

should collect annual charges directly from Michigan Electric Transmission Company, LLC (METC) but left open the question of whether METC could pass these charges onto its customers.

4. In November 2003, Midwest ISO filed further tariff revisions to comply with the October 28 Order. In that filing, Midwest ISO indicated its intention to commence billing METC for Schedule 10 FERC annual charges.

5. On January 20, 2004, Midwest ISO submitted the proposed Schedule 10-FERC-METC in Docket No. ER04-446-000, “designed to provide a tariff mechanism whereby FERC annual charges billed by the Midwest ISO to METC may be billed for recovery by METC from customers taking service under the Midwest ISO OATT within the METC pricing zone.”² The proposed Schedule 10-FERC-METC does not contain provisions that specify the recovery of any particular annual charge amounts. According to Midwest ISO, “actual recovery of annual charges will be reflected in METC invoices to the METC zonal customers.”³ Midwest ISO requests waiver of the 60-day prior notice provision in the Commission regulations (18 C.F.R. § 35(a) (2003)), for an effective date of January 21, 2004, one day after filing.

Notice and Responses

6. Notice of Midwest ISO’s filing was published in the Federal Register, 68 Fed. Reg. 5850 (2004), with comments, protests and motions to intervene due on or before February 10, 2004. METC filed a motion to intervene with comments supporting the filing. Wolverine Power Supply Cooperative, Inc. (Wolverine), the Michigan Public Power Agency and the Michigan South Central Power Agency (jointly, the Michigan Agencies), and Consumers Energy Company (Consumers) all filed motions to intervene and protests. METC also filed an answer to the protests.

² Transmittal Letter at 1. Midwest ISO notes that it is making the filing at METC’s request and, as the administrator of its OATT, takes no position on the filing. Midwest ISO further points out that all service over METC’s facilities is rendered under the Midwest ISO OATT pursuant to Midwest Independent Transmission System Operator, Inc., 102 FERC ¶ 61,181, order granting clarification, 104 FERC ¶ 61,027 (2003) and that the rate for transmission service is \$0.98 per kW/month (\$980.00 per MW/month).

³ Transmittal Letter at 3.

Discussion

Procedural Matters

7. The timely, unopposed motions to intervene serve to make Wolverine, METC, the Michigan Agencies, and Consumers parties to this proceeding. See 18 C.F.R. § 385.214 (2003).

8. Rule 213 (a)(2) of the Commissions Rules of Practice and Procedure normally prohibits answers to a protest or answers unless otherwise ordered by the decisional authority. We will accept METC's answer because it provides information that assisted in our decision-making process.⁴

Analysis

Proposed Schedule 10-FERC-METC

9. The proposed Schedule 10-FERC-METC is the vehicle by which METC would pass on to its customers the FERC annual charges it is being assessed by Midwest ISO. METC claims that the Commission's action in the October 28 Order did not preclude it from passing through these charges. In its answer to the protests, METC argues that the October 28 Order appeared to contemplate its right to seek recovery of annual charges billed to it by Midwest ISO. Furthermore, METC argues that "there could be no prospect of a 'double charge' unless and until METC attempted to recover from the zonal customers annual charge amounts invoiced to METC by the Midwest ISO."⁵ METC also points out that Section V of the proposed filing permits customers to challenge any future invoice that might be sent by METC on the grounds that the invoiced amounts are already covered in the base zonal rate.⁶

10. Consumers objects to the proposed filing and argues that the Commission has already ruled in the October 28 Order that METC could not pass through the annual charges to its customers by way of a Schedule 10 type charge. In addition, Consumers argues that even if METC can utilize a Schedule 10 type charge, it cannot do so here because METC is bound to charge a fixed rate for a fixed period and this Schedule 10

⁴ See 18 C.F.R. § 385.213 (a)(2) (2003).

⁵ See METC Answer at 4.

⁶ See Id. at 6.

charge would be an impermissible extra surcharge.⁷ According to Consumers, “annual charge costs are already reflected in the calculation of the \$.098/kW/mos. charge that was later approved for use by METC as a fixed rate.”⁸

11. The Michigan Agencies object to the proposed Schedule 10-FERC-METC because they argue that the filing collaterally attacks the October 28 Order which directed Midwest ISO to collect the annual charges from METC, not METC’s customers.⁹ They assert that METC, by placing the instant filing before the Commission, is attempting to circumvent the proper procedural safeguards because it addresses issues still pending in another docket.¹⁰ The Michigan Agencies also object to the proposal because “permitting METC to separately invoice its customers for FERC assessments violates the currently effective rate moratorium . . .”¹¹

12. Wolverine objects to the proposed Schedule 10-FERC-METC as being unjust and unreasonable because METC is presently recovering a stated rate that includes FERC annual charges from its respective customers through the METC zone base transmission rate under the Midwest ISO OATT.¹²

Waiver of Prior Notice Requirements

13. Midwest ISO, on behalf of METC, requests waiver of prior notice requirements in order to ensure that METC will have the opportunity to recover all annual charges billed to it by Midwest ISO.

⁷ Consumers points out that in *TransElect, Inc., et al.*, 98 FERC ¶ 61,142, at 61,418 (2002), the rate approved for METC had a provision for the deferral and collection of specific types of costs not provided for in the \$0.98 rate and FERC annual charges were not among those costs. See Consumers Motion at 4.

⁸ Id.

⁹ See Michigan Agencies Motion at 7.

¹⁰ See Michigan Agencies Motion at 9. We note that, in a separate order to be issued concurrently with this one, the Commission addresses issues raised in Docket ER03-1277-003 clarifying the October 28 Order. Thus, Midwest ISO’s instant filing does not circumvent issues in Docket No. ER03-1277-003.

¹¹ Id. at 10.

¹² See Wolverine Motion at 4-5.

14. Consumers¹³ and the Michigan Agencies¹⁴ object to waiver of 60-day prior notice requirements claiming that waiver has not been adequately justified and would be unreasonable.

15. In its answer to the opposing protests, METC states that Midwest ISO has begun to invoice it for FERC annual charges and that it has no tariff mechanism (absent the instant proposal) to recover these charges from the zonal customers. METC argues that it will be seriously prejudiced if the Commission delays the effectiveness of the instant filing pending the ultimate resolution of the zonal rate issues. METC argues that the request for waiver of prior notice is analogous to the situation in Michigan Electric Transmission Co., LLC,¹⁵ where the Commission granted waiver of prior notice, over Wolverine's objection, to permit the timely pass-through of charges assessed to METC by Midwest ISO.¹⁶

Commission Determination

16. In the October 28 Order, we did not address the merits of the claim that if METC were to pass through the Midwest ISO Schedule 10 charges, METC would be 'double recovering' those charges.¹⁷ In this regard, the October 28 Order explained that METC's customers could file a complaint under Section 206 of the Federal Power Act against METC with the Commission.¹⁸ The October 28 Order only held that Midwest ISO should bill METC, as a transmission owner, for the annual charges assessed to it. Nor did the October 28 Order address how or if METC could recover the annual charges from its customers. We address those issues here.

¹³ See Consumers Motion at 6, which states that "customers should not need to pay Schedule 10-FERC-METC invoices before Schedule 10-FERC-METC is accepted by this Commission in order to avoid having to pay late payment fees . . ."

¹⁴ See Michigan Agencies Motion at 3-4, asserting that Midwest ISO and METC have failed to adequately justify granting waiver of prior notice requirements.

¹⁵ 106 FERC ¶ 61,129 at PP 16, Ordering Para. A (2004).

¹⁶ See Id. at 7.

¹⁷ In the original proceeding in Docket No. ER03-1277, Michigan Agencies raised a "double charge" claim, stating that the METC zonal transmission rate already includes a FERC annual charge component. They claimed that paying the MISO Schedule 10 charge would essentially amount to "double paying" the FERC annual charges. They asserted that METC should be the entity responsible for any FERC annual charge assessment allocated for service rendered in the METC zone. See October 28 Order at Ps 32-34.

¹⁸ See October 28 Order at P 34.

17. Our preliminary analysis indicates that the proposed Schedule 10-FERC-METC, designed to allow METC bill its customers for the FERC annual charges it is assessed by Midwest ISO, has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept the proposed Schedule 10-FERC-METC for filing, suspend it for a nominal period, make it effective subject to refund, and set it for hearing. As this proposed Schedule 10-FERC-METC is designed to recover costs that Midwest ISO has begun to seek recovery of and METC's customers are ultimately protected from any unreasonable charges by the refund/interest provision, we will grant the request for a waiver of our 60-day prior notice requirement to permit an effective date of January 21, 2004.¹⁹

18. In order to provide the parties the opportunity to resolve these matters among themselves, we will hold the hearing ordered in this case in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.²⁰ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.²¹ Within 60 days of the date of this order, the settlement judge shall file a report with the Chief Judge and the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue settlement discussions, if appropriate, or assign the case to a presiding judge for hearing, if appropriate.

The Commission orders:

(A) The proposed Schedule 10-FERC-METC is hereby accepted for filing and suspended for a nominal period, to become effective on January 21, 2004, subject to refund.

(B) Midwest ISO's request for a waiver of the Commission's 60-day prior notice requirement is hereby granted.

¹⁹ 18 C.F.R. § 35.11 (2003); Prior Notice and Filing Requirements under Part II of the Federal Power Act, 64 FERC ¶ 61,139, at 61,984, order on reh'g, 65 FERC ¶ 61,081 (1993).

²⁰ 18 C.F.R. § 385.603 (2003).

²¹ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 219-2500 within 5 days of this order. A list of Commission judges and a summary of their background and experience is available at <http://www.ferc.gov/legal/oalj/bio/judges.htm>.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred on the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly Sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the proposed Schedule 10-FERC-METC. As discussed in the body of this order, we will hold the hearing in abeyance to give the parties time to conduct settlement judge procedures.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2003), the Chief Administrative Law Judge is hereby authorized to appoint a settlement judge in this proceeding within 15 days of the date of this order. The designated settlement judge shall have all the powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable.

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

(F) If the settlement judge procedures fail and a formal hearing is to be held, a presiding administrative law judge to be designated by the Chief Judge shall convene a conference in this proceeding to be held within approximately fifteen (15) days of the date the Chief Judge designates the presiding judge, in a hearing room of the Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding administrative law judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

(G) Midwest ISO's rate schedule designation is hereby accepted as filed.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.