administrative Law Judge established hearing procedures. On November 12, 2013, the Presiding Judge issued an order clarifying the issues set for hearing to include issues relating to the calculation of the interest due Michigan Electric on the unpaid invoices, pursuant to the terms of the Facilities Agreement, and limitations on time value refunds.[32]

19. On January 24, 2014, the participants in the proceeding (including Trial Staff) filed a joint motion asking the Presiding Judge to approve a stipulation that the six new

[28] This issue and certain other issues raised by the 2012 Refund Report were settled by stipulation. *See infra* PP 19-20.

[29] January 2014 Order, 146 FERC ¶ 61,008.

[30] *Id.* PP 19-20, 22, 26, 28.

[31] *Id.* P 31.

[32] *Consumers Energy Co.*, Docket No. ER10-2156-004, at PP 34-40 (Nov. 12, 2013) (unpublished order).

revenue meters became fully operational on September 27, 2012.[33] The Presiding Judge approved the stipulation on January 28, 2014.

20. On April 7, 2013, the participants filed a joint motion asking the Presiding Judge to approve a stipulation that the amounts billed to Midland by Michigan Electric under the terms of the Facilities Agreement, consisting of unreimbursed property taxes ($1,891,631) and O&M expenses ($129,454), were "properly incurred" by Michigan Electric. The participants further agreed that, upon approval of this stipulation, together with the earlier stipulation regarding the operational date of six revenue meters approved by the Presiding Judge on January 28, 2014, only two issues remained to be resolved in the hearing, specifically: (1) what time value refunds, if any, do Consumers Energy and/or Michigan Electric owe to Midland for revenues collected, or to be collected, under the Facilities Agreement; and (2) how much late payment interest does Midland owe under the Facilities Agreement and how should the interest be calculated. The Presiding Judge approved the stipulation on April 11, 2014.

C. Initial Decision

21. On August 18, 2014, the Presiding Judge issued his Initial Decision. He addressed the Commission's stated concerns and the additional issues that he had identified in his November 12, 2013 order clarifying issues set for hearing.

22. The Presiding Judge found the following issues to be non-controversial, either because of his determination that they were not contested or because the participants had stipulated to them: (1) the Midland GIA became effective on September 27, 2012, thereby terminating the Facilities Agreement and the Agency Agreement;[34] (2) the unpaid invoices reflect $2,021,085 of costs that were properly incurred by Michigan Electric;[35] (3) Trial Staff's witness provided undisputed testimony that, prior to the Commission-designated effective date of the Facilities Agreement (October 5, 2010), Consumers Energy collected from Midland revenues totaling $5,130,978 for services rendered under the Facilities Agreement, and the participants stipulated that Michigan Electric collected from Midland revenues totaling $287,992 while acting as Consumers Energy's agent;[36]

[33] This date is when MISO began receiving real-time data from the meters, the remaining condition for the Midland GIA to supersede the Facilities Agreement.

[34] Initial Decision, 148 FERC ¶ 63,012 at P 4.

[35] *Id.* PP 4, 32, 134.

[36] *Id.* P 19. The sum of $5,130,078 that Consumers Energy collected from Midland refers to the on-going expenses of owning, operating, and maintaining the

(continued...)

(4) Trial Staff's witness provided undisputed testimony that all costs incurred by Consumers Energy and Michigan Electric in providing service under the Facilities Agreement were fixed costs, rather than variable costs, in that such costs did not vary with the amount of service provided;[37] and (5) the Facilities Agreement permitted only reimbursement of out-of-pocket costs, with no profit.[38] We find that all of the foregoing factual determinations appear to be well supported by the record.

23. The Presiding Judge also made a number of findings that are now before us on exceptions by one or more of the participants: (1) Consumers Energy and Michigan Electric are each obligated to pay time value refunds to Midland on the amounts collected without authorization from Midland;[39] (2) Midland is obligated to reimburse Michigan Electric for all costs properly incurred by Michigan Electric;[40] (3) Michigan Electric has no obligation to pay time value refunds on the late payment interest component of the revenues that it will collect under the terms of the Facilities Agreement, noting that the Commission had previously held that late payment interest is a component of the Facilities Agreement rates, which were determined to be just and reasonable;[41] (4) section 3.6.4 of the Facilities Agreement requires late payment interest to be calculated using the prime interest rate of JP Morgan Chase Bank, plus one percent, computed on a daily basis,[42] and such interest begins to accrue on the day after the due date, i.e., the 21st day after the invoice was sent;[43] and (5) the parties to the Facilities Agreement intended that simple interest (not compound interest) be charged on late

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Midland Plant interconnection facilities. It does not include the $1,406,088 in construction costs mentioned in the 2012 Refund Report.

[37] *Id.* P 20 (citing Trial Staff May 7, 2014 Exhibit S-1 at 19:8-9, 19:17-20; 23 (Trial Staff's expert witness so stated in written testimony. No participant disputed the statement)).

[38] *Id.* P 53.

[39] *Id.* P 95.

[40] *Id.* P 132.

[41] *Id.* P 133 & n.184.

[42] *Id.* P 137. The Facilities Agreement named the National Bank of Detroit, a predecessor of the J.P. Morgan Chase Bank.

[43] *Id.* P 147.

payments.[44] As discussed below, the Presiding Judge also directed Midland to use Trial Staff's witness's methodology to calculate the amount of interest due Michigan Electric on the unpaid invoices, although expressing doubt as to the correctness of that methodology.[45]

24. Finally, the Presiding Judge held that there was no need to rule on Midland's request for a definitive ruling on whether the Midland Settlement shields Consumers Energy from liability for time value refunds, since no party claimed that the Midland Settlement does so.[46]

D. Post-Initial Decision Events

25. On September 17, 2014, the participants filed briefs on exceptions, and, on October 7, 2014, briefs opposing exceptions.

26. On October 15, 2014, Consumers Energy filed a motion asking the Commission to strike the portions of Midland's and Trial Staff's briefs opposing exceptions in which these participants argue that the Midland Settlement is unenforceable. In support of its motion, Consumers Energy notes that the Presiding Judge did not rule on whether the Midland Settlement shields Consumers Energy from liability for time value refunds. Rather, the Presiding Judge determined that the absence of any party claiming that the Midland Settlement had that effect obviated the need for such a ruling.[47] Consumers Energy also urges that Midland and Trial Staff have waived their rights to address the Midland Settlement's enforceability in their briefs opposing exceptions because they did not first take exception, in their briefs on exceptions, to the relevant finding by the Presiding Judge. Alternatively, Consumers Energy requests leave to reply to Midland's and Trial Staff's arguments, and includes its reply in the filing. Consumers Energy states that Midland and Trial Staff have misstated Consumers Energy's position on this issue. On October 30, 2014, Michigan Electric filed comments in support of the Consumers Energy's motion, while Midland and Trial Staff each filed its opposition to the motion.

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[44] *Id*. PP 138-139.

[45] *Id*. P 152, n.206.

[46] *Id.* P 99 n.138 (citing Midland June 11, 2014 Initial Brief at 10). Subsequently, Michigan Electric took exception to this determination and Midland opposed Michigan Electric's exception.

[47] Consumers Energy Motion at 1-2 (citing Initial Decision, 148 FERC ¶ 63,012 at P 99 n.138).

27. On December 23, 2014, Michigan Electric filed a motion asking the Commission to order Midland to pay it the principal amount owed for the services that it, as agent for Consumers Energy, had provided to Midland under the Facilities Agreement, but which had not been paid. Midland filed its opposition to this motion on December 31, 2014.

28. Separately, on February 3, 2015, the U.S. Court of Appeals for the District of Columbia Circuit, to which Midland had appealed the Commission's orders concerning the Facilities Agreement and the Agency Agreement, determined that it lacked jurisdiction over Midland's challenges. It therefore dismissed Midland's petition for review.[48]

29. On April 9, 2015, Midland filed a notice stating that it had wired $2,021,085 to a bank account for the benefit of Michigan Electric, in accordance with instructions given by Consumers Energy. This amount reflected the unpaid principal amount that the participants had previously stipulated was properly incurred by Michigan Electric under the Facilities Agreement.

30. On July 23, 2015, Consumers Energy filed a motion requesting the Commission to take notice, as applicable authority, of its July 16, 2015 order on rehearing in *International Transmission Co.*, Docket No. ER12-217-001, which granted International Transmission Co.'s (International Transmission) request for rehearing.[49] On August 7, 2015, Michigan Electric filed an answer supporting Consumers Energy's motion, and, on August 13, 2015, Midland filed an answer to Michigan Electric's answer. On August 18, 2015, Michigan Electric filed an answer opposing Midland's August 13, 2015 motion for leave to file an answer.

[48] The court found that Midland had failed to seek rehearing of the Facilities Agreement Order in which the Commission accepted the Facilities Agreement as just and reasonable. It found that Midland's arguments about subsequent orders were, in fact, collateral attacks on the Facilities Agreement Order. Thus, pursuant to section 313(b) of the FPA, 16 U.S.C. § 825l(b) (2012), the court concluded that it was statutorily barred from hearing Midland's challenges to the Facilities Agreement Order because of Midland's failure to seek rehearing of the Facilities Agreement Order. *Midland Cogeneration Venture Ltd. P'ship v. FERC*, No. 12-1224, slip op. at 2 (D.C. Cir. Feb. 3, 2015).

[49] *Int'l Transmission Co.*, 140 FERC ¶ 61,151 (2012) (*ITC*), *order on reh'g*, 152 FERC ¶ 61,043 (2015) (*ITC Rehearing Order*).

E. Issues Raised on Exceptions to the Initial Decision

31. The principal issue raised by Consumers Energy and Michigan Electric in their briefs on exceptions to the Initial Decision relates to the Presiding Judge's determination that Consumers Energy and Michigan Electric are each obligated to pay Midland the time value of the full amounts that each collected from Midland for services under the Facilities Agreement prior to the effective date of that agreement, accrued through the date of payment and calculated in accordance with section 35.19a of the Commission's regulations.[50] In its brief on exceptions, Midland takes issue with the Presiding Judge's determination that Midland is obligated to pay Michigan Electric the unpaid amount reflected in Michigan Electric's invoices, plus interest accrued through the date of payment, and that late payment interest received by Michigan Electric on such amount is not subject to time value refunds. Michigan Electric disputes the Presiding Judge's determination that, in the calculation of late payment interest, only simple interest (i.e., no compounding) is required. It also disputes the Presiding Judge's acceptance of Trial Staff's witness's methodology in calculating late payment interest.

32. In their briefs on exceptions, various participants also take issue with certain findings of the Presiding Judge that are ultimately related to the question of Consumers Energy's and Michigan Electric's obligations to pay time value refunds and the amounts of any such refunds. These include: (1) the Presiding Judge's refusal to rule on the effect of the Midland Settlement on Consumers Energy's time value refund obligation; (2) the Presiding Judge's determination that Michigan Electric, and not Consumers Energy, is responsible for time value refunds on the payments that Michigan Electric received in 2003 – 2004; (3) the Presiding Judge's finding that Michigan Electric had an independent duty to file the Facilities Agreement; (4) the Presiding Judge's refusal to consider Consumers Energy's arguments that its costs were unavoidable and therefore protected from time value refund; and (5) the Presiding Judge's determination that the amount of time value refunds that Consumers Energy is obligated to pay should not be capped at the amount of revenues actually collected from Midland.

[50] 18 C.F.R. § 35.19a (2015).

F. Time Value Refunds

1. Initial Decision

a. Unlimited or Limited Refunds

33. The Presiding Judge noted that, under the Commission's *Prior Notice Order*,[51] a public utility that has made a late filing of a jurisdictional agreement is required to refund the time value of all unauthorized revenues it has collected.[52] He acknowledged, however, that in *Carolina Power & Light Co.*[53] and later cases, the Commission recognized that if the utility incurred primarily variable costs, such as fuel costs and variable O&M expense, this remedy could result in unintended consequences in that the refund amount could cause the utility to sustain a loss if the utility was not able to retain sufficient revenues to cover its variable costs.[54] He accepted, therefore, that the Commission's policy is that the utility's variable costs establish a "floor" that would protect the utility from operating at a loss.[55] Under this approach, the utility can retain sufficient revenues to cover its variable costs (variable-costs floor) under a late-filed agreement. In contrast, he rejected Consumers Energy's and Michigan Electric's contentions that the Commission's time value refund policy focuses only on the profit factor in any unauthorized revenues. Under this approach, the utility may recover all costs incurred as a result of the unauthorized activity, and time value refunds are limited to the amount of the utility's profit. A utility not profiting from the unauthorized transaction need not make time value refunds (all-costs floor).[56]

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[51] *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*).

[52] Initial Decision, 148 FERC ¶ 63,012 at P 62.

[53] 84 FERC ¶ 61,103 (1998), *reh'g denied*, 87 FERC ¶ 61,083 (1999) (*Carolina Power*).

[54] Initial Decision, 148 FERC ¶ 63,012 at P 64.

[55] *Id.* P 67.

[56] *Id.* PP 52-54.

34. The Presiding Judge further noted that the Commission spelled out in subsequent decisions that its refund floor does not include fixed costs.[57] He added that the Facilities Agreement Rehearing Order expressly endorsed the variable-costs floor as the mechanism that prevents time value refunds from causing public utilities to sustain losses from their unauthorized transactions. Therefore, he reasoned, the Commission deems a time value refund to have caused such a loss only when it prevents the utility from retaining its variable costs.[58]

35. The Presiding Judge also stated that, in *ITC*, which raised issues virtually identical to the issues in this proceeding, the Commission plainly endorsed the variable-costs floor advanced by Midland.[59] He further stated that the Commission reiterated in *ITC* that

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[57] *Id.* P 68 (citing *Braintree Elec. Light Dep't*, 116 FERC ¶ 61,121, at P 232 & n.12 (2006), *reh'g denied*, 120 FERC ¶ 61,097, at P 14 (2007); *Pacific Corp.*, 141 FERC ¶ 61,150, at PP 19, 24 (2012) (electric "storage" agreement); *OREG 1, Inc.* 138 FERC ¶ 61,110, at P 19 (2012) (QF self-certification); *Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,061 (2008) (interconnection agreement); *Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,143 (2008) (interconnection agreement); *El Paso Elec. Co.*, 105 FERC ¶ 61,131, at P 22 (2003) (*El Paso*) (transmission agreement)).

[58] *Id.* P 70 (citing Facilities Agreement Rehearing Order, 132 FERC ¶ 61,241 at PP 27-29).

[59] *Id.* PP 73, 77. In *ITC*, Detroit Edison Company (Detroit Edison) and Michigan Public Power Agency (MPPA) jointly owned certain high-voltage transmission lines pursuant to a joint ownership and operating agreement that was entered into in 1982 but not filed with the Commission until 2012. This agreement was assigned to International Transmission in 2001 when Detroit Edison transferred its transmission assets to International Transmission. International Transmission charged MPPA, in proportion to MPPA's ownership interest in the lines, for the costs to operate, maintain, and make capital improvements to the lines. The agreement permitted International Transmission to recover only its "out-of-pocket costs" with no profit. International Transmission objected that time value refunds would cause it to operate at a loss and requested waiver of the requirement to make time value refunds. *ITC*, 140 FERC ¶ 61,151 at PP 5, 7. *ITC* was pending on rehearing when the Initial Decision was issued. On rehearing, the Commission granted International Transmission's rehearing request in part and held that, for purposes of determining the "floor" for time value refunds, costs are not limited to variable O&M costs but also include other costs, fixed or variable, incurred to operate and maintain facilities serving a single customer. Thus, the Commission determined that International Transmission would operate at a loss if required to make time value refunds. *ITC Rehearing Order*, 152 FERC ¶ 61,043 at PP 29-34. The Commission subsequently

(continued...)

when a utility recovers the variable costs it incurred in providing the unauthorized service, the utility does not incur a loss, regardless of whether it recovers its fixed costs.[60]

36. The Presiding Judge next addressed Consumers Energy's and Michigan Electric's arguments that, in cases involving jurisdictional agreements other than power sales agreements (such as was involved in *Carolina Power*), the Commission has limited time value refunds to an amount no larger than the utility's profit, that is, used an all-costs floor.[61] The Presiding Judge stated that the Commission did not disavow a variable-costs floor in *Fla. Power I* and *Fla. Power II*, much less adopt the all-costs floor advocated by Consumers Energy and Michigan Electric. Rather, he stated, the Commission determined that Florida Power had to show not only that it did not make a profit but also that time value refunds would cause the utility to operate at a loss.[62] The Presiding Judge concluded that, in both cases, the Commission's finding that Florida Power made no profit was equivalent to finding that Florida Power's revenues did not exceed its variable costs.[63]

37. The Presiding Judge also discussed Michigan Electric's reliance on *ITC*, in which the Commission stated that "the Commission's time-value refund policy for the late-filed agreements does not require the utility to operate at a loss; if the utility is only recovering its out-of-pocket costs incurred to provide the service, there is no requirement to make time-value refunds."[64] He stated that because International Transmission had not demonstrated that providing time value refunds would have caused it to operate at a loss, the Commission therefore required a revised refund report detailing actual variable out-of-pocket costs (e.g., variable O&M expenses and incremental construction costs) to

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accepted Detroit Edison's refund report and, except for requiring return of an overpayment, found that no other time value refunds were warranted because the amounts billed included no profit or return. *Detroit Edison Co.*, 152 FERC ¶ 61,235, at PP 18, 21 (2015).

[60] Initial Decision, 148 FERC ¶ 63,012 at P 77.

[61] *Id*. P 78; *see Florida. Power & Light Co.*, 98 FERC ¶ 61,276, *reh'g denied*, 99 FERC ¶ 61,320 (2002) (*Fla. Power I*); *Florida Power & Light Co.*, 133 FERC ¶ 61,120 (2010) (*Fla. Power II*).

[62] *Id.* P 83.

[63] *Id.* PP 84-85.

[64] *ITC*, 140 FERC ¶ 61,151 at P 26.

demonstrate that providing time value refunds would result in operating at a loss. Thus, he concluded that the Commission had made clear, in *ITC*, that the only out-of-pocket expenses that comprise a utility's refund floor are variable out-of-pocket expenses.[65]

38. The Presiding Judge added that, in *Granite State Electric Co.,*[66] the energy and capacity costs that caused the loss in that case were variable in that they varied with the amount of energy and capacity purchased. Therefore, the variable costs alone caused the loss, and the variable-costs cap eliminated any time value refund obligation.[67]

39. The Presiding Judge concluded that *Fla. Power I*, *Fla. Power II*, and *Granite State*, the three cases on which Consumers Energy and Michigan Electric principally rely, do not warrant using an all-costs floor.[68]

40. The Presiding Judge addressed the other cases cited by Consumers Energy and Michigan Electric to demonstrate that the Commission offered public utilities an opportunity to make a compliance filing to show why they need not make time value refunds. He stated that the allegations described in those orders were only that making the refunds would cause the utilities to lose money. He stated that the Commission did not address in those cases whether the utilities' revenues included profits. Moreover, he stated, the Commission has explicitly endorsed the variable-costs floor in cases not involving power sales agreements, such as interconnection agreements, and in cases where the variable-costs component was substantially lower than in power sales agreements.[69]

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[65] Initial Decision, 148 FERC ¶ 63,012 at P 87.

[66] 113 FERC ¶ 61,289, at P 1 & n.2, P 16 (2005) (*Granite State*). The case concerned sales of energy and capacity at market based rates before Commission authorization. The Commission ordered refunds collected in excess of cost-based rates. However, where the companies demonstrated that the purchasing costs for energy and capacity exceeded the revenues received from re-selling into the ISO New England market, the Commission did not require refunds.

[67] Initial Decision, 148 FERC ¶ 63,012 at P 91.

[68] *Id.* P 92.

[69] *Id*. P 94. The additional cases that Consumers Energy and Michigan Electric cited are: *Southern Cal. Edison Co.*, 98 FERC ¶ 61,304 (2002) (*Southern California*); *Pacific Gas & Elec. Co.*, 102 FERC ¶ 61,232, at P 28 (2003); *Pacific Gas & Elec. Co.*, 117 FERC ¶ 61,336, at P 15 (2006); *Pacific Gas & Elec. Co.*, 115 FERC ¶ 61,373,

(continued...)

41. The Presiding Judge stated his understanding that, while the Commission has limited time value refunds to the extent necessary to allow a utility to retain its variable costs, it has not otherwise limited their size. Therefore, because all costs incurred under the Facilities Agreement were fixed, rather than variable, a refund of the time value of all unauthorized collections is warranted. He continued that, by assuring that a utility retains revenues sufficient to cover its variable costs, the Commission ensures that the utility is in no worse a position than it would have been in had it not provided the unauthorized service, in which case it would not have collected the revenue nor incurred the variable costs but still would have incurred the fixed costs.[70]

42. The Presiding Judge found that Consumers Energy must refund the time value of the total revenues, $5,130,978, collected from Midland for services provided prior to the Facilities Agreement's effective date, October 5, 2010. The Presiding Judge found it unnecessary to rule on Midland's request for a definitive ruling on whether the Midland Settlement shielded Consumers Energy from liability for time value refunds, since no party asserted that it did. In any event, the Presiding Judge observed that Midland's preference for a ruling was not dispositive, since time value refunds are not meant to remedy any injury to the customer resulting from the late filing of an agreement, but the Commission's ability to enforce section 205 of the FPA.[71]

43. Additionally, the Presiding Judge rejected Consumers Energy's argument that the costs under the Facilities Agreement "are akin to variable costs (e.g., fuel supply) because they would not have been incurred but for the operation of [Midland's] interconnection facilities."[72] He found this argument inconsistent with the evidentiary record. The Presiding Judge observed that property taxes, which accounted for most of the unpaid costs, are clearly fixed costs because they were attributable to ownership of the Midland Plant interconnection facilities and would have been the same regardless of whether Consumers Energy had provided service over them. Moreover, he stated, Consumers Energy did not argue that its expenses were akin to variable costs until its reply brief, when other participants were unable to respond.[73]

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at P 17 (2012); *ITC Midwest, LLC*, 138 FERC ¶ 61,105, at P 17 (2012); *Int'l Transmission Co. and Mich. Elec. Transmission Co.*, 139 FERC ¶ 61,022, at P 5 (2012).

[70] Initial Decision, 148 FERC ¶ 63,012 at PP 95-96.

[71] *Id.* PP 97-100.

[72] *Id.* P 101 (quoting from Consumers Energy July 2, 2014 Reply Brief at 3).

[73] *Id.* PP 101-105.

44. The Presiding Judge stated that although the refund amount imposed on Consumers Energy exceeds the revenues collected, it is not excessive. In this regard, he noted that the size of Consumers Energy's refund "is due solely to the magnitude and length of Consumers' violation, which Consumers could have ended at any time by filing the Facilities Agreement."[74] He further observed that the refund actually leaves Consumers Energy in a better position than if it had complied with the law by not providing the unauthorized service. Consumers Energy would still have incurred all the costs attributable to ownership and maintaining the Midland Plant interconnection facilities but would not have collected the unauthorized revenues. He stated that the remedy he imposed allows Consumers Energy to keep the unauthorized revenues while refunding only their time value.[75]

b. Michigan Electric's Liability for Time Value Refunds

45. As noted above, the Presiding Judge held that Michigan Electric, not Consumers Energy, must pay time value refunds on the $287,992 of unauthorized revenues that Michigan Electric collected from Midland during 2003 and 2004 under the Facilities Agreement. He also held that Michigan Electric had an independent obligation to file the Facilities Agreement once it began to implement the agreement, and that the late filing of the Agency Agreement was an independent basis for requiring Michigan Electric to pay time value refunds on the collections in 2003 and 2004.[76]

46. On the other hand, the Presiding Judge found that Michigan Electric does not have to pay time value refunds on amounts billed but uncollected during the period of violation.[77] In this regard, the Presiding Judge noted that, under the *Prior Notice Order*, a utility is only required to make time value refunds on amounts collected without Commission authorization. Midland had argued that Michigan Electric should pay time

[74] *Id*. P 106 (citing *El Paso,* 105 FERC ¶ 61,131 at P 21). The dollar amount of Consumers Energy's refund liability was not quantified in the Initial Decision. However, in its brief on exceptions, Consumers Energy states that, as of the date of filing its brief, the time value of the amounts collected was $7,921,143. Consumers Energy Sept. 17, 2014 Brief on Exceptions at 1.

[75] Initial Decision, 148 FERC ¶ 63,012 at PP 106-107.

[76] *Id.* PP 123-129.

[77] *Id.* P 130 (citing *Northern States Power Co., a Minnesota corporation,* 146 FERC ¶ 61,007, at P 9 (2014); *Entergy Services, Inc.*, 76 FERC ¶ 61,034, at 61,185-86 (1996)).

value refunds on charges billed before the Facilities Agreement's effective date because Michigan Electric will eventually receive interest on Midland's late payments, which puts Michigan Electric in a position comparable to the position of having received timely payments.[78]

2. Briefs on Exceptions

47. Midland states its general support for the Presiding Judge's finding that Consumers Energy and Michigan Electric must pay time value refunds on the monies that they collected from Midland through 2004. It argues, however, that the Presiding Judge did not go far enough and should have ordered time value refunds on the amounts (including interest) that Michigan Electric will eventually collect when Midland pays Michigan Electric's invoices for service after 2004.[79]

48. Consumers Energy contends that, in finding Consumers Energy responsible for time value refunds on the amounts collected from Midland, which included no profit or return, the Presiding Judge misinterpreted Commission case law and policy. Consumers Energy also argues that the ordered refund is excessive and outside the zone of reasonableness, and that the Presiding Judge erroneously failed to consider Consumers Energy's argument on why its costs are protected from time value refunds.[80] Consumers Energy excepts to the Presiding Judge's understanding and application of *Fla. Power I*, *Fla. Power II*, and *Granite State*.[81]

49. Like Consumers Energy, Michigan Electric urges that no time value refunds be ordered, and that the variable costs floor not apply to this proceeding. Michigan Electric points out that the Commission's use of a variable costs limit to time value refunds was developed in the context of late-filed power sales agreements where most of the costs of providing service were variable costs, such as fuel, and that this limit kept the resulting time value refunds within reasonable bounds. It argues that the Commission has not used this limit in cases where the underlying costs are fixed costs, despite the Presiding Judge's attempt to prove the contrary, and cites, in support, *ITC*, where the Commission

[78] *Id*. PP 131-132 (citing *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,979).

[79] Midland Brief on Exceptions at 12-16.

[80] Consumers Energy Brief on Exceptions at 14.

[81] *Id.* at 15 (citing Initial Decision, 148 FERC ¶ 63,012 at PP 78-92).

stated that "if the utility is only recovering its out-of-pocket costs incurred to provide the service, there is no requirement to make time-value refunds."[82]

50. Trial Staff, like Midland, is generally supportive of the Presiding Judge's finding that Consumers Energy is responsible for time value refunds on the full amount it collected from Midland, but excepts to the Presiding Judge's finding that Michigan Electric must pay time value refunds to Midland on the amounts it collected in 2003-2004. Trial Staff also excepts to the Presiding Judge's findings that Michigan Electric had an independent obligation to file the Facilities Agreement and that Michigan Electric's failure to file the Agency Agreement in timely fashion was a separate ground for assessing time value refunds on Michigan Electric for its collections from Midland.[83]

3. Briefs Opposing Exceptions

51. Midland responds that the Presiding Judge correctly applied the Commission's policy, that the "no loss" rule ensures recovery of only a utility's variable costs. This policy, continues Midland, requires a showing of more than that a time value refund results in a loss; it requires the utility to demonstrate that a time value refund deprives it of recovery of its variable costs.[84]

52. Consumers Energy repeats many of the arguments made earlier in its brief on exceptions. Consumers Energy also addresses Trial Staff's argument that the Presiding Judge should have capped Consumers Energy's time value refunds at the amount that Consumers Energy actually received from Midland. Consumers Energy states that, while it does not disagree with this cap, in case the Commission requires it to pay time value refunds, the Commission's prior policy does not justify any refunds because any time value refund causes a loss to Consumers Energy's out-of-pocket costs that did not include any profit.[85] Consumers Energy also argues that, while it believes that, under Commission precedent, neither it nor Michigan Electric owes a time value refund, if the

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[82] Michigan Electric Brief on Exceptions at 26-28 (citing *ITC*, 140 FERC ¶ 61,151 at P 26).

[83] Trial Staff Brief on Exceptions at 25 (citing Initial Decision, 148 FERC ¶ 63,012 at P 129).

[84] Midland Brief Opposing Exceptions at 7, 9-10.

[85] Consumers Energy Brief Opposing Exceptions at 4 (citing Consumers Energy Brief on Exceptions at 15-21).

Commission finds that Midland is owed a time value refund on the amounts it paid or will pay to Michigan Electric, then Michigan Electric, and not Consumers Energy, should pay this time value refund.[86]

53. Michigan Electric, in its brief opposing exceptions, also repeats many of the same arguments on payment of time value refunds that it made earlier in its brief on exceptions. Michigan Electric, like Consumers Energy, supports the Presiding Judge's findings that public utilities that violate the Commission's prior notice policy do not have to refund the time value of revenues that were never collected during the violation period, and that time value refunds will not apply when Midland ultimately pays, with interest, the amounts that were billed, but not paid, prior to the filing of the Facilities Agreement.

54. Trial Staff contends that the Presiding Judge's interpretation of Commission precedent concerning variable costs as a cap on time value refunds is correct, and that Consumers Energy and Michigan Electric wrongly interpret *Carolina Power*, the *Fla. Power* cases, and *Granite State*.[87]

4. Commission Determinations

55. We find, based on the record in this proceeding, including the 2012 Refund Report, that no time value refunds are required with respect to revenues collected from or to be paid by Midland pursuant to the terms of the Facilities Agreement. Accordingly, we reverse the findings of the Presiding Judge that Consumers Energy and Michigan Electric owe Midland time value refunds on the amounts each collected during the period prior to acceptance of the Facilities Agreement. We affirm the Presiding Judge's finding directing Midland to pay to an account established for Michigan Electric the amounts invoiced beginning in 2004,[88] which Midland did not pay, plus late payment interest per the terms of the Facilities Agreement. We also affirm the Presiding Judge's finding that late payment interest paid to Michigan Electric after acceptance of the Facilities Agreement is not subject to time value refunds.

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[86] *Id.* at 11.

[87] Trial Staff Brief Opposing Exceptions at 12.

[88] As previously noted, on April 9, 2015, Midland paid Michigan Electric the principal amount of the costs incurred by Michigan Electric in providing services, as Consumers Energy's agent, under the Facilities Agreement between 2004 and the agreement's termination on September 27, 2014. *See supra* P 29

56. In finding that Consumers Energy and Michigan Electric are not liable for time value refunds, we agree with Consumers Energy and Michigan Electric that there is little that distinguishes the Facilities Agreement from the generator interconnection agreements that were before the Commission in *Fla. Power I* and *Fla. Power II*. We reject the Presiding Judge's finding that the Commission's citation to *Carolina Power* in later cases, such as *Fla. Power I* and *ITC,* validates application of a variable cost floor on time value refunds in cases, such as the one before us, in which all or most of the costs incurred by a utility to construct, own, and operate transmission facilities for a specific customer are fixed rather than variable. The Facilities Agreement is sufficiently similar to the transmission line ownership and operating agreement that was before the Commission in *ITC,* in that the amounts billed to Midland were for reimbursement of actual costs incurred, whether characterized as variable or fixed, in constructing, owning, and operating interconnection facilities used specifically to serve solely the needs of Midland, and do not include any profit or return. Under the specific circumstances of this case, if Consumers Energy and Michigan Electric were required to refund the time value of payments received, or to be received, from Midland for services performed prior to acceptance of the Facilities Agreement, they would necessarily have operated at a loss, contrary to long established Commission policy.[89]

57. In reaching this decision, we find particularly relevant the Commission's recent order on rehearing in *ITC* (issued subsequent to the Initial Decision and the participants' briefs). There, the Commission acknowledged that its reference to a variable cost floor in later cases had led to confusion over the types of costs that may be taken into consideration when determining the appropriate limit on time value refunds, and noted 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.[90] The Commission distinguished between the time value refund methodology that applies in cases involving power sales (*Carolina Power*), in which the utility typically incurs substantial fuel and other O&M costs that vary with the amount of energy produced or transmitted, and the time value refund methodology that has been used and accepted in numerous generator interconnection and transmission line ownership cases, where the costs incurred are sunk investment in the transmission system or fixed O&M costs that do not vary depending on the amount of energy produced or transmitted (*Fla. Power I*, *Fla.*

[89] *See Fla. Power II*, 133 FERC ¶ 61,120 at P 5 (citing *Fla. Power I*, 98 FERC ¶ 61,276 at 62,150-51).

[90] *ITC Rehearing Order*, 152 FERC ¶ 61,043 at PP 33-34.

Power II, and *Southern California*).[91] The Commission also distinguished cases in which a utility has been ordered to refund the time value of revenues collected under unauthorized agreements providing for general network transmission service (*El Paso*). While costs incurred under such agreements are also fixed, in the sense that the utility's costs do not vary with the amount of energy produced or transmitted, the difference in those cases is that the utility has not made any new investment in facilities or incurred any costs to operate facilities to serve the requirements of a specific customer.

58. Having decided that Consumers Energy and Michigan Electric are not obligated for time value refunds, it is unnecessary to address the participants' exceptions to other findings by the Presiding Judge on issues that are related to the time value refund payment issue. In particular, we need not and do not address: (1) the effect of the Midland Settlement on Consumers Energy's time value refunds; (2) whether Consumers Energy or Michigan Electric is responsible for time value refunds on the payments that Michigan Electric received in 2003 – 2004; (3) whether Michigan Electric had an independent duty to file the Facilities Agreement; (4) whether the Presiding Judge erred in refusing to consider Consumers Energy's arguments that its costs were unavoidable and therefore protected from time value refund; and (5) whether the amount of time value refunds that Consumers Energy is ordered to pay should be capped at the amount of revenues actually collected from Midland. Also, we find it unnecessary to rule on Consumers Energy's October 15, 2014 motion to strike portions of the participants' briefs that discuss whether the Midland Settlement is enforceable, and Michigan Electric's, Midland's, and Trial Staff's responsive motions, since, as stated above, the Midland Settlement is relevant here, if at all, only insofar as it relates to the question of Consumers Energy's liability for time value refunds.

G. Interest on Midland's Payment Obligation

1. Initial Decision

59. The Presiding Judge stated that the participants had stipulated that the unpaid principal amount that Michigan Electric billed to Midland, $1,891,630.56 for property taxes and $129,454.19 for O&M expenses, for a total of $2,021,084.75, reflected costs properly incurred under the Facilities Agreement. However, the participants disagreed as to the calculation of late payment interest on the overdue amounts. As previously noted, the Presiding Judge made findings on three issues. First, he held that the Facilities

[91] *Id*. P 37. *See also CED Corcoran Solar, LLC*, 152 FERC ¶ 61,075 (2015) (finding no time value refunds due on unauthorized collections under a late-filed common facilities agreement that provided only for pass through of actual operating and maintenance costs, without profit).

Agreement provides for simple interest, not compound interest, on overdue amounts. Second, he held that Michigan Electric is not entitled to be paid interest on invoices that it had not sent. Third, he directed Midland to use the methodology for calculating late payment interest advanced by Trial Staff's witness, despite noting that this methodology appears to depart from the requirements of the Facilities Agreement.

a. Simple v. Compound Interest

60. Michigan Electric contended that the Facilities Agreement provides for interest compounded quarterly while Midland and Trial Staff contended that only simple interest is provided for. The Presiding Judge found that, under the Facilities Agreement and the law of Michigan, Michigan Electric is entitled to simple interest.[92] He interpreted the text, "payment not made," in section 3.6.4,[93] to refer only to non-payment of principal and not to the non-payment of interest on the principal in unpaid bills.[94]

61. The Presiding Judge was unpersuaded by Michigan Electric's argument that, because this section also includes the phrase, "the amount [that] becomes past due," the intent is to include both the principal of any unpaid invoice and the late payment interest accrued on the unpaid amounts to date. The Presiding Judge rejected this argument because Michigan Electric did not explain its underlying reasoning and because the phrase in section 3.6.4, "the amount [that] becomes past due," relates not to compounding of interest but to the determination of the interest rate to be paid.[95]

62. Additionally, because the Facilities Agreement provides, in section 11, that "[t]his agreement shall be deemed to be a Michigan contract and shall be construed in accordance with and governed by the laws of Michigan," the Presiding Judge looked for guidance to Michigan law. He found that Michigan case law deems that only simple interest be charged on overdue debt absent an explicit provision for compounding.[96]

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[92] Initial Decision, 148 FERC ¶ 63,012 at PP 134-138.

[93] Section 3.6.4 of the Facilities Agreement states: "Any payment not made on or before the due date set forth in subsection 3.6.2 shall bear interest until paid at the prime rate established by the National Bank of Detroit at the close of business on the date the amount becomes past due, plus one percent, or the maximum rate permitted by law, whichever is less."

[94] Initial Decision, 148 FERC ¶ 63,012 at P 139.

[95] *Id.* PP 139-140.

[96] *Id.* P 142 (citations to Michigan cases omitted).

Lastly, the Presiding Judge rejected Michigan Electric's argument that Order No. 47[97] demonstrates that the Commission's policy supports compound interest. Order No. 47, he stated, applies solely to calculation of interest for funds held subject to refund, and Michigan Electric had not explained why Order No. 47 should govern the interpretation of a contract, which turns on the intent of the parties.[98]

b. Interest on Unsent Invoices

63. The Presiding Judge noted that the participants had agreed that interest should begin to accrue on the day after the charge in a sent invoice became due, i.e., the 21st day after the invoice was sent. He then addressed Michigan Electric's contention that it should be entitled to collect interest on the Unsent Invoices, that is, for the money it spent for work done and taxes paid under the terms of the Facilities Agreement even though it did not invoice Midland for these costs until February 27, 2014.[99] These expenditures are $157,915.77 of property taxes on the interconnection facilities and $2,206.06 on telemetry, incurred from January through September, 2012. Michigan Electric explained that it did not send the invoices in the normal course of business because it thought, from the Commission's acceptance of Consumers Energy's filing of a notice of cancellation for the Facilities Agreement, effective January 15, 2012,[100] that the Facilities Agreement had also terminated on this date.[101]

64. The Presiding Judge rejected Michigan Electric's contention as being contradictory to the plain language of sections 3.6.2[102] and 3.6.4 of the Facilities

[97] *Rate of Interest on Amounts Held Subject to Refund*, Order No. 47, FERC Stats. & Regs. ¶ 30,083, *order on reh'g*, Order No. 47-A, FERC Stats. & Regs. ¶ 30,099 (1979), *clarified*, Order No. 47-B, FERC Stats. & Regs. ¶ 30,121 (1980).

[98] Initial Decision, 148 FERC ¶ 63,012 at PP 143-145; *see* 18 C.F.R. § 35.19a (2015).

[99] *See supra* P 14.

[100] *See* Facilities Agreement Cancellation Order, 139 FERC ¶ 61,014.

[101] Initial Decision, 148 FERC ¶ 63,012 at PP 147-48 (citing Michigan Electric Initial Brief at PP 32-34).

[102] Section 3.6.2 states: "Each statement shall be paid by Seller [Midland] so that Consumers will receive the funds by the 20th day following the day on which the statement is sent, or the first working day thereafter, if the payment date falls on other than a working day."

Agreement, which make sending an invoice a prerequisite to the accrual of late-payment interest on the principal due. Moreover, he noted that Michigan Electric's request for rehearing of the termination date in the Facilities Agreement Cancellation Order shows that Michigan Electric knew that the termination date might be modified. He added that Michigan Electric could have protected itself by continuing to submit invoices until the Facilities Agreement termination date issue was finally resolved.[103]

c. Applicable Interest Rate

65. The Presiding Judge highlighted the methodology used by Trial Staff's witness to calculate Midland's liability for late-payment interest through February 2, 2014, to which no party objected. This methodology applies the prevailing interest rate in effect for any given month to the payment that first became overdue in that month, as well as to all previous overdue amounts. Nonetheless, the Presiding Judge observed that Trial Staff's methodology of calculating monthly interest "appears to have departed" from the methodology prescribed in section 3.6.4 of the Facilities Agreement, which provides that each monthly unpaid amount continues to bear interest at the same rate, month after month, regardless of how interest rates may vary in the future. The Presiding Judge adopted Trial Staff's witness's methodology in lieu of the Facilities Agreement's methodology because no party had challenged this aspect of Trial Staff witness's interest calculation during the hearing, thus waiving any objections they may have had to that methodology.[104]

2. Briefs on Exceptions

66. Michigan Electric excepts to the Presiding Judge's adoption of Trial Staff's variable rate methodology instead of following the Facilities Agreement's fixed rate methodology. Michigan Electric urges that, as the Presiding Judge acknowledged, section 3.6.4 requires that the applicable interest rate in effect on the date that a payment becomes due shall continue to apply to that particular late payment until it is paid. Michigan Electric states that failure of a party or participant to propose adopting the Facilities Agreement's methodology does not mean that it has waived its right to support this methodology in its brief on exceptions.[105] Michigan Electric urges that the language

[103] Initial Decision, 148 FERC ¶ 63,012 at PP 149-150.

[104] *Id.* P 152 & n.206.

[105] Michigan Electric cites Rule 711(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.711(d) (2015), which states that arguments not raised in briefs on exceptions are waived. Michigan Electric claims that the rule does not preclude

(continued...)

of section 3.6.4 is the only evidence required to establish that the late payment interest rate continues until the unpaid amount is paid, and cites Midland's agreement that this meaning is correct.[106]

3. Briefs Opposing Exceptions

67. Midland opposes Michigan Electric's exception to the Presiding Judge's adoption of the interest calculation used by Trial Staff's witness, contending that Michigan Electric is only now challenging testimony, after issuance of the Initial Decision. Midland states that, during the hearing, Michigan Electric submitted testimony on the interest calculation, using the same methodology that Trial Staff's witness used. Moreover, after the Presiding Judge questioned the interest calculation at the July 16, 2014 hearing, Michigan Electric neither corrected the methodology that it and Trial Staff used nor sought to reopen the record to correct its or Trial Staff's witness's testimony. Midland contends that Michigan Electric has not shown the requisite good cause to disturb the finality of the record.[107]

68. Trial Staff states that in testimony and in post-hearing briefs, it, Midland, and Michigan Electric all assumed that late payment interest would be calculated at the prevailing interest rate as that rate changed. Trial Staff states that Michigan Electric's brief on exceptions was the first time that Michigan Electric argued that the interest rate should be calculated separately for each invoice over the fifteen years of Midland's non-payment. Trial Staff states that because no party or participant had proposed or addressed this approach during the hearing, there is no record evidence of what the result would be or whether the variable rate methodology is even feasible.[108]

4. Commission Determination

69. We affirm the Presiding Judge's findings that, under the Facilities Agreement and Michigan law, Michigan Electric is entitled only to simple interest, and that Michigan Electric is not entitled to interest for the late payment of property taxes and O&M costs

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raising arguments on exceptions that were not advanced previously. Michigan Electric Brief on Exceptions at 24-25.

[106] Michigan Electric Brief on Exceptions at 25 (citing Tr. 162:20-23 (Gordon Coffee (Attorney for Midland))).

[107] Midland Brief Opposing Exceptions at 30-33.

[108] Trial Staff Brief Opposing Exceptions at 6-9.

that were incurred through September 2012 but not billed until February 17, 2014, when Michigan Electric finally sent Midland invoices for such amounts. Both findings are supported by ample record evidence.

70. However, we reverse the Presiding Judge as to the methodology by which the applicable interest rate should be applied to unpaid amounts. Section 3.6.4 of the Facilities Agreement provides that "any payment not made on or before the due dates set forth in Subsection 3.6.2 shall bear interest until paid at the prime rate established by the [bank] at the close of business on the date the amount becomes past due, plus one percent, or the maximum rate permitted by law, whichever is less." The Presiding Judge found that this "provision requires that each monthly unpaid amount shall continue to bear *the same interest rate at the same rate, month after month, regardless of how rates may vary in the future*. . . . [E]ach unpaid amount would bear a different interest rate"[109] Thus, we have the Presiding Judge's specific finding of what the parties to the Facilities Agreement intended when they executed the agreement.

71. Despite making this finding, the Presiding Judge directed Midland to calculate late payment interest due Michigan Electric using Trial Staff's witness's methodology. The Presiding Judge's reason for adopting a method that varied from the method provided in the Facilities Agreement was that "the parties have not challenged this aspect of [Trial Staff's witness's] calculations, and have thereby waived any objections they may have had in that regard."[110]

72. The transcript of the July 16, 2014 hearing[111] reflects that, while the parties understood the two different ways of calculating late payment interest, as described by the Presiding Judge, there was no clear agreement among them as to the proper methodology for calculating the interest. Significantly, the transcript does not reflect that the parties intended to waive the requirements of section 3.6.4 of the Facilities Agreement, which, as the Presiding Judge explained, leads to a different calculation than made by Trial Staff's witness. We therefore will not disturb the intent of the parties to the Facilities Agreement and we reverse the Presiding Judge's directive that Midland use Trial Staff's witness's methodology in calculating late payment interest. We instead direct Midland to apply the applicable rate in effect at the time each invoiced amount initially became past due and continue to use that rate, month after month, until that invoice was paid. We agree with the Presiding Judge's observation that this is the

[109] Initial Decision, 148 FERC ¶ 63,012 at P 152 n.206.

[110] *Id*.

[111] Tr. 159:19 – 162:25.

methodology prescribed by section 3.6.4 of the Facilities Agreement. We further find no reason to reopen the record to allow evidence explaining why the approach adopted by the Initial Decision is "better" than the approach advocated by Michigan Electric when the requirements of the Facilities Agreement (as acknowledged by the Presiding Judge) are reasonably clear.

73. The Presiding Judge rejected Trial Staff's recommendation that Midland pay all the invoiced, but previously unpaid, amounts to Consumers Energy, which then should pay Michigan Electric. He found that the Facilities Agreement and the Agency Agreement prescribe that Consumers Energy should establish a bank account in Michigan Electric's name and then direct Midland to wire funds to this bank account. He found that the Commission had implicitly authorized the presiding judge in this proceeding to order refunds. Therefore, he directed Midland and Consumers Energy to make the payments ordered in the Initial Decision, and that the payments be due after the 30-day deadline for filing exceptions has passed.[112]

74. In the Midland Payment Notice, Midland stated that, in accordance with Consumers Energy's instructions, it wired the stipulated unpaid principal amount of Michigan Electric's invoices to a bank account established for the benefit of Michigan Electric. We hold that, within 45 days of the date of this order, Midland must use the same method to make its payment of accrued interest, and, within 60 days of paying accrued interest, shall file a certificate confirming the amount and date of such payment.

H. Stay of Interest Payment

1. Brief on Exceptions

75. In its brief on exceptions, Midland urges that the Presiding Judge's order that Midland pay Michigan Electric the amounts previously billed but unpaid, plus interest, be stayed for two reasons. First, Midland argues, the amount that it has been directed to pay may eventually be partially or completely offset by the time value refunds that Consumers Energy and Michigan Electric must pay so that, after netting all payments, Midland will likely receive money.[113] Second, Midland argues that Michigan Electric

[112] Initial Decision, 148 FERC ¶ 63,012 at PP 153, 155, 158, 160.

[113] Midland Brief on Exceptions at 17.

will not be harmed by delay in payment because it will continue to accrue interest pending court resolution of this proceeding.[114]

2. Brief Opposing Exceptions

76. Consumers Energy opposes Midland's request that payments to Michigan Electric be stayed because these payments may be offset by a potential time value refund that Consumers may owe Midland. While not taking a position on whether Midland's obligation to pay Michigan Electric should be stayed, Consumers Energy objects to the idea that any offset should occur. Consumers Energy argues that the three categories of potential payments in this proceeding, i.e., time value refunds based on Midland's payments to Consumers Energy between 1988-2001, time value refunds based on Midland's payments to Michigan Electric between 2001-2004, and Midland's payments to Michigan Electric for services performed between 2004-2010, are functionally independent of each other and that Midland has provided no reason to require offsetting. Also, Midland assumes that the Commission will require a refund by Consumers Energy, but such refund would cause a loss to Consumers Energy's out-of-pocket expenses, contrary to established Commission policy.[115]

3. Commission Determination

77. We deny Midland's request for a stay on the amounts that the Presiding Judge ordered it to pay to Michigan Electric. As discussed above, we are not requiring Michigan Electric or Consumers Energy to pay time value refunds to Midland on revenues collected under the Facilities Agreement prior to its acceptance by the Commission, and this extends to the interest on overdue payments that the Presiding Judge correctly determined are part of the rates that the Commission accepted. Consequently, there is no potential for netting of the payments between parties.

The Commission orders:

(A) The Initial Decision is hereby affirmed in part and reversed in part, as discussed in the body of this order.

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[114] *Id.* at 18. Midland had also argued that, on appeal, it might be found not liable for payment or that the court could greatly reduce its liability. This argument was mooted when the court dismissed Midland's appeal. *See supra* P 28.

[115] Midland Brief on Exceptions at 19.

(B) Consumers Energy's October 15, 2014 motion and Michigan Electric's December 23, 2014 motion are hereby dismissed as moot.

(C) Consumers Energy's July 23, 2015 motion has already been granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.