

UNITED STATES OF AMERICA 105 FERC ¶ 61,209
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

The Detroit Edison Company Docket Nos. ER03-19-002

International Transmission Company ER01-3000-007

DTE Energy Company RT01-101-007

EC01-146-007

ORDER DENYING REHEARING IN PART AND GRANTING
REHEARING IN PART

(Issued November 17, 2003)

1. On April 14, 2003, the Detroit Edison Company (Detroit Edison) filed a request for rehearing of the Commission's March 13 Order.¹ In addition, Detroit Edison moved to reopen the record to include a Michigan Public Service Commission's (Michigan Commission) order and requested an extension of time to make a compliance filing. As discussed below, we will deny Detroit Edison's request for rehearing in part and grant rehearing in part. We will also deny its motion to reopen the record to include the Michigan Commission's order.

I. Background

A. Docket No. ER01-3000-007, et al

2. On July 16, 2002, International Transmission Company (International Transmission) and DTE Energy Company (collectively Applicants) submitted a filing to comply with the Commission's order issued on May 22, 2002,² which directed Applicants to explain why control over certain facilities that appeared to perform a transmission

¹Detroit Edison Co., 102 FERC & 61,282 (2003) (March 13 Order).

²International Transmission Co. and DTE Energy Co., 99 FERC & 61,211 (2002) (May 22 Order).

function should not be transferred to the Midwest Independent Transmission System Operator, Inc. (Midwest ISO). In their compliance filing, Applicants confirmed that certain transmission-related facilities located at the Baxter sub-station had been transferred by Detroit Edison to International Transmission³ and were included in the list of transmission circuits set forth in Exhibit 1 of their initial compliance filing. However, Applicants maintained that the Navarre-DIG line and a certain portion of the Baxter sub-station (collectively, Facilities),⁴ are local distribution facilities owned and operated by Detroit Edison, and are subject to the jurisdiction of the Michigan Commission. Applicants asserted that any transfer of functional control to the Midwest ISO should be limited to instances in which the Facilities are used to reach the International Transmission system from the Dearborn generation facility for wholesale transactions.

3. By order issued on April 11, 2003, the Commission conditionally accepted Applicants' compliance filing. After performing a detailed analysis, the Commission found that the Facilities were transmission facilities and should be included in the final list of jurisdictional facilities transferred to the operational control of the Midwest ISO, and directed the compliance filing to be modified to reflect the transfer of operational control of the Facilities to the Midwest ISO.⁵

B. Docket No. ER03-19-002

4. On October 4, 2002, Detroit Edison filed with the Commission an executed Agency Agreement between Detroit Edison and the Midwest ISO. The Agency Agreement was filed pursuant to a directive set forth in the Commission's order issued in

³Applicants cite DTE Energy Co., 91 FERC & 61,317 (2000) and identify these transmission-related facilities and equipment as including certain buses, disconnects and other equipment at the terminals of the 230 kV Baxter-Navarre and Baxter-Warren lines located at the Baxter sub-station.

⁴The facilities at issue include a disconnect switch on the 230 kV Baxter-DIG line connecting the Dearborn Industrial Generation, LLC (DIG) generator to International Transmission Company's Baxter substation and the 230 kV Navarre-DIG line connecting DIG to International Transmission.

⁵International Transmission Co. and DTE Energy Co., 103 FERC & 61,041 (2003) (April 11 Order).

Docket Nos. ER01-3000-003, et al., which conditionally approved the transfer of operational control of International Transmission's jurisdictional facilities to the Midwest ISO.⁶

5. The Agency Agreement provides the Midwest ISO with limited functional control over certain facilities to ensure that DIG is provided with non-discriminatory transmission service when using the Facilities for wholesale sales while continuing to allow Detroit Edison to charge for retail service and recover costs under its Retail Access Service Tariff (RAST).

6. In the March 13 Order, the Commission conditionally accepted the Agency Agreement for filing and found that the Facilities perform a transmission function (not a state-jurisdictional, local distribution function) and also provide unbundled retail transmission service. The Commission explained that the Facilities were high voltage, looped transmission facilities for which operational control should be transferred to the Midwest ISO, consistent with the level of the Midwest ISO's control over other transmission facilities. The Commission directed Detroit Edison to revise the Agency Agreement to reflect the Commission's findings and ordered Detroit Edison to transfer full operational control of the facilities to the Midwest ISO. The Commission also ordered Detroit Edison to submit a compliance filing within 30 days of the issuance of the March 13 Order.

II. Instant Filings

A. Docket No. ER03-19-002

7. On rehearing, Detroit Edison argues that the Commission erred in the March 13 Order by finding that the Facilities are solely transmission facilities subject to the Commission's exclusive jurisdiction. Detroit Edison also contends that the Commission violated its statutory authority and regional transmission organization (RTO) policy by ordering Detroit Edison to transfer full operational control over the Facilities to the Midwest ISO.

⁶ International Transmission Co., 99 FERC ¶ 61,211 at 61,889 (2003) (May 22 Order).

8. Detroit Edison contends that the Facilities perform the dual functions of transmission and local distribution, and therefore, are not within the Commission's exclusive jurisdiction. Further, Detroit Edison argues that the Commission ignored additional evidence in the record which shows that Detroit Edison developed the Facilities to provide local distribution service to its customers and continues to utilize the Facilities to provide retail access service to end-use customers.

9. Detroit Edison also requests that the Commission reopen the record and grant its motion to include the Michigan Commission's recent order, which determined that Detroit Edison's RAST charges applied to industrial end-users of Ford Motor Co. (Ford) and Rouge Steel Co. (Rouge),⁷ as further evidence of the Facilities' local distribution function. Detroit Edison contends that the Michigan Commission's decision determined that the Facilities were local distribution facilities necessary to deliver power for end use.⁸

10. In addition, Detroit Edison requests that the Commission grant it an unspecified time period to file its compliance filing pursuant to the March 13 Order, or alternatively, stay application of the order pending the Commission's decision on rehearing.

11. DIG and CMS Marketing, Services and Trading Co. (CMS) filed: (1) an answer opposing Detroit Edison's rehearing request; (2) a motion to lodge the Michigan Commission's order; and (3) a request for extension of time for submitting the compliance filing or for a stay of the March 13 Order. They argue, among other things, that the Facilities are not "dual-use" facilities as they are used primarily for transmission service. CMS contends that even if the facilities are dual-use facilities, they are subject to the Commission's jurisdiction.

B. Docket No. ER01-3000-007, et al.

12. DTE Energy requests rehearing on the same basis that Detroit Edison requests rehearing in Docket No. ER03-19-002. In addition, DTE Energy states that Detroit Edison owns the Facilities and neither International Transmission nor DTE Energy can transfer control over the facilities to Midwest ISO.

⁷ See Detroit Edison's Rehearing at 10-11 and Attachment A (In the Matter of the Complaint of Ford Motor Company and Rouge Steel Company Against the Detroit Edison Co., Order and Opinion in Case No. U-12980 (March 12, 2003)).

⁸ Id.

13. DTE Energy also requests an extension of time to address the compliance filing required by the April 11 Order until the Commission or the courts resolve the issues regarding state and federal jurisdiction over the Facilities.

III. Discussion

A. Procedural Matters

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a rehearing request unless otherwise ordered by the decisional authority. We are not persuaded to accept DIG's answer to Detroit Edison's rehearing request in Docket No. ER03-19-002, and will, therefore, reject it.

B. Rehearing Requests

15. On rehearing, Detroit Edison and DTE Energy argue that because the Facilities are utilized to provide retail access service to end-use customers, the Commission erred in its determination that the Facilities perform only a transmission function. Detroit Edison claims that pursuant to Section 201(b) of the Federal Power Act (FPA), the Commission cannot assert exclusive jurisdiction over the Facilities which Detroit Edison contends are dual function facilities subject to the jurisdiction of both the Commission and the Michigan Commission. Therefore, Detroit Edison concludes that the Commission should accept the Agency Agreement without modification.

16. Detroit Edison and DTE Energy also assert that the Commission lacks the authority to compel it to transfer additional control over the Facilities to the Midwest ISO or to order Detroit Edison to join the Midwest ISO as a transmission-owning member. Detroit Edison states that Order No. 2000 and the FPA do not give the Commission the authority to compel utilities to join RTOs or to transfer authority over facilities to RTOs. They further argue that if the Commission finds that the Facilities perform a transmission function and are under the Commission's exclusive jurisdiction, it must make the same finding and order the transfer of operational control with respect to the other facilities on the Facilities' 230 kv loop configuration.⁹

⁹They identify DIG's, Ford's and Rouge's facilities as comprising part of the 230 kV loop. See Detroit Edison Rehearing at 19; DTE Energy Rehearing at 22.

Commission Response

17. We will deny in part, and grant in part, Detroit Edison's and DTE Energy's requests for rehearing. With regard to whether the Facilities in question are transmission facilities, Detroit Edison and DTE Energy have not raised any new arguments or introduced any new evidence that would persuade us to change our findings in the underlying proceedings. However, we will grant rehearing and provide further clarification with regard to our decisions directing the transfer of functional control of the Facilities to the Midwest ISO.

18. As the Commission explained in the March 13 Order and affirmed in the May 22 Order, the Facilities perform a transmission function.¹⁰ Although local distribution lines may exist within the Rouge Industrial Complex where Detroit Edison states that it serves retail customers, the record demonstrates that the Facilities are not local distribution facilities. As we explained in the March 13 Order, the Facilities include switching facilities and a 230 kV line (not low voltage lines or facilities). Power flows into and out of the Facilities, making them looped transmission facilities, *i.e.*, not radial in character like those of local distribution facilities. With the DIG facility interconnected to the grid and given the network configuration, the Facilities have the capacity to transmit energy to other markets outside the geographical area. These characteristics demonstrate that the Facilities are jurisdictional transmission facilities. Neither Detroit Edison nor DTE Energy has proffered any additional evidence on rehearing that shows otherwise. Such a finding is consistent with the seven-factor test outlined in Order No. 888 for classifying facilities as transmission or local distribution.¹¹

¹⁰ We note that the Agency Agreement's characterization of the Facilities as "distribution/interconnection" facilities is inconsistent with this finding, and, in our view, inaccurate.

¹¹ Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Statutes & Regulations. Regulations Preambles January 1991-June 1996 ¶ 31,036 (1996), Order No. 888-A, FERC Statutes. & Regulations., Regulations Preambles July 1996-December 2000 ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part and rev'd in part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

19. We also emphasize that Detroit Edison previously characterized the Baxter 230 kV switch, a portion of these Facilities, as transmission. In its May 2000 application to transfer its jurisdictional transmission facilities to International Transmission in Docket No. EC00-86, Detroit Edison listed the Baxter Substation as part of the transmission facilities to be transferred to International Transmission. Detroit Edison specifically noted that it had applied the Commission's seven-factor test to its facilities and that the transmission facilities to be transferred generally excluded certain "distribution" facilities that had voltage ratings below 120kV.¹² In support, Detroit Edison cited to the Michigan Commission's Order issued on January 14, 1998 in which the Michigan Commission adopted Detroit Edison's proposed classification of its facilities.¹³ Thus, the Baxter 230 kV switch was properly classified as a transmission facility.

20. The other Facilities in question, the 230 kV Navarre-DIG line, was not included in the classification adopted by the Michigan Commission as it was constructed after Detroit Edison transferred its transmission facilities to International Transmission. However, based on the characteristics of the Navarre-DIG line, it should also be classified as a transmission facility. Similar to those facilities found to be transmission and transferred to International Transmission in Docket No. EC00-86, the Navarre-DIG line connects to

¹² See DTE Energy, Detroit Edison and International Transmission May 4, 2000 Filing at 17-18.

¹³ See DTE Energy, Detroit Edison and International Transmission May 4, 2000 Filing in Docket No. EC00-86-000 at Attachment 3 (In Re: The Detroit Edison Company, case No. U-11337 (MPSC 1998). Detroit Edison proposed to classify its facilities as transmission if they operated at or above 120 kV (including 345 and 230 kV), except for radial lines and related facilities serving end-use customers.

The Commission approved the transfer of Detroit Edison's transmission facilities to International Transmission in *DTE Energy Co., et al.*, 91 FERC & 61,317 (2000). Detroit Edison states that after the Commission's approval but before the financial closing of the transaction, it conducted a final detailed analysis of each asset listed in their transfer application and withheld the transfer of its facilities located at the Baxter substation because they performed a local distribution function subject to the Michigan Commission's jurisdiction. Detroit Edison has not presented the results of a seven-factor test and did not submit evidence of any proposal given to the Michigan Commission to reclassify these facilities as local distribution. See International Transmission July 16, 2002 filing at 4.

the International Transmission system and thus to the transmission grid and is a looped 230 kV transmission line. These characteristics are consistent with the seven factors outlined in Order No. 888. Accordingly, we find that the Navarre-DIG line is a jurisdictional transmission facility.

21. With respect to Detroit Edison's and DTE Energy's arguments that the Facilities are "dual use" facilities not subject to the Commission's exclusive jurisdiction, we disagree. For the reasons discussed above, we find that the Facilities are not local distribution facilities; rather, they are transmission facilities, and pursuant to Section 201 of the FPA,¹⁴ are subject to the Commission's jurisdiction and review.¹⁵ However, we believe it is important to clarify that this finding does not prevent Detroit Edison from recovering any retail access charges that the state of Michigan is authorized to impose under state law.

22. Consistent with our discussion above, we will deny Detroit Edison and DTE Energy's requests for rehearing on this issue and direct Detroit Edison to revise the Agency Agreement by removing its characterization of the Facilities as Adistribution@ facilities and inserting the appropriate description of the Facilities as Atransmission@ facilities.¹⁶

23. Detroit Edison also contends that the March 13 Order required it to join the Midwest ISO as a transmission-owning member. We recognize that Order No. 2000 does not mandate utilities to participate in RTOs, and clarify that the March 13 Order did not require Detroit Edison to join Midwest ISO or any other RTO; rather, it required Detroit Edison to transfer control of the Facilities after determining that they were transmission facilities. However, for reasons set forth in Order No. 2000, we will not require Detroit Edison to transfer additional control over the Facilities to Midwest ISO and instead will accept the arrangement proposed in the Agency Agreement, except as noted herein.

¹⁴ 16 U.S.C. § 824 (2000).

¹⁵ Id.

¹⁶ Detroit Edison should make these changes in paragraphs 3, 4, 6 and 7 in Recitals; Articles One, Two (Sections 2.1, 2.2, 2.3); Articles Three, Four, Six, 10.2 of the Agency Agreement.

24. Because of our concern regarding the reliability of transmission system operations, which include these Facilities, we will direct Detroit Edison and the Midwest ISO to revise the Agency Agreement to include a provision that provides for the coordination of scheduling and maintenance for these Facilities between Detroit Edison and Midwest ISO to be consistent with the provisions of the Midwest ISO Agreement and the Midwest ISO OATT.¹⁷

25. With respect to the Agency Agreement's provision addressing rate treatment, Detroit Edison states that part of the costs of these Facilities are included in its retail rate base and, therefore, are collected through its RAST. Payments were made by DIG for the cost of the Navarre-DIG line, thus accounting for the remaining cost of the Facilities.¹⁸ Given that these costs are currently covered by the DIA or through Detroit Edison's RAST, we will accept the Agency Agreement's provision addressing rate treatment at this time.¹⁹

26. Detroit Edison's argument that DIG's ring bus facilities and Ford and Rouge's facilities comprising the 230 kV loop should also be under the operational control of the Midwest ISO go beyond the scope of this proceeding. Accordingly, we will not address that issue.²⁰

¹⁷ Although Article 2 of the proposed Agency Agreement promotes adherence to state laws, the FPA preempts state and local law to the extent that enforcement of such laws and regulations would conflict with the Commission's exercise of its jurisdiction under the federal statute.

¹⁸ In Docket No. EL01-51-000, et al., the Commission approved a Settlement of the Distribution Interconnection Agreement (DIA) between Detroit Edison and DIG that addressed Detroit Edison's cost recovery for the Navarre-DIG line. The Settlement provides, among other things, that DIG will receive credits for these payments. See Dearborn Industrial Generation, LLC, 99 FERC ¶ 61,268 (2002).

¹⁹ However, we note that Midwest ISO may request, or the Commission may initiate a proceeding under Section 206 of the FPA to revisit the rate treatment of the Facilities.

²⁰ Detroit Edison may file a complaint under Section 206 of the FPA requesting an investigation of this issue.

27. It is important to note that the Agency Agreement is a unique proposal that has not been implemented before. The Commission will revisit this issue if experience shows that this limited functional control conveyed to the Midwest ISO results in issues regarding reliability or non-discriminatory transmission service. Moreover, we note that pursuant to the proposed Agency Agreement, the wholesale service over these Facilities must be taken under the Midwest ISO OATT.²¹

B. Reopening of the Record

28. Detroit Edison and DTE Energy request that the Commission reopen the record of this proceeding in order to include the Michigan Commission's decision²² and a diagram that identifies the systems at the Rouge Complex. Detroit Edison contends that because the Michigan Commission's decision was issued one day prior to the March 13 Order, it could not bring the decision to the attention of the Commission.

29. In determining whether to reopen a record, the Commission looks to whether the movant has demonstrated the existence of extraordinary circumstances that outweigh the need for finality in the administrative process.²³ The movant must demonstrate a change in circumstances that goes to the very heart of the case.²⁴ Detroit Edison has not done so.

30. In accordance with Order No. 888, the Commission gives deference to a state commission's classification of facilities, but "[i]n order to give such deference, [the Commission] expects state regulators to specifically evaluate the seven factor indicators

²¹ See Agency Agreement, Article 2. We believe that it is important to note that but for the Agency Agreement, Detroit Edison would be required to file an open access transmission tariff governing transmission over these Facilities.

²² See Attachment A to Detroit Edison Rehearing Request, In the matter of the Complaint of Ford Motor Co. and Rouge Steel Company against the Detroit Edison Co., Order and Opinion in Case No. U-12980 (March 12, 2003).

²³ See, e.g., East Texas Electric Cooperative, Inc. v. Central and Southwest Services, Inc., et al., 94 FERC & 61,218 (2001); order denying reh'g, 95 FERC & 61,066 (2001).

²⁴ Id.

and any other relevant facts and to make recommendations consistent with the essential elements of the Rule.”²⁵ For example, in *Nevada Power Co.*, 88 FERC ¶ 61,234 (1999) (*Nevada Power*), the Commission deferred to the state commission’s approval of Nevada Power’s reclassification of its transmission and local distribution plant where Nevada Power reclassified this plant after applying the seven factor test, and filing it with the Nevada Commission.²⁶ Detroit Edison has not demonstrated that it has followed these procedures for reclassification. The Michigan Commission decision that Detroit Edison cites does not discuss an application of the seven-factor test or reclassification of the portion of the Facility that is at issue.²⁷

31. Therefore, we will deny Detroit Edison's request to reopen the record.

C. Requests for Extension of Time

1. Detroit Edison

32. In Docket No. ER03-19-002, Detroit Edison requests an indefinite extension of time to address the compliance filing required in the March 13 Order until the Commission acts upon its rehearing request. Detroit Edison asserts that an extension of time to address the Agency Agreement, as ordered by the Commission, will not cause DIG or its affiliates any harm.

33. We will deny Detroit Edison’s request for an indefinite extension of time to file the revised Agency Agreement. Given our finding herein, such an extension would not serve DIG, Detroit Edison or their customers. However, in order to provide sufficient time to

²⁵ Order No. 888 at 31,784 and n.548.

²⁶ *Nevada Power*, 88 FERC at 61,768 and n.4.

²⁷ Further, we note that it appears that the facilities discussed in the Michigan Commission's Order are not the Facilities at issue in the instant proceeding, as there is no specific mention of these Facilities in the Michigan Commission's decision. In addition, the diagram submitted in the instant proceeding is similar to other diagrams submitted in the instant proceedings and would not add substantial information to our decision making process.

revise the Agency Agreement, as directed herein, we will grant Detroit Edison an extension of 15 days from the date of this order to file the revised Agency Agreement and appropriate rate treatment with the Commission.

34. Detroit Edison requests that, if the Commission denies its request for an extension of time to address the compliance filing, the Commission stay application of the March 13 Order's requirement that it file a revised version of the Agency Agreement pending rehearing. As we are acting on Detroit Edison's rehearing request and allowing Detroit Edison 15 days from the date of this order to submit its compliance filing, its request for a stay is now moot.

2. DTE Energy

35. In Docket No. ER01-3000-007, et al., DTE Energy also requests an extension of time to address the compliance filing required by the April 11 Order until the Commission or the courts resolve the issues regarding state and federal jurisdiction over the Facilities.

36. We find it appropriate to also grant DTE Energy 15 days from the date of issuance of this order to file its compliance filing in this proceeding.

The Commission orders:

(A) Detroit Edison's request for rehearing is hereby denied in part and granted in part, as discussed in the body of this order.

(B) Detroit Edison's request to reopen the record is hereby denied as discussed in the body of this order.

(C) Detroit Edison's request for an extension of time to file a revised Agency Agreement and appropriate rate treatment is hereby granted, as modified, as discussed in the body of this order.

(D) DTE Energy's request for an extension of time to file a compliance filing is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.