

152 FERC ¶ 61,042  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

International Transmission Company

Docket No. ER12-2170-000

ORDER ACCEPTING COMPLIANCE FILING

(Issued July 16, 2015)

1. In this order, we accept a compliance filing made by International Transmission Company (ITC) in response to the Commission's directive in an August 28, 2012 order issued in this proceeding.<sup>1</sup> In the August 2012 Order, the Commission conditionally accepted ITC's late filing of the Belle River Transmission Ownership and Operating Agreement (Belle River Agreement) between ITC and Michigan Public Power Agency (MPPA). The agreement, which was originally entered into in 1982 between Detroit Edison and MPPA, was assigned to ITC in 2001 in conjunction with ITC's acquisition of Detroit Edison's transmission assets, but was not filed with the Commission until June 29, 2012.<sup>2</sup>

**I. Background**

2. The Belle River Agreement sets forth the terms pursuant to which ITC and MPPA share joint ownership of certain 120 kV and higher voltage transmission lines

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<sup>1</sup> *International Transmission Co.*, 140 FERC ¶ 61,151 (2012) (August 2012 Order). On September 27, 2012, ITC filed a request for clarification or, in the alternative, rehearing, of the August 2012 Order, and Detroit Edison Company (Detroit Edison) filed a request for rehearing. In an order being issued concurrently with this order, we are denying Detroit Edison's request for rehearing, and granting in part and denying in part ITC's request for rehearing. *International Transmission Company*, 152 FERC ¶ 61,043 (2015) (Belle River Rehearing Order).

<sup>2</sup> ITC June 29, 2012 Filing. International Transmission Company, FERC Electric Tariff, ITC Transmission Agreements, [ITC Transmission RS 16, Belle River Transmission Ownership and Operating Agmt, 0.0.0.](#)

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

3. Under Section 3.6 of the Belle River Agreement, the parties further agreed to share the costs of capital improvements to the Designated Transmission Lines made after the commencement of commercial operation in proportion to their ownership interests. Pursuant to Article 8 of the agreement, Detroit Edison (and now ITC) is responsible for the management, operation and maintenance of the Designated Transmission Lines. Section 8.2 requires MPPA to pay Detroit Edison (and now ITC) for the operation and maintenance (O&M) and administrative and general expenses allocable to MPPA's ownership interest in the Designated Transmission Lines based on MPPA's proportion of investment in Detroit Edison's (and now ITC's) transmission system.<sup>3</sup> The costs included in the O&M formula include supervision, engineering, employee payroll, and sales and use taxes.<sup>4</sup> Under Section 10.2 of the agreement, the parties share property and other taxes arising out of the construction, ownership, operation, maintenance and use of the Designated Transmission Lines in proportion to their ownership interests in the lines. Likewise, under Section 11.1, the parties share the costs of insurance in proportion to their ownership interests in the Designated Transmission Lines.

4. Section 6.1 of the Belle River Agreement provides that MPPA is entitled to utilize, "without charge or cost, except as specifically set forth in this Agreement," Detroit Edison's (and now ITC's) transmission system, which includes facilities that are not jointly-owned with MPPA, for the purpose of delivering electric capacity and energy to MPPA from various sources, provided that "the total amount of electric capacity and

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<sup>3</sup> Under Section 8.2 of the agreement, MPPA's investment in Detroit Edison's (and now ITC's) transmission system is the sum of MPPA's original investment in its undivided interest in the Designated Transmission Lines, as determined under Section 3.2, and its share of the cost of capital improvements made after the Designated Transmission Lines commenced commercial operation, as determined under Section 3.6.

<sup>4</sup> ITC June 29, 2012 Filing at 5-6.

energy being delivered from the Bulk Transmission System in any calendar year . . . shall not exceed the difference between MPPA's Electric Capability And Energy Entitlement in [the Belle River generating station], expressed in megawatts, and MPPA's Planned Excess Electric Capability and Energy Entitlement for such calendar year." Section 6.1 of the Belle River Agreement further provides that Detroit Edison "shall permit MPPA to utilize the Bulk Transmission System to receive electric capacity and energy from Municipal Systems and other utilities and to deliver electric capacity and energy to Municipal Systems and other utilities without regard to the source of the electric capacity and energy to be transferred, subject to mutual agreement regarding the proposed use, scope and utilization, all to be included in separate transmission service tariffs."

5. ITC filed the Belle River Agreement as a new rate schedule. ITC acknowledged that, under the Commission's *Prior Notice Order*, it must provide its customer with time value refunds of any amounts that it received under the late-filed agreement.<sup>5</sup> ITC stated that, beginning in 2003, when Detroit Edison sold ITC to ITC Holdings Corp. (ITC Holdings), ITC invoiced MPPA for \$14,402,532.33. ITC calculated the time value of MPPA's payments as \$2,895,023.79.<sup>6</sup> However, ITC stated that, if ITC were required to make such time value refunds to MPPA, it will have performed services under the Belle River Agreement at a loss of approximately \$2.5 million. Therefore, ITC requested waiver of the requirement to make time value refunds.<sup>7</sup> MPPA protested the filing, arguing that ITC did not properly compute the time value of all of MPPA's payments under the agreement prior to its filing or demonstrate that paying time value refunds would cause ITC to not recover its variable O&M expenses.

6. In the August 2012 Order, the Commission conditionally accepted for filing the Belle River Agreement, effective August 29, 2012, as requested. The Commission agreed with MPPA that ITC's refund report was deficient. Among other things, the Commission determined that the appropriate date from which ITC should have calculated

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<sup>5</sup> *Id.* at 6 (citing *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,979, *clarified*, 65 FERC ¶ 61,081 (1993) (*Prior Notice Order*)). The *Prior Notice Order* provides that, if a utility files an otherwise just and reasonable cost-based rate after new service has commenced, or if waiver is denied and the proposed rate goes into effect after service has commenced, the utility is required to refund to its customers the time value of the revenues collected, calculated pursuant to section 35.19a of the Commission's regulations (18 C.F.R. §35.19a), for the entire period that the rate was collected without Commission authorization.

<sup>6</sup> *Id.* at 7, Attachment D.

<sup>7</sup> *Id.* at 7-8.

time value refunds is the date on which ITC succeeded Detroit Edison under the Belle River Agreement in 2001, rather than 2003, when ITC became an independent company under the ownership of ITC Holdings, as ITC had argued.<sup>8</sup> Further, the Commission found that ITC had not demonstrated that providing time value refunds to MPPA would cause it to operate at a loss under the Belle River Agreement. Accordingly, the Commission directed ITC to provide a revised refund report “detailing its actual variable out-of-pocket costs (e.g., variable O&M expenses and incremental construction costs) incurred to provide service under the Belle River Agreement from 2001 and demonstrating that it would be operating at a loss as a result of providing time value refunds.”<sup>9</sup>

7. As directed, on September 27, 2012, ITC submitted a revised refund report to provide more detail regarding costs incurred under the Belle River Agreement and to calculate the time value of amounts paid by MPPA beginning in 2001, in compliance with the August 2012 Order. In its revised refund report, ITC broke down the costs incurred (and subsequently billed) under the Belle River Agreement to show O&M costs, administrative and general costs, payroll, sales and use taxes, capital costs (i.e., construction), and asset amortization as separate categories. These costs are detailed in Attachment A to ITC’s September 27, 2012 compliance filing. ITC reports that the total costs it incurred and billed under the Belle River Agreement dating back to 2001 through September 2012 were \$16,373,810.71, of which approximately \$12.6 million represents allocated system O&M and administrative expenses, and approximately \$3.7 million represents MPPA’s share of costs of improvements and upgrades to the Designated Transmission Lines. In Attachment B to the compliance filing, ITC states that MPPA’s total payments for the services it received under the Belle River Agreement were \$16,205,993.30. ITC calculates the time value of MPPA’s payments through September 27, 2012, to be \$4,398,876.48.<sup>10</sup>

8. In support of the revised refund report, ITC submits that “variable operation and maintenance” costs apply to ITC’s system O&M costs as provided for under the Belle River Agreement. ITC notes that, while transmission system O&M costs do not

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<sup>8</sup> August 2012 Order, 140 FERC ¶ 61,151 at P 25 (noting that the transfer of Detroit Edison’s transmission assets to ITC became effective on January 1, 2001 and citing DTE Energy Co., Notice of Consummation, Docket No. EC00-86-000 at 4 (filed Dec. 15, 2000)).

<sup>9</sup> *Id.* P 26.

<sup>10</sup> ITC September 27, 2012 Compliance Filing, Attachment B. There was a small (less than \$200), unexplained discrepancy between the time value of the amounts paid by MPPA shown on Attachment B and on page 7 of the transmittal letter.

vary based on customer usage, they do vary on a monthly basis, depending on a given system's needs, weather, and scheduled and unscheduled maintenance. It is thus appropriate, ITC continues, to deem ITC's system O&M costs as "variable" when determining the floor for time value refunds.<sup>11</sup>

9. Furthermore, ITC requests that the Commission find that its O&M costs, administrative and general costs, payroll, sales and use taxes, and capital costs are "out-of-pocket" costs as that term is used in the August 2012 Order. ITC states that capital costs are ITC's construction costs under the Belle River Agreement, i.e., costs incurred in making upgrades and improvements to the jointly-owned facilities. ITC further states that, in accordance with Section 3.6 of the Belle River Agreement, these costs are tracked separately and shared by ITC and MPPA in proportion to their ownership interests in the facilities. Thus, ITC argues, capital costs are ITC's "out-of-pocket" costs under the Belle River Agreement.

10. ITC explains that, unlike capital costs, ITC's O&M and administrative and general costs are not separately tracked under the Belle River Agreement, but instead are allocated to MPPA based on a share of ITC's system costs. ITC argues that, though these costs are allocated, rather than separately tracked, it does not change the fact that these are actual costs that ITC pays "out-of-pocket" and for which ITC will suffer a loss if it pays time value refunds. In that regard, ITC states that it cannot recoup these costs from other customers, nor is there any profit or return built into the costs charged to MPPA.<sup>12</sup> For the same reason, ITC asserts that it is appropriate to include administrative and general costs that are allocated to MPPA in the refund report as "out-of-pocket" costs for determining the floor for time value refunds.<sup>13</sup> ITC further supports this assertion by stating that administrative and general expenses are a part of the costs that ITC incurs in operating and maintaining its transmission system as a whole, including the jointly-owned facilities.<sup>14</sup>

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<sup>11</sup> *Id.* at 7-8.

<sup>12</sup> *Id.* at 8 (citing *Carolina Power & Light*, Docket No. ER98-3220-003 (May 17, 1999) (delegated letter order), where the Commission accepted a refund report based on allocated, rather than actual costs).

<sup>13</sup> *Id.* at 8-9 (claiming that other utilities have included similar allocations to administrative costs in their calculation of the floor for time value refunds and citing to *Florida Power & Light Co.*, Docket No. ER02-766-05 (Oct. 8, 2003) (delegated letter order) as an example).

<sup>14</sup> *Id.* at 9.

11. ITC asserts that the relevant analysis regarding the “floor” for time value refunds is whether the company will have provided service at a loss if it is required to pay such time value refunds.<sup>15</sup> ITC claims that whether such costs are specifically tracked to a certain contract (as they are for the construction costs under the Belle River Agreement), or they are allocated to a customer based on a calculated portion of system costs (as they are for O&M costs and administrative and general costs under the Belle River Agreement) does not change the fact that ITC paid these costs, and that ITC will have provided service at a loss if it is required to pay time value refunds.<sup>16</sup>

## II. Notice of Filing and Responsive Pleadings.

12. Notice of the September 27, 2012 compliance filing was published in the Federal Register, 77 Fed. Reg. 60,979 (2012), with interventions and protests due on or before October 18, 2012. On October 18, 2012, MPPA filed a protest.

13. In its protest, MPPA argues that the August 2012 Order is unambiguous and consistent with Commission policy requiring time value refunds and that ITC should be required to make time value refunds to MPPA because ITC has not demonstrated that making time value refunds will cause ITC to be operating at a loss under the Belle River Agreement.<sup>17</sup> MPPA asserts that “ITC’s compliance filing does not identify any costs that ITC would not have incurred absent service to MPPA” under the Belle River Agreement.<sup>18</sup>

14. MPPA acknowledges that, under the Commission’s precedent, a late-filing public utility is permitted “to recover its incremental variable costs of providing service to customers under the late-filed agreement that are directly attributable to the service to a specific customer,”<sup>19</sup> but argues that Commission policy does not include the public

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<sup>15</sup> *Id.* (citing *Florida Power & Light Co.*, 98 FERC ¶ 61,276, at 62,151 (2002) (*FP&L I*)).

<sup>16</sup> *Id.*

<sup>17</sup> MPPA Protest at 1.

<sup>18</sup> *Id.* at 2. MPPA, however, does not dispute the amounts billed and collected by ITC under the Belle River Agreement since 2001, as shown in Attachment A to ITC’s compliance filing, or ITC’s calculation of the time value of MPPA’s payments. MPPA has also not disputed ITC’s assertion that there is no profit component associated with any of the charges under the Belle River Agreement.

<sup>19</sup> *Id.* at 3 (citing *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,357 (1999) (*Carolina Power*)).

utility's fixed or embedded costs, i.e., costs that are not directly affected by the provision of service to the customer under the late-filed agreement.<sup>20</sup> MPPA states that, because the Belle River Agreement is a transmission service agreement, ITC does not experience variable out-of-pocket costs. MPPA continues that, unlike a generation-based power sales transaction, ITC has no fuel costs, variable O&M expenses, or similar costs that are directly linked to the incremental sales or service to MPPA under the Belle River Agreement.<sup>21</sup> MPPA argues that, under the August 2012 Order, the Commission did not alter its refund policy to extend refund protection to ITC's fixed or embedded costs incurred to provide service under the Belle River Agreement, nor did the Commission expand the exception to include costs (whether fixed or variable) that ITC incurs regardless of the level of service it provides to MPPA under the Belle River Agreement.<sup>22</sup>

15. MPPA further argues that ITC did not detail its actual variable out-of-pocket costs incurred to provide service under the Belle River Agreement from 2001, and did not demonstrate that it would be operating at a loss as a result of providing time value refunds.<sup>23</sup> Rather, according to MPPA, ITC is asking the Commission to accept definitions for the terms "variable" and "out-of-pocket" that are "incongruous" with Commission precedent, specifically, *Carolina Power, Southern California Edison Co.*, and *FP&L I*.<sup>24</sup> MPPA reasons that ITC is trying to equate its non-incremental, system-wide costs to the variable and incremental costs involved in *Carolina Power, Southern California*, and *FP&L I* simply because a portion of ITC's company-wide costs are allocated to MPPA. MPPA contends that those allocations are not incremental allocations based on the level of service provided, but are based instead on MPPA's ownership entitlement percentage, which is fixed under the Belle River Agreement. MPPA asserts that "ITC's argument meanders from 'variable' costs to 'out-of-pocket'

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.* at 4-5.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.* at 5-6 (citing *Carolina Power*, 87 FERC at 61, 357, in which the Commission permitted the late-filing utility to recover variable costs, which included fuel costs and variable operation and maintenance costs, and *Southern California Edison Co.*, 98 FERC ¶ 61,304, at 62,301-02 (2002) (*Southern California*), and *FP&L I*, 98 FERC at 62,151 n.32, in which the Commission limited the time value refunds to ensure that the companies would be returning only the interest on monies that they were never authorized to receive under unfiled interconnection agreements, with a floor to protect the companies from constructing the interconnection facilities at a loss).

costs as if they are identical.”<sup>25</sup> However, MPPA argues that not all out-of-pocket costs are variable costs, and further asserts that, under ITC’s argument, “Commission policy would be rendered unenforceable because any refund would cause the refunding company to experience a loss.”<sup>26</sup> MPPA states that the Commission should not alter its definition of “operating at a loss” because ITC offers no support for defining the term and such redefinition would introduce regulatory uncertainty where there is none now.<sup>27</sup>

16. MPPA also disputes ITC’s characterization of O&M costs allocated to MPPA under the Belle River Agreement as “variable” in that they reflect system-wide variations in the levels of its O&M and administrative costs that occur from time to time.<sup>28</sup> MPPA argues that ITC cites to no precedent for equating month-to-month fluctuations in fixed O&M and administrative costs with variable O&M costs incurred to provide service to MPPA under the Belle River Agreement.<sup>29</sup>

17. MPPA adds that ITC’s definition of “out-of-pocket” is incorrect and not properly based on Commission precedent.<sup>30</sup> Further, MPPA asserts that ITC’s argument “would have the Commission believe that if MPPA did not receive service from ITC under the Belle River [Agreement], ITC would not have incurred these O&M costs, [administrative and general] costs, payroll, sales and use taxes, and capital costs.”<sup>31</sup> MPPA claims that Commission policy does not extend the limit on time value refunds to include the fixed costs that ITC claims are “out-of-pocket” expenses.<sup>32</sup>

18. MPPA concludes that ITC must account for the time value of MPPA’s payments from which it improperly benefitted before August 29, 2012, and that the Commission should order ITC to revise its compliance filing accordingly.<sup>33</sup>

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<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 7.

<sup>28</sup> *Id.* at 7-8.

<sup>29</sup> *Id.* at 8.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 9.

<sup>32</sup> *Id.* at 10.

<sup>33</sup> *Id.* at 10-11.

### **III. Discussion**

#### **A. Procedural Matters**

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), MPPA's timely, unopposed motion to intervene serves to make MPPA a party to this proceeding.

#### **B. Substantive Matters**

20. In the Belle River Rehearing Order, which is being issued concurrently with this order, we explain that the "floor" for purposes of determining ITC's liability for time-value refunds under the Belle River Agreement includes ITC's costs, including allocated system O&M and administrative costs, in providing services under the agreement.

21. ITC has provided additional detail of its costs incurred and billed to MPPA beginning in 2001 through September 2012.<sup>34</sup> On the basis of our determination in the Belle River Rehearing Order of the appropriate time value refund remedy that should apply in cases involving costs associated with facilities constructed, owned or operated for the use of a single customer, where there was no return reflected in the rates charged, and of ITC's revised refund report, we conclude that ITC would have operated at a loss if required to refund the time value of amounts collected from MPPA prior to the filing of the Belle River Agreement. Accordingly, we will accept ITC's revised refund report and find that no time value refunds are warranted here.

#### **The Commission orders:**

ITC's September 27, 2012 compliance filing, including its revised refund report, is hereby accepted, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>34</sup> As noted above, in its protest, MPPA has not questioned the accuracy of the information or level of detail provided in the revised refund report or ITC's assertion that charges under the Belle River Agreement do not include any profit or return.