

UNITED STATES OF AMERICA 106 FERC 61, 064
FEDERAL ENERGY REGULATORY COMMISSION

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

Michigan Electric Transmission Company, LLC Docket No. ER03-1003-001

ORDER DENYING REHEARING

(January 28, 2004)

1. This order addresses the requests for rehearing filed by the Wolverine Power Supply Cooperative, Inc. (Wolverine) and Michigan Public Power Agency and the Michigan South Central Power Agency (Michigan Agencies) of the Commission's order issued in this proceeding on August 29, 2003 (August 29 Order).¹ This order benefits customers because it confirms the Commission's prior order that a public utility will be allowed to recover certain costs associated with the provision of transmission service that could not be recovered otherwise. As discussed below, we deny the rehearing requests.

I. Background

2. On June 30, 2003, Michigan Electric Transmission Company (METC) filed certain amendments to five Transmission Ownership and Operating Agreements (Operating Agreements) between METC, Wolverine and the Michigan Agencies. The Operating Agreements are similar and the amendments are intended to recover Midwest Independent System Operator, Inc. (Midwest ISO) cost recovery charges assessed to METC under Schedules 10, 16, and 17 of the Midwest ISO Open Access Transmission Tariff (OATT).² In the August 29 Order, the Commission accepted the amendments to the Operating Agreement to allow pass through of RTO charges assessed to METC by the Midwest ISO. Additionally, the amendments provided for the reimbursement of the Commission's annual charges assessed to the Midwest ISO pursuant to 18 C.F.R. § 382.201 (2003), and charged, in turn, to METC in connection with each party's load.

¹ Michigan Electric Transmission Company, LLC, 104 FERC ¶ 61,236 (2003).

² Midwest ISO Schedule 10 – ISO Cost Recovery Adder, Schedule 16 – Financial Transmission Administrative Service Cost Recovery Adder, Schedule 17 – Energy Market Support Administrative Cost Recovery Adder.

II. Discussion

A. Procedural Matters

3. On October 14, 2003, METC filed a response to the request for rehearing of Wolverine. Rules 213(a)(2) and 713(d)(1) of the Commission's Rules of Practice and Procedure³ generally prohibit answers to requests for rehearing unless otherwise ordered by the decisional authority. In this instance, we will accept the answer of METC because it provides information that clarifies the issues and aids us in the decisional process.

B. Commission Decision

4. The discussion that follows addresses the four issues raised in the requests for rehearing filed by Wolverine on September 26, 2003 and the Michigan Agencies on September 29, 2003.

1. **Whether the RTO charges should be charged to Wolverine under the Operating Agreements**

5. Wolverine states that the Commission erred by approving METC's pass through of the Midwest ISO RTO charges to Wolverine and, by doing so, the Commission has approved the Midwest ISO RTO charges without examining whether the Midwest ISO charges are legitimate. Wolverine claims that the charges are not legitimate, since Midwest ISO has no basis for treating Wolverine's ownership shares in transmission facilities as load. In addition, Wolverine asserts that the Commission should not allow METC to pass through the RTO charges because the Operating Agreements reflect capacity ownership entitlements, not transmission load. Also, Wolverine argues that it should not be required to reimburse METC for the RTO charges because the Operating Agreements are not transmission service agreements and there is nothing in the Operating Agreements which provide for transmission service.

METC's Answer

6. METC states that the capacity entitlements under the Operating Agreements clearly involve the delivery of transmission service and that the RTO charges are a cost to METC associated with the provision of that transmission service. In addition, METC states that the underlying transmission system use must be scheduled with the Midwest ISO, assigned e-tags, and coordinated with other transmission system uses.

³ 18 C.F.R. § 385.213(a)(2) and § 385.713(d)(1) (2003).

Commission Determination

7. We reject Wolverine's argument that METC's pass through of RTO charges should not be assessed under the Operating Agreements. Wolverine purchased a 64% joint ownership interest in a transmission line (Tittabawassee-South line) constructed by METC that is part of the METC system pursuant to the July 27, 1992 Wolverine Transmission Ownership and Operating Agreement (Tittabawassee-South Entitlement Agreement). The Agreement provided Wolverine with a 105 MW entitlement to transmission service over the entire METC system. Wolverine has an additional 15 MW entitlement to transmission over the entire METC transmission grid as a result of Wolverine's joint ownership interest in Consumers' Campbell Unit No. 3 plant and intertie lines pursuant to the August 15, 1980 Campbell Unit No. 3 Transmission Ownership and Operating Agreement ("Campbell Entitlement Contract"). Wolverine is permitted under these Operating Agreements to use the entire METC system even though it only owns a part of discrete facilities. Therefore, we disagree with Wolverine's statement that the terms of the Operating Agreements do not provide for the underlying transmission service. We find that the Operating Agreements contain language indicating that transmission service was intended by the parties to the Operating Agreements. For example, Subsection 6.1.2 of the Campbell Unit No. 3 Operating Agreement and Article 6 of the Wolverine Operating Agreement state that Wolverine will be permitted without charge or cost, except as specifically set forth in the agreement, to utilize the Bulk Transmission System for the purpose of delivering to Wolverine the capacity and energy to which Wolverine is entitled. Therefore, we find that the Operating Agreements clearly involve the delivery of transmission service and contain the terms and conditions applicable to each party to serve the load.

8. In addition, the Operating Agreements exclude Wolverine from paying the capital costs associated with its interest in the discrete transmission facilities, but require Wolverine to pay all operating and maintenance expenses and taxes (other than income taxes) related to the discrete facilities, as well as all administrative and general expenses applicable to the system-wide electric operations of METC which is allocable to the designated transmission lines. As mentioned previously, the capacity entitlements under the operating agreements expressly permit Wolverine to utilize all of METC's bulk transmission system to transmit energy. Since Wolverine is permitted to use the entire METC system for delivery service, we find that Wolverine should pay the RTO costs assessed by Midwest ISO and the Commission's annual charges, as these are costs incurred by METC and are applicable to its system-wide electric operations necessary to provide service to Wolverine. Accordingly, if the Midwest ISO imposes its RTO charges on METC in connection with the capacity entitlements shown under the Operating Agreements, the charges are rightly passed through to the involved parties consistent with the agreements. Finally, it is not in dispute that the Operating Agreements permit METC the right to modify the agreements to change the rates. Therefore, we deny Wolverine's claim that the Operating Agreements are not the appropriate forum to include RTO

charges that could not otherwise be recovered for the transmission service billed to METC.

9. We also reject Wolverine's argument that by approving the METC pass through of the Midwest ISO RTO charges to Wolverine, the Commission essentially approved the Midwest ISO charges without examining whether the Midwest ISO charges are legitimate. The Midwest ISO charges are currently on file with the Commission or are pending before the Commission in other proceedings. As such, the legitimacy and reasonableness of the Midwest ISO's proposed rates are at issue in those proceedings,⁴ not in this proceeding. However, we have determined that the Midwest ISO is entitled to assess the RTO charges on transactions utilizing the Midwest ISO transmission system and the transmission owners are entitled to recover any RTO charges billed to them by the Midwest ISO.⁵ It is this principle we are applying here.

2. Whether payment of the RTO charges to METC constitutes a double payment by Wolverine of the same charges already paid to Midwest ISO

10. Wolverine argues that it already pays RTO charges under the Midwest ISO OATT based on Wolverine's load. Therefore, to pay an additional set of RTO charges based on Wolverine's capacity entitlements under the Operating Agreements with METC would result in double charges. In addition, Wolverine claims that it is questionable whether the Midwest ISO in fact assesses METC such RTO charges.

METC's Answer

11. METC states in its response that Wolverine is billed the RTO charges under the transmission service agreements between it and the Midwest ISO for its use of the transmission system under those agreements. In addition, METC separately accounts for and reports to the Midwest ISO the transmission system usage associated with Wolverine's capacity entitlement under the Operating Agreement because they are grandfathered agreements. METC asserts that since the Midwest ISO bills METC the applicable RTO charges for these entitlements, that METC should be able to recover these amounts from Wolverine. In addition, METC states that it has been assessed the Schedule 10 charges by the Midwest ISO in association with Wolverine's transmission

⁴ Midwest Independent Transmission System Operator, Inc., 101 FERC ¶ 61,221 (2002).

⁵ Midwest Independent Transmission System Operator, Inc., 102 FERC ¶ 61,192 (2003).

system uses under the Operating Agreements since May of 2002. METC also states that it will not seek to collect any amounts for RTO charges for which it is not billed by the Midwest ISO.

Commission Determination

12. We reject Wolverine's claims that it already pays the RTO charges under the Midwest ISO's OATT based on Wolverine's load, and therefore, requiring it to pay any additional charge under the Operating Agreements would result in a double charge to Wolverine. We find that the portion of Wolverine's load attributable to the grandfathered Operating Agreements is separate from other Wolverine load being served under Wolverine's network service agreements under the Midwest ISO OATT.

13. METC is being assessed the RTO charges based on Wolverine's capacity entitlements being transmitted by the Midwest ISO over the Midwest ISO transmission system, under the Midwest ISO OATT, within the METC pricing zone. Wolverine is correctly billed the RTO charges under transmission service agreements between Wolverine and the Midwest ISO. In addition, the Midwest ISO correctly bills METC for the transmission system usage associated with Wolverine's capacity entitlements under the grandfathered Operating Agreements. Therefore, we find the underlying transmission service for which Wolverine is being assessed RTO charges from both the Midwest ISO and METC to be separate and distinct and that METC should be able to pass through the RTO charges associated with Wolverine's load under the Operating Agreements. There is no double collection of RTO costs.

3. Whether the Commission improperly relied on a prior order as precedent for determining that Wolverine is obligated to pay RTO charges to METC

14. Wolverine states that the Commission erred by relying on a case that is not a valid precedent.⁶ Wolverine argues that the Commission May 19 Order, should not be of any precedential value due to the fact that the Michigan Agencies did not object to the pass through of the RTO charges. Wolverine states that the May 19 order did not address any of the issues raised by Wolverine and did not address the Commission's annual charges at all. Wolverine maintains that because one party does not contest certain issues means that other parties are not bound by that choice.

⁶ Michigan Electric Transmission Company, LLC, 103 FERC ¶ 61,195 (2003) (May 19 Order) in which the Commission approved a similar amendment to a Michigan South Central Power Agency Operating Agreement.

METC's Answer

15. METC states that in the May 19 Order, the Commission determined that METC could legitimately recover certain RTO cost from Michigan South Central Power Agency under the relevant Operating Agreements. METC states in its response that since the proceeding in Docket Nos. ER03-688 and ER03-1003 dealt with similar issues arising under materially identical agreements with similarly situated parties, it is appropriate for the Commission to rely on the May 19 Order, as justification for its findings in the August 29 Order. METC states that, given the findings in the May 19 Order, it could be discriminatory under the Federal Power Act not to treat these similarly situated customers the same.

Commission Determination

16. We disagree with Wolverine's conclusion that the Commission based its decision in the August 29 Order on the fact that the Michigan Agencies did not object to the pass through of the RTO Charges. The decision was based on the fact that the RTO charges reflect the cost of providing service over the METC transmission system. In addition, Wolverine's capacity entitlements under the Operating Agreements should not be treated differently than any other parties in the METC pricing zone under similar conditions.

4. Whether non-jurisdictional transmission-owning entities may be assessed Commission annual charges

17. The Michigan Agencies argue that they fall outside of the Commission's definition of "public utility" and are not subject to the Commission's jurisdiction and may not be assessed FERC's annual charges when they use transmission pursuant to their ownership interest. The Michigan Agencies argue that the proposed amendments impose the FERC annual assessments on facilities owned by non-jurisdictional entities. Michigan Agencies allege that the Commission Order fails to distinguish between the Michigan Agencies' use of their ownership interests as distinct for the Michigan Agencies Purchase Supplement Transmission Service under the Midwest ISO Tariff. Michigan Agencies also argue that the Commission does not have jurisdiction to assess, either directly or indirectly, charges to a non-jurisdictional transmission-owning entity for transmission used pursuant to its ownership interests.

Commission Determination

18. The Michigan Agencies argue that as a non-jurisdictional transmission-owning entity they are not subject to the Commission's jurisdiction and may not be assessed FERC's annual charges, either directly or indirectly, when they use transmission pursuant to their ownership interest. We have previously addressed this issue. The existing Commission policy is that municipal systems and rural electric cooperative utility

systems that are financed by the Rural Utilities Service will not be required to pay annual charges.⁷ However, the Commission noted that as transmission customers they may, of course, be charged rates by the transmission provider that reflect annual charges assessed to the transmission provider.⁸ Consistent with this, the Commission has stated:

How the [annual charge] is recovered is a matter of the public utility's ratemaking. Just as a public utility recovers its other transmission-related costs in its rates, so a public utility's annual charges may be recovered in its rates. That the entity paying these rates may not itself be jurisdictional does not mean it should not have to pay these rates.⁹

The Commission orders:

Requests for rehearing are hereby denied for the reasons stated herein.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

⁷ See Revision of Annual Charges Assessed to Public Utilities, Order No. 641, 65 Fed. Reg. 65,757 (November 2, 2000), FERC Stats. & Regs. Regulations Preambles July 1996-December 2000 ¶ 31,109 (2000), reh'g denied, Order No. 641-A, 66 Fed. Reg. 15793 (March 21, 2001), 94 FERC ¶ 61,290 (2001). Order No. 641 at 31,845.

⁸ Order No. 641 at 31,845 n.34.

⁹ Midwest ISO, 103 FERC ¶ 61,048 at P 15 n.25. See also, Midwest Independent Transmission System Operator, Inc., 104 FERC ¶ 61,060 at P 19 n. 35 (2003).