

135 FERC ¶ 61,162
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and Cheryl A. LaFleur.

Interstate Power and Light Company

Docket No. EL09-11-001

v.

ITC Midwest, LLC

ORDER ON REHEARING AND MOTION TO REOPEN THE RECORD

(Issued May 19, 2011)

1. On April 16, 2009, the Commission denied the relief requested in a complaint filed under section 206 of the Federal Power Act (FPA)¹ by Interstate Power and Light Company (Interstate) against ITC Midwest, LLC (ITC Midwest), alleging improper implementation of ITC Midwest's formula rate for Commission-jurisdictional transmission service for 2009 and beyond.² Interstate filed a request for rehearing and motion to reopen the record and Midwest TDUs³ filed a request for rehearing. We deny the requests as discussed below.

I. Background

2. Interstate completed the sale of its transmission system to ITC Midwest on December 20, 2007.⁴ ITC Midwest charges for use of its transmission system according

¹ 16 U.S.C. § 824e (2006).

² *Interstate Power and Light Co. v. ITC Midwest, LLC*, 127 FERC ¶ 61,043 (2009) (Initial Order).

³ Midwest TDUs in this proceeding consist of the Iowa Association of Municipal Utilities, Missouri River Energy Services, and WPPI Energy (known formerly, and at the time of intervention, as Wisconsin Public Power Inc.).

⁴ The Commission approved the sale, *ITC Holdings Corp.*, 121 FERC ¶ 61,229 (2007), as did the Illinois Commerce Commission, the Iowa Utilities Board, the

(continued...)

to a formula rate, in which it annually projects its transmission cost of service and establishes charges for transmission service on the basis of its projections, then true up its actual revenue collection with its actual cost of service, and collects or refunds the difference in the following year with interest. Starting January 1, 2009, ITC Midwest's charges for transmission service changed to reflect its projected cost of service for 2009.⁵

3. In its complaint, Interstate stated that it did not object to ITC Midwest's formula rate or to ITC Midwest's application of its formula rate on a forward-looking basis. Rather, Interstate objected to the implementation of the rate. Specifically, Interstate contended that ITC Midwest included excessive costs in its operations and maintenance (O&M) and administrative and general (A&G) expenses in its projections, and additional cost increases in its O&M and A&G true-up components. Interstate argued that these costs led to unjust and unreasonable transmission service charges. Interstate further argued that ITC Midwest did not provide adequate information regarding its expenditures and rate calculations to support its annual rate calculation and true-up procedures. In addition, Interstate challenged the change in methodology used to allocate non-directly assigned A&G costs among the subsidiaries of ITC Holdings, including ITC Midwest, from a load ratio share method to the Massachusetts Formula.⁶

4. ITC Midwest answered that the asset sale agreement, in which Interstate agreed to sell its transmission system to ITC Midwest, contractually barred rate challenges for seven years, and that Interstate's complaint should be dismissed because it breached that agreement. ITC Midwest further argued that Interstate did not meet its burden under FPA section 206, and that Interstate had conceded that it does not have sufficient information to assess whether ITC Midwest's O&M and A&G expenses are prudent and reasonable. In any case, ITC Midwest stated that its costs were higher than the previous year because it is upgrading and improving the transmission system. Regarding the Massachusetts Formula, ITC Midwest argued that ITC Holdings' use of this method of allocating non-direct charged A&G among its affiliates is just and reasonable, and that

Minnesota Public Utilities Commission, and the Missouri Public Service Commission. Initial Order, 127 FERC ¶ 61,043 at P 3.

⁵ *Id.* P 5 (citing *ITC Holdings*, 121 FERC ¶ 61,229 at P 50).

⁶ Interstate characterized the Massachusetts Formula as a formula in which ITC Midwest or ITC Holdings allocates certain A&G expenses that are not directly assignable to specific ITC Holdings operating subsidiaries on a mixed basis that factors in load ratio shares and plant, property, and equipment ratios. It is called the Massachusetts Formula based on the Commission decision in *Distrigas of Massachusetts Corp.*, 41 FERC ¶ 61,205 (1987).

Interstate had not shown otherwise. Finally, ITC Midwest asserted that it had met its obligations to provide Interstate with the data it requested.

5. The Commission denied the relief requested in Interstate's complaint, concluding that Interstate did not provide *prima facie* evidence showing that the proposed O&M and A&G expenses were, or will be, imprudently incurred and therefore should not be chargeable to Interstate.⁷ The Commission also concluded that Interstate did not provide sufficient evidence in support of its allegation that ITC Midwest's projected and true-up transmission rates are unjust and unreasonable, and therefore that a hearing was not warranted. The Commission also found that a hearing was not warranted on Interstate's argument that ITC Midwest denied access to information needed to substantiate Interstate's claim, because Interstate did not specify the information that it needed and to which it had been denied access. In addition, the Commission found that Interstate did not establish that the change in allocation methodology for A&G costs was unjust and unreasonable.

II. Requests for Rehearing

A. Interstate's Request for Rehearing and Motion to Reopen the Record

6. Interstate argues that the Commission erred in shifting the burden of proof as to whether ITC Midwest's rates were just and reasonable, from ITC Midwest, under FPA section 205, to complainants, under FPA section 206.⁸ Interstate asserts that its complaint was not against ITC Midwest's rate formula; rather, it concerned how ITC Midwest implemented its formula rate by applying improper costs under the formula. Interstate contends that ITC Midwest should bear the burden of showing that the charges resulting from ITC Midwest's application of its Commission-approved formula rate are just and reasonable.⁹ Interstate contends that the Commission should commence a hearing to investigate ITC Midwest's application of its formula rate and require ITC Midwest to show that the charges derived from its formula are just and reasonable.

⁷ Although the Initial Order denied the complaint, it may be more accurately characterized as a dismissal of the complaint without prejudice. That is, the word "denial" would have been more appropriate had the Commission reached and weighed the merits of the complaint.

⁸ Interstate Request for Rehearing at 2 (citing *American Electric Power Service Corp.*, 124 FERC ¶ 61,306 (2008) (*AEP*); *Virginia Electric and Power Co.*, 123 FERC ¶ 61,098 (2008) (*Virginia Electric*)).

⁹ *Id.* at 6 (citing *Public Service Co. of New Hampshire*, 6 FERC ¶ 61,299, *reh'g denied*, 9 FERC ¶ 61,202 (1979)).

7. Interstate further argues that in shifting the burden of proof, the Commission did not satisfy its obligation under the FPA to promote the public interest. Interstate contends that ITC Midwest's formula rate requires only modest information disclosure obligations, so it is especially important that the Commission investigate ITC Midwest's formula rate implementation. Interstate states that ITC Midwest is obligated to make available its formula inputs "in sufficient detail to identify the components of ITC Midwest[s] net revenue requirement' and to hold a customer meeting to explain formula rate input projections and cost detail."¹⁰ Interstate argues that ITC Midwest did not provide sufficiently detailed information about its projected 2009 O&M or A&G costs.¹¹ Interstate contends that the Commission erred in rejecting its allegation that ITC Midwest did not provide sufficiently detailed data because the Commission relied on cases in which the complainant bore the burden of proof that the rates were not just and reasonable and Interstate again asserts that it does not bear that burden here.

8. Interstate also argues that state regulators lack jurisdiction to investigate ITC Midwest's Commission-jurisdictional transmission rates, and ITC Midwest customers have limited means to obtain the information they need to ensure that the resulting charges are fair and justified, which results in a gap between state and federal regulation that can harm customers. Thus, the Commission should ensure that ITC Midwest implements its formula rate to ensure that the ensuing charges are just and reasonable. Moreover, Interstate contends that the Commission should monitor ITC Midwest's implementation of its formula rate because ITC Midwest is not required to annually file its formula rate redetermination inputs or calculations; the annual rate redetermination is essentially a self-regulated process. Interstate further asserts that ITC Midwest does not operate in a competitive market for transmission service, and market forces will not keep prices at a just and reasonable level, thus the Commission should investigate allegations of ITC Midwest's implementation of its formula rate. In addition, Interstate contends that the Commission should be aware of ITC Midwest's transmission rate increases and the effect on Interstate's retail customers, citing Interstate's recent rate case at the Iowa Utilities Board (Iowa Commission).

9. Interstate argues that even if it bears the burden of proof under section 206 of the FPA, the Commission erred in denying the relief requested in the complaint and refusing to commence an investigation. Interstate contends that ITC Midwest was not responsive to Interstate's request for detailed information and that, by not commencing an

¹⁰ *Id.* at 7-8 (quoting Midwest Independent Transmission System Operator, Inc. (Midwest ISO) Open Access Transmission, Energy, and Operating Reserve Markets Tariff at Substitute Original Sheet No. 1365Z.16H).

¹¹ *Id.* at 8 (citing *Idaho Power Co.*, 115 FERC ¶ 61,281 (2006)).

investigation, the Commission denied Interstate additional opportunities to compile evidence regarding ITC Midwest's rates. Interstate asserts that the Commission should commence an investigation that will allow Interstate, working through the Commission hearing process, to discover the information it needs to show that ITC Midwest's formula-derived charges are unjust and unreasonable.

10. In addition, Interstate contends that the Commission erred in assigning the burden of proof to Interstate regarding whether the change in allocation method for A&G expenses was just and reasonable or an unsupported rate change in violation of section 205 of the FPA. Interstate states that, when ITC Midwest adopted its formula rate structure and filed it with the Commission, ITC Midwest represented to state regulators that it and its affiliates would allocate A&G expenses among themselves using a load ratio share methodology.¹² Interstate asserts that ITC Midwest subsequently adopted the Massachusetts Formula was subsequently adopted without prior notice. Interstate argues that this unilateral change in A&G expense allocation methodology caused more than \$4.5 million in additional expenses to be allocated to Interstate and other customers, over ITC Midwest's 2007 projection to the Iowa Commission. Interstate contends that the Commission erred in concluding that Interstate failed to prove that use of the Massachusetts Formula was unjust and unreasonable, because Interstate did not bear such a burden. It also contends that the Commission erred in failing to investigate the implementation of a rule or practice that affects rates without that rule or practice first being filed with the Commission.¹³

11. Finally, Interstate argues that denial of the relief requested in its complaint will jeopardize future sales of transmission systems by traditional vertically-integrated public utilities to independent transmission companies, which would contradict the Commission's policy encouraging the formation of transcos.¹⁴ Interstate states that it sold its transmission system to ITC Midwest under the transco model set forth by the Commission and contends that the Commission has an obligation to ensure that transcos operate in accordance with the requirements of the FPA and the Commission's regulations and that their rates are just and reasonable. Interstate argues that if the Commission does not grant rehearing and commence an investigation, it will discourage vertically-integrated utilities from transferring their transmission systems to transcos out

¹² *Id.* at 15 (citing IPL Complaint at 15, which discussed testimony of an ITC Midwest representative to the Iowa Commission and the Minnesota Commission).

¹³ *Id.* at 16 (citing 18 C.F.R. § 35.1(a)).

¹⁴ *Id.* at 3 (citing *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh'g*, 119 FERC ¶ 61,062 (2007)).

of concern that they will put themselves and their retail customers at a disadvantage arising from inattentive regulatory oversight.

12. In addition to its request for rehearing, Interstate moves to reopen the record to admit the direct testimony of Thomas L. Aller, filed in Interstate's retail rate case proceeding before the Iowa Commission, and Interstate's March 17, 2009, Form 8-K filing with the United States Securities and Exchange Commission. Interstate contends that these pieces of evidence show the effect on Interstate's customers arising from ITC Midwest's implementation of its transmission formula rate in a manner that significantly increases its transmission service charges. Interstate states that these documents are not duplicative of evidence already in the record and did not become available until after it submitted its complaint, but that the documents are publicly available records that have been readily available to ITC Midwest and other members of the public.

B. Midwest TDUs' Request for Rehearing

13. The Midwest TDUs support Interstate's request for rehearing, but write separately to highlight their argument that the Commission should not have summarily dismissed Interstate's challenge to the switch to the Massachusetts Formula for allocation of overhead costs. The overhead allocation method is not specified in the filed rate formula and is characterized by the Midwest TDUs as a methodology for determining the inputs into ITC Midwest's formula rates. The Midwest TDUs contend that ITC Midwest indicated to state regulators during its takeover of Interstate that it would allocate overhead costs based on load ratios. The Midwest TDUs argue that the Commission should treat those representations as a section 205(c) filing of practices associated with a filed rate, and should have required such a filing as a condition precedent for switching to a new allocation methodology. Further, they assert that, even if the Commission views ITC Midwest's prior representations as giving it discretion to adopt a new methodology, the new methodology was never filed and was never accepted or approved by the Commission. The Midwest TDUs further argue that a challenge to ITC Midwest's practices that affect rates should not require the complainant to meet the section 206 burden of proof and that ITC Midwest bears the burden of proving that its change is just, reasonable, and nondiscriminatory.¹⁵

C. ITC Midwest's Answer

14. ITC Midwest filed a response to Interstate's motion to re-open the record. It argues that Interstate possessed the data underlying the proffered documents prior to

¹⁵ Midwest TDUs' Request for Rehearing at 3 (citing *Virginia Electric*, 123 FERC ¶ 61,098 at P 47).

filing its complaint, so the documents are not actually new evidence. Moreover, ITC Midwest argues that these pieces of evidence were compiled by Interstate and have not been tested by cross-examination. ITC Midwest contends that the evidence provided by Interstate does not rise to the level of “extraordinary circumstances” required by the Commission to reopen the record. ITC Midwest also requests permission to respond to the requests for rehearing.

III. Discussion

A. Procedural Matters

15. Rule 713(d)(1) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2009), prohibits answers to requests for rehearing. Accordingly, we will not consider the portions of ITC Midwest’s answer that seek to respond to the requests for rehearing.

B. Commission Determination

1. Requests for Rehearing

a. Burden of proof regarding rates

16. The Commission found in the Initial Order that Interstate did not make a prima facie showing that ITC Midwest’s O&M and A&G expenses were imprudently incurred.¹⁶ The Commission further found unsubstantiated Interstate’s assertions that ITC Midwest’s inputs into the formula rate were not just and reasonable. Nevertheless, the Commission stated that its findings in this regard were without prejudice to Interstate filing a new complaint that adequately substantiates its allegations.

17. On rehearing, Interstate contends that the Commission erred in shifting the burden of proof under FPA section 206 from ITC Midwest to Interstate, regarding the issue of whether ITC Midwest’s rates were just and reasonable. Interstate further argues that ITC Midwest did not comply with the requirements under its formula rate to provide sufficiently detailed information about its projected 2009 O&M or A&G costs. Moreover, Interstate argues that the Commission should commence an investigation that will allow Interstate to discover the information it needs to show that ITC Midwest’s formula-derived charges are unjust and unreasonable.

18. We disagree with Interstate’s argument that the Commission applied the wrong burden of proof under FPA section 206 in the Initial Order. The Commission never

¹⁶ Initial Order, 127 FERC ¶ 61,043 at P 43.

reached the merits of the complaint because Interstate's submission was facially insufficient and did not warrant further investigation. The Commission and the courts have long recognized that a complainant must do more than make unsubstantiated allegations.¹⁷ Interstate, as the complainant, is required to provide an adequate proffer of evidence that such a hearing is warranted, regardless of which party would bear the burden of proof at hearing.¹⁸ Interstate alleged that costs and expenses have increased since ITC Midwest began operating the transmission facilities that Interstate formerly operated, but Interstate did not do more than make bald assertions that the costs and expenses were too high.

19. On rehearing, Interstate alleges that the Commission's decision not to commence a hearing erroneously denied Interstate further opportunities to compile information regarding ITC Midwest's projected rate inputs. We disagree. We acknowledge that a party challenging rate inputs is at an informational disadvantage. We do expect, however, to at least be able to understand why a challenging party cannot do more than make bald assertions, and Interstate's complaint did not indicate how ITC Midwest failed to produce any requested or required data.¹⁹ ITC Midwest's Attachment O protocols state that it will provide "information regarding projected costs of plant in forecasted rate base, expected construction schedules and in-service dates, load and resultant rates

¹⁷ See *UNITIL Power Corp. v. Public Service Co. of New Hampshire and Northeast Utilities*, 62 FERC ¶ 61,055, at 61,287 (1993) ("The question we must answer at this stage of the proceeding is whether UNITIL has presented sufficient evidence of PSNH's costs so that we may assess whether a trial-type, evidentiary hearing is warranted."). See also *Houlton Water Company, et al. v. Maine Public Service Co.*, 55 FERC ¶ 61,037, at 61,110 (1991) ("Maine Public correctly states that a customer seeking a section 206 investigation of existing rates *must provide some basis* to question the reasonableness of the overall rate level, taking into account changes in all cost components and not just . . . [the item being challenged]." (emphasis added)).

¹⁸ See, e.g., *California Independent System Operator Corporation*, 107 FERC ¶ 61,150 at P 7 n.11 (2004) (citing *South Carolina Electric & Gas Company*, 56 FERC ¶ 61,379, at 62,440 & n.14 (1991), *hearing denied*, 59 FERC ¶ 61,050, at 61,219-20 (1992)) ("The Commission has found that a trial-type evidentiary hearing requires an adequate proffer of evidence that such hearing is warranted, *i.e.*, more than mere allegations on the part of a requesting party.").

¹⁹ Initial Order, 127 FERC ¶ 61,043 at P 45 ("Interstate derides ITC Midwest for not supplying it with 'sufficiently detailed' information about ITC Midwest's O&M and A&G expenses, but does not specify what information it needs and what it has been denied access to.").

incorporating a True-up Adjustment” to customers and the relevant state commissions.²⁰ Further, “[a]ll inputs shall be provided in sufficient detail to identify the components of ITC Midwest[’s] net revenue requirement.”²¹ Interstate’s complaint did not persuade us that Interstate did not have, or could not obtain, enough information to properly evaluate projected and actual O&M and A&G expenses.

b. Adoption of the Massachusetts Formula

20. In the Initial Order, the Commission also found that Interstate failed to substantiate its allegations that the use of the Massachusetts Formula to allocate non-direct A&G expenses among ITC Holdings’ public utility transcos is unjust and unreasonable.²² However, the Commission stated that this finding was without prejudice to Interstate filing another complaint that adequately substantiates its allegations.

21. On rehearing, Interstate contends that the Commission erred in concluding that Interstate failed to prove that use of the Massachusetts Formula was unjust and unreasonable, that the Commission failed to properly consider the statements of ITC Midwest representatives to the Iowa Commission and the Minnesota Commission, and that the Commission erroneously failed to investigate the implementation of a rule or practice that affects rates without that rule or practice first being filed with the Commission. As before, we disagree with Interstate’s contention that the Commission, in making its findings, erroneously shifted the burden of proof to justify the cost allocation methodology from ITC Midwest to Interstate. The Initial Order found that Interstate’s unsubstantiated allegations are insufficient to warrant an investigation into the cost allocation methodology, and dismissed Interstate’s complaint without prejudice. Further, our decision in the Initial Order to dismiss IPL’s complaint was based on Interstate failing to make a prima facie showing that ITC Midwest’s O&M and A&G expenses were imprudently incurred. Thus, the Initial Order does not implicate any broader issues related to transco formation. Accordingly, we will deny Interstate’s request for rehearing with regard to use of the Massachusetts Formula.

22. The Midwest TDUs also request rehearing on the adoption of the Massachusetts Formula, reiterating Interstate’s arguments but also asserting that ITC Midwest’s statements to state regulators that it would allocate overhead costs based on load ratios should be treated as a section 205(c) filing of practices associated with a filed rate. We

²⁰ Compliance Filing in Docket Nos. EC07-89-000 and ER07-887-000, Attachment 3, Midwest ISO Substitute Original Sheet No. 1365Z-16H (Jan. 22, 2008).

²¹ *Id.*

²² Initial Order, 127 FERC ¶ 61,043 at P 46.

reject the Midwest TDUs' assertion that statements made by representatives of ITC Midwest in state commission proceedings should be treated as filings to the Commission under FPA section 205. That statute, and the Commission's regulations implementing the statute, are explicit that every public utility must file schedules with the Commission that show all rates and charges for any transmission or sale subject to the jurisdiction of the Commission.²³ Accordingly, the Commission cannot treat statements made by representatives of ITC Midwest in state commission proceedings as filings with the Commission pursuant to FPA Section 205. Moreover, the Commission can direct staff to investigate a utility's accounting and recordkeeping practices, or whether a practice affecting rates should have been filed with the Commission under section 205.²⁴ However, based on our review of the record, the Commission has decided not to initiate such an investigation in this proceeding.²⁵ We deny the Midwest TDUs' request for rehearing.

2. Motion to Reopen the Record

23. Under Rule 716 of the Commission's Rules of Practice and Procedure, the Commission has discretion to reopen the record when good cause is shown.²⁶ In order to persuade the Commission to exercise its discretion to reopen the record, the requesting party must demonstrate the existence of extraordinary circumstances, which are not merely material but rise to the level of a change in core circumstances that go to the very heart of the case.²⁷ The Commission's policy against reopening the record except in extraordinary circumstances is based on the need for finality in the administrative process.²⁸ We find that the new availability of Mr. Aller's testimony and Interstate's Form 8-K filing do not rise to the level of extraordinary circumstances, thus we deny Interstate's motion to reopen the record.

²³ 16 U.S.C. § 824d(c) ("every public utility shall file with the Commission ... schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission..."); 18 C.F.R. § 385.205 (2009) ("A person must make a tariff or rate filing in order to establish or change any specific rate ...").

²⁴ 18 C.F.R. § 1b (2010).

²⁵ Initial Order, 127 FERC ¶ 61,043 at P 46.

²⁶ 18 C.F.R. § 385.716 (2009).

²⁷ *Cal. Indep. Sys. Operator Corp.*, 121 FERC ¶ 61,193, at P 14 (2007) (footnotes omitted).

²⁸ *Id.* (citing *CSM Midland Inc.*, 56 FERC ¶ 61,177, at 61,624 (1991)).

The Commission orders:

- (A) The requests for rehearing are hereby denied.
- (B) Interstate's motion to reopen the record of this proceeding is hereby denied.

By the Commission. Commissioner Norris is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.