

106 FERC ¶ 61,011
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Midwest Generation EME, LLC

Docket No. ER04-190-000

Midwest Generation EME, LLC

v.

Docket No. EL04-22-000
(Not Consolidated)

Commonwealth Edison Company and
Exelon Generation Company, LLC

ORDER ACCEPTING AND SUSPENDING FILING AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES
AND DISMISSING COMPLAINT

(Issued January 12, 2004)

1. On November 13, 2003, Midwest Generation EME, LLC (MWGen) filed, under Sections 205 and 206 of the Federal Power Act (FPA),¹ respectively, a proposed tariff to recover the annual revenue requirement associated with its provision of Reactive Power and Voltage Control from Generation Sources Service (reactive power) on the transmission system of Commonwealth Edison Company (ComEd) and a conditional complaint asking that the Commission direct ComEd and its affiliate, Exelon Generation Company, LLC (ExGen) to allocate a portion of the reactive power revenues currently collected by ComEd and ExGen to MWGen. As discussed below, we accept and suspend the proposed tariff for a nominal period, to become effective January 13, 2004, subject to refund, and establish hearing and settlement judge procedures. Because the concerns MWGen raises in its conditional complaint in Docket No. EL04-22-000 will be addressed in the hearing we are setting in Docket No. ER04-190-000, we dismiss MWGen's

¹ 16 U.S.C. §§ 824d, 824e (2000).

conditional complaint. This order benefits customers by ensuring a timely inquiry into whether the proposed tariff is just and reasonable.

Background

2. In its filing in Docket No. ER04-190-000, MWGen seeks compensation for reactive power provided by generation facilities that MWGen owns and operates in the ComEd control area which have been released (or will be released as of January 1, 2004) from power purchase agreements (PPAs) with ExGen. In 1999, ComEd sold certain jurisdictional facilities (including fossil fuel stations and peaking units), via Edison Mission Energy (EME),² to MWGen.³ MWGen states that it sold the output of the facilities it acquired from ComEd, including reactive power, back to ComEd under three long-term PPAs. In 2001, ComEd transferred its interest as purchaser of the output of the facilities acquired by MWGen under the PPAs to ExGen.⁴

3. MWGen states that ComEd collects revenues from its transmission customers for reactive power under Schedule 2 of its Open Access Transmission Tariff (OATT). On February 7, 2001, the Commission accepted, *inter alia*, an Ancillary and Other Control Area Services Resource Purchase Agreement (Ancillary Agreement) between ExGen and ComEd under which ExGen would sell and deliver resources necessary for ComEd to meet its obligation to supply certain ancillary services, including reactive power, under its OATT.⁵ Under the terms of the Ancillary Agreement, ExGen is paid the same price as stated under Schedule 2 of ComEd's OATT for providing reactive power.

4. MWGen states that its facilities consist of seven generating stations with twenty generating units and have a reactive power capability of 4,290 MVARs. Prior to January 1, 2003, MWGen states it sold all of the output from each of its operational facilities to ExGen under the PPAs. However, effective January 1, 2003, and January 1, 2004, MWGen states that ExGen will have released certain MWGen facilities from the PPAs, which have a total reactive power capability of 2,030 MVARs (with 1,510 MVARs in operational status and 520 in suspended operational status) and

² MWGen is a wholly-owned subsidiary of EME.

³ Commonwealth Edison Company, 89 FERC ¶ 62,105 (1999).

⁴ PECO Energy Co., *et al.*, 97 FERC ¶ 62,013 (2001).

⁵ Exelon Corporation, Commonwealth Edison Company, and Commonwealth Edison Company of Indiana, 94 FERC ¶ 61,105 (2001).

435 MVARs, respectively.⁶ MWGen contends that with the release of these facilities from the PPAs, ExGen no longer has contractual rights to the output from the released facilities as it had at the time the Ancillary Agreement was filed with the Commission. MWGen requests that it be allocated a share of the reactive power revenue requirement specified in ComEd's OATT.

Notice of Filing, Intervention, Protest and Answers

5. Notice of MWGen's tariff filing and conditional complaint was published in the Federal Register, 68 Fed. Reg. 65,693 (2003), with comments, interventions, protests and the answer to the conditional complaint due on or before December 5, 2003. Nesbitt Asset Recovery, LLC, filed a timely motion to intervene. Exelon Corporation (Exelon) filed a timely motion to intervene and protest in Docket No. ER04-190-000 and an answer to MWGen's conditional complaint in Docket No. EL04-22-000. MWGen filed an answer to Exelon's protest of the rate filing and to Exelon's answer to the conditional complaint. Exelon filed an answer to MWGen's answer.

Discussion

A. Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to these proceedings.

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 384.213 (2003), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept MWGen's and Exelon's answers because they have provided information that assisted us in our decision-making process.

B. Docket No. ER04-190-000

1. MWGen's filing

8. As support for its request to recover its annual revenue requirement for the provision of reactive power from the released MWGen facilities, MWGen cites to Mirant Chalk Point, LLC, 96 FERC ¶ 61,310 (2001) (Chalk Point), wherein the Commission approved the allocation of reactive power revenues to the new owners of divested

⁶ ExGen has released a total reactive power capability of 2,455 MVARs from the PPAs (1,935 MVAR capability in operational status) out of the 4,290 MVAR capability of the units.

generation by the transmission provider that previously owned such units. Specifically, MWGen states that Potomac Electric Power Company (Pepco) divested its generating assets to unaffiliated companies (collectively, Mirant generators) and to its affiliate, Pepco Energy Services, Inc. After divestiture, MWGen states that Pepco continued to receive the revenues for reactive power under Schedule 2 of PJM Interconnection, LLC's (PJM) OATT that it had received prior to divestiture. The new owners of the divested generation units sought an allocation of the reactive power revenues. MWGen states that the Commission found it appropriate that the allocation of reactive power revenues to the owners of the divested units should be based on the maximum VAR ratings of the divested generating units.

9. MWGen states that because new owners of independent generators generally do not file a FERC Form No. 1 or otherwise maintain their books and records in compliance with the Commission's Uniform System of Accounts, a methodology in which the prior owner's Commission-accepted reactive power rates are allocated among the new owners based on the relative capability of the units to produce reactive power (i.e., Chalk Point) is appropriate because it recognizes the relative contribution of the units to support voltage stability on the transmission grid. MWGen also states that ComEd recognized the appropriateness of distributing reactive power revenues to generators when it agreed to transfer the revenues it received under Schedule 2 of its OATT to ExGen because ExGen owned or controlled the output of all of the former ComEd facilities used to develop the rates under Schedule 2. MWGen states that the instant filing is intended to merely allocate a portion of those reactive power revenues to MWGen to reflect the fact that MWGen now has the right to the output of some of the former ComEd facilities used to develop the rates in Schedule 2.

10. MWGen seeks waiver of the Commission's 60-day prior notice requirement and requests that the Commission make the proposed tariff effective January 1, 2004, the same date that MWGen states that it will own and control the output of generating facilities which provide reactive power to the ComEd system. MWGen states that its proposed tariff will not impact the rates of ComEd's customers because ComEd will continue to collect the current cost-based rates under Schedule 2 of its OATT regardless of whether the Commission accepts this filing.

2. Exelon's protest of rate filing

11. Exelon states that under ComEd's OATT, controlling Interconnection Agreements (IAs), and Commission precedent, MWGen is not entitled to receive compensation for reactive power under normal operating conditions because the ComEd control area operator can only require the MWGen units to operate outside the established power factor range under emergency conditions. Exelon states that the Schedule 2 revenue requirement under ComEd's OATT is based on the generating facilities formerly owned by ComEd. Exelon essentially argues that once ExGen released the facilities under the

PPAs, the MWGen facilities were no longer under the control of the ComEd control area operator and were, therefore, no longer useful for providing reactive power. Exelon states that ExGen has also purchased the output of several newly constructed Independent Power Producer (IPP) facilities and turned the control of those facilities over to the control of the ComEd control area operator. Exelon indicates that because ComEd has not revised its reactive power revenue requirement to account for the addition of the IPP facilities put under the control of the ComEd control area operator, ComEd's current reactive power revenue requirement undercompensates it for the costs of reactive power. Exelon points to Order Nos. 888, *et al.*,⁷ wherein the Commission stated it would not force a transmission provider to purchase services it may not need, including duplicative ancillary services such as reactive power at low load periods or at a location where it is not needed, as support for its position.⁸ Exelon requests that the filing be dismissed.

12. Exelon further states that under the terms of the IAs, MWGen is required to operate its units within established power factors without receiving compensation for reactive power. Specifically, Exelon points to Section 5.7(b)(i) of the IAs which provides, in part, that:

. . . (1) the generators at the Station shall be capable of operating at power factors within limits set forth by the machine capability curves as supplied by ComEd at the time of sale and (2) the Station shall automatically generate such reactive power as may be necessary to maintain reactive support.

Exelon argues that this section is consistent with Commission precedent which recognizes that generators should not be compensated for reactive power when operating

⁷ 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).

⁸ Order No. 888-B at 62,094.

within their established power factor ranges. Exelon points, inter alia, to Section 9.6.3 of Order No. 2003:⁹

Transmission Provider is required to pay Interconnection Customer for reactive power that Interconnection Customer provides or absorbs from the Large Generating Facility only in those instances where the Transmission Provider requests the Interconnection Customer to operate its Large Generating Facility outside the agreed upon dead band¹⁰

13. Further, citing to Consumers Energy Company,¹¹ Exelon states that Section 5.4(c) of the IAs, which provides for MWGen to be compensated for reactive power if ComEd directs MWGen to turn on its plant or raise or lower output under emergency conditions, is consistent with Commission precedent regarding emergency conditions.¹² Exelon claims this provision is proof that ComEd cannot rely on the released facilities for reactive power and is not obligated to pay MWGen for reactive power. ComEd states that it agrees that MWGen would be entitled to file rates under Section 205 to recover its reactive power costs when ComEd assumes control of MWGen's units during emergency conditions.

14. Exelon also contends that MWGen's argument that it should be compensated for reactive power is based on Schedule 2 of PJM's OATT. Exelon states that this argument is flawed because that language pertains only to PJM's tariff, not ComEd's. Exelon contends that MWGen erred when it premised its Section 205 filing on the proposition that the decision in Chalk Point is applicable to all transmission tariffs when, in fact, the Commission was only interpreting PJM's tariff.

15. Finally, Exelon contends that to the extent that it was proper for MWGen to seek recovery of such costs, MWGen's filing is deficient because it lacks adequate cost support. Specifically, Exelon argues that the Chalk Point methodology applies only under an interpretation of special provision of PJM's tariff and does not apply herein because the service would be under ComEd's tariff. Exelon submits that the appropriate cost support is the methodology set forth in American Electric Power Service

⁹ Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 Fed. Reg. 49,846 (Aug. 19, 2003), III FERC Stats. & Regs. [Preambles] ¶ 31,146 (2003) (Order No. 2003).

¹⁰ Id. at 30,645.

¹¹ 93 FERC ¶ 61,230 (2001).

¹² Id.

Corporation.¹³ Exelon contends that MWGen's calculation, which used a ratio based on 1998 ComEd cost data to determine its revenue requirement, ignores the actual costs of the unit (fossil fuel or nuclear, baseload or cycling) and how the units are used, resulting in an overstatement of the revenue requirement for MWGen's released units. Should the Commission not reject the filing, Exelon asks for a five-month suspension.

3. MWGen's answer

16. MWGen states that although ComEd no longer has the right to dispatch the real power output of the released MWGen facilities, ComEd does have the right to dispatch reactive power from the released MWGen facilities during both non-emergency and emergency conditions under the IAs between MWGen and ComEd. MWGen states that the released MWGen facilities provide reactive power to the ComEd transmission system both automatically as needed to maintain proper transmission line voltage and in response to specific requests from ComEd dispatchers. MWGen states that under the IAs the released MWGen facilities are required to absorb and produce reactive power, at the discretion of ComEd, within the power factors specified in their generation capability curves, and in excess of the normal 0.95 leading/lagging deadband.¹⁴ Moreover, MWGen states that the released MWGen facilities are located within ComEd's control area and ComEd has control over their supply of reactive power through the IAs.

17. In addition, MWGen states that it seeks compensation of its fixed costs associated with providing reactive power capability of the released MWGen facilities to the ComEd transmission system for transmission voltage support outside the leading/lagging deadband where the transmission provider (i.e., ComEd) has control over such reactive power output. MWGen states that it is not seeking compensation for producing or absorbing reactive power within this deadband. MWGen further asserts that although the IAs between ComEd and MWGen do not address compensation for reactive power, ExGen paid MWGen under the PPAs for the entire output of the released MWGen facilities, including reactive power.

18. Also, MWGen asserts that Exelon's argument that MWGen has provided no cost support for its proposed rates is erroneous. MWGen states that MWGen's proposed rates

¹³ 80 FERC ¶ 63,006 (1997), aff'd in relevant part, Opinion No. 440, 88 FERC ¶ 61,141 (1990), reh'g withdrawn, 92 FERC ¶ 61,001 (2000). Exelon states that the Commission later standardized this methodology by recommending all generators use it for determining cost-based reactive revenue requirements. See WPS Westwood Generation, L.L.C., 101 FERC ¶ 61,290 (2002).

¹⁴ Citing, Order No. 2003 at 30,645.

are based on data filed by ComEd in 1999 to support reactive power rates under Schedule 2 of its OATT and are consistent with Chalk Point. MWGen further states that it is not seeking to file a new rate but rather is filing to receive an appropriate allocation of existing FERC-approved rates (i.e., ComEd's rates).

4. Commission response

19. MWGen's proposed filing presents issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing ordered below. Our preliminary analysis indicates that the proposed filing 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 tariff for filing, suspend it for a nominal period, make it effective January 13, 2004, subject to refund,¹⁵ and set it for hearing.

20. In order to provide the parties an opportunity to resolve this matter among themselves, we will hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁶ 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.¹⁷ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

¹⁵ See 18 C.F.R. §35.3 (2002). See also Central Hudson Gas & Electric Corp., et al., 60 FERC ¶ 61,106 at 61,338-39, reh'g denied, 61 FERC ¶ 61,089 (1992).

¹⁶ 18 C.F.R. § 385.603 (2003).

¹⁷ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. FERC's website contains a listing of the Commission's judges and a summary of their background and experience (www.ferc.gov -- click on Office of Administrative Law Judges).

C. Docket No. EL04-22-000**1. MWGen's conditional complaint**

21. If the Commission accepts MWGen's tariff for reactive power without modification or hearing, MWGen states that it does not require the relief requested in its complaint.¹⁸ However, if the Commission modifies or sets MWGen's proposed tariff for hearing, MWGen asks that the Commission exercise its authority under Section 206 of the FPA to conduct a hearing regarding ComEd's reactive power payments to ExGen and to require ComEd to compensate MWGen for reactive power to the same degree that ComEd compensates ExGen using the methodology set forth in Chalk Point.

22. MWGen argues that ComEd's failure to compensate MWGen for reactive power violates the FPA's prohibition against undue discrimination as well as Commission policy. MWGen states that while the relevant terms and conditions of the IAs between MWGen and ComEd and between ExGen and ComEd contain virtually identical provisions regarding the provision of reactive power, ExGen receives all of the revenues ComEd collects for reactive power through the Ancillary Agreement between ComEd and Exelon. MWGen states that this discrimination against unaffiliated power suppliers distorts markets in violation of Section 205 of the FPA and long-standing Commission policy.¹⁹

2. Exelon's answer to complaint

23. Exelon argues that MWGen's complaint should be denied for its failure to support its allegations. Specifically, Exelon argues that MWGen has not shown that the existing rate is unjust and unreasonable or unduly discriminatory and has not shown that the payments ComEd makes to ExGen under the Ancillary Agreement are excessive because ExGen no longer controls the released units. With respect to the latter, Exelon argues that the revenue requirement under Schedule 2 of ComEd's OATT undercompensates ComEd because ExGen has acquired replacement capacity and energy from recently constructed independent generation in ComEd's control area to provide reactive power and these units have a higher revenue requirement than the old, highly depreciated units. Exelon states that ExGen has not sought to increase the revenue requirements for these units which are under the control of ComEd's control area operator.

¹⁸ MWGen states that if the Commission accepts the proposed tariff without modification or hearing, it will withdraw its complaint.

¹⁹ Citing, e.g., Southern Power Co., 104 FERC ¶ 61,041 at P 23 (2003), reh'g pending.

24. In addition, Exelon argues that MWGen's complaint fails because ExGen and MWGen are not similarly situated. Exelon states that ComEd pays ExGen under the Ancillary Agreement that allows the ComEd control area operator to dispatch ExGen's units. However, Exelon states, the ComEd control area has no such control over MWGen's units.

3. Commission response

25. As we discuss above, in this order we set for hearing MWGen's Section 205 filing in Docket No. ER04-190-000 regarding its compensation for reactive power. Pending the outcome of that hearing (which may address or moot the concerns raised in the complaint) we dismiss at this time MWGen's complaint without prejudice.

The Commission orders:

(A) MWGen's proposed tariff is hereby accepted for filing, suspended for a nominal period, to become effective January 13, 2004, subject to refund and set for hearing as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon 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 1), a public hearing shall be held in Docket No. ER04-190-000 concerning the justness and reasonableness of the proposed tariff, as discussed in the body of this order. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in paragraphs (C) and (D) below.

(C) 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 directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and with 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 this case

to a presiding judge for a trial-type 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.

(E) If settlement judge procedures fail, and a trial-type evidentiary hearing is to be held, a presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a conference in this proceeding, to be held within approximately fifteen (15) days of the date on which the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory 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.

(F) MWGen's complaint is hereby dismissed without prejudice as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.