

119 FERC ¶ 61,181
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Ontelaunee Power Operating Company, LLC

Docket No. EL07-15-000

v.

Metropolitan Edison Company

ORDER DENYING IN PART COMPLAINT AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued May 22, 2007)

1. On November 7, 2006, Ontelaunee Power Operating Company, LLC (Ontelaunee) filed a complaint against Metropolitan Edison Company (MetEd) alleging that MetEd's charges for certain services provided under its Generation Facility Transmission Interconnection Agreement (Interconnection Agreement) with MetEd are unjust, unreasonable, unduly discriminatory, and inconsistent with the Commission's longstanding interconnection and pricing policies. In this order, we deny in part the complaint and establish hearing and settlement judge procedures to resolve certain issues involving the complaint.

Background

A. Interconnection Agreement Filing in Docket No. ER00-1855-000

2. On February 22, 2000, MetEd and Ontelaunee's predecessor in interest¹ entered into an Interconnection Agreement. The Interconnection Agreement establishes the rates, terms, and conditions for the construction, maintenance, and operation of certain facilities necessary to interconnect Ontelaunee's generation facilities with MetEd's transmission system. The Interconnection Agreement was filed by MetEd, with Calpine filing

¹ Calpine Construction Finance Company, L.P. (Calpine)

comments in support of MetEd's filing.² The Interconnection Agreement was accepted by the Commission by delegated letter order dated May 4, 2000.³ The Ontelaunee Facility became operational in the later part of 2002.⁴

3. Section 5.1 of the Interconnection Agreement specifies that Ontelaunee is responsible for the following charges: (1) Company Additional Facilities Charge; (2) North Temple Substation Maintenance Charge; (3) General Facilities Maintenance Charge; and (4) General Facilities Use Charge.

4. The Company Additional Facilities Charge is a monthly charge to Ontelaunee, calculated as the Company Monthly Rate⁵ multiplied by the Company Additional Facilities Cost.⁶

² Calpine Construction Finance Company, L.P. Motion for Leave to Intervene and Comments in Support of Filing, Docket No. ER00-1855-000 (Mar. 31, 2000).

³ See *Metropolitan Edison Company*, Docket No. ER00-1855-000 (May 4, 2000) (unpublished letter order).

⁴ United States Department of Energy, Energy Information Administration's U.S. Electricity Database. Ontelaunee Energy Center (Ontelaunee Facility) is a 584 megawatt natural gas-fired electric generation facility located in Pennsylvania that is interconnected to PJM Interconnection, LLC (PJM) and owned by Ontelaunee.

⁵ The Company Monthly Rate is based on a levelized fixed charge rate methodology agreed to by MetEd and Calpine. The rate is 1.5 percent per month or 18 percent per annum.

⁶ The Interconnection Agreement defines this as "All costs by the Company associated with the design, engineering, procurement, construction, and installation of the Company Additional Facilities. Such costs shall include, without limitation, all applicable costs incurred by Company in accordance with the July 20, 1999 letter agreement between the Parties." Section 1.1(g) of the Interconnection Agreement. Company Additional Facilities are facilities added by MetEd to accommodate the interconnection and Ontelaunee's generating facilities, including reconfiguration of the existing North Temple and Ontelaunee substations. Section 1.1(e) of the Interconnection Agreement. The letter agreement of July 20, 1999 (1999 Letter Agreement) has never been filed with the Commission.

5. The North Temple Substation Maintenance Charge is assessed as a monthly charge of \$1,398.81 for the costs to operate and maintain the North Temple Substation, a 230 kV and 13.2/69 kV switchyard. The General Facilities Maintenance Charge is assessed at \$95.23 per month to maintain the structures, improvements, and facilities of the North Temple Substation, including, among other things, dikes, roadways, landscaping, lighting and yard improvements.

6. The General Facilities Use Charge was assessed to Calpine as a one-time charge of \$40,382.05 as a reimbursement for a portion of past capital costs incurred by MetEd for the structures, improvements, and facilities of the North Temple Substation.

7. In 2005, the Commission approved the indirect acquisition of the Ontelaunee Facility by Ontelaunee from Calpine in Docket No. EC05-125-000.⁷ According to the Commission's records, the parties did not file the Interconnection Agreement under section 205 to reflect its assignment from Calpine to Ontelaunee.⁸

B. Procedural Matters

Notice of Filings and Responsive Pleadings

8. Notice of Ontelaunee's November 7, 2006 complaint was published in the *Federal Register*, 71 Fed. Reg. 66,764 (2006), with comments, interventions, and protests due on or before November 27, 2006. MetEd timely filed an answer to the complaint (MetEd Answer). On December 12, 2006, Ontelaunee filed a motion for leave to respond and response to MetEd's answer. On December 22, 2006, MetEd filed a motion for leave to reply and reply to Ontelaunee's response. On January 3, 2007, the parties filed a joint motion to hold the proceeding in abeyance and to engage in alternative dispute resolution (ADR). On March 6, 2007, Ontelaunee filed a motion to lift abeyance and for the Commission to renew its consideration of the complaint. On March 12, 2007, MetEd filed an amendment to its November 27, 2006 answer (Amended Answer).

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to an answer unless otherwise permitted by the decisional authority. We reject Ontelaunee's response and MetEd's reply to Ontelaunee's response because they have not provided information that has assisted us in our decision-making process.

⁷ See *LSP Ontelaunee Holding, LLC*, 113 FERC ¶ 62,001 (2005).

⁸ See 18 C.F.R. § 35.1 (2006).

C. Substantive Matters

10. Ontelaunee complains that MetEd's charges for the Ontelaunee Facility are unjust, unreasonable, and unduly discriminatory because MetEd: (1) insists on charging an excessive capital recovery rate of 18 percent per annum for all costs Ontelaunee is required to pay, (2) charges an excessive Company Additional Facilities Cost of \$7,479,403 that is unsupported by MetEd's filings and not part of its filed rate, (3) refuses to allow Ontelaunee to pay off its interconnection costs in a reasonable lump sum amount, and (4) improperly imposes O&M charges on network upgrades related to Ontelaunee. Ontelaunee requests that the Commission order the Interconnection Agreement to be modified to provide for a correct cost responsibility for the amount of interconnection facilities and network upgrades that were required to facilitate the interconnection of the Ontelaunee Facility and allow Ontelaunee to pay such costs in a reasonable lump sum amount. Further, Ontelaunee requests that the Commission order MetEd to award Ontelaunee transmission credits for the network upgrades it has funded.

1. Preclusion

Positions of the Parties

11. MetEd argues that absent evidence of changed circumstances, claim preclusion⁹ and issue preclusion¹⁰ act to bar a party from repeating challenges to a jurisdictional agreement found to be just and reasonable.¹¹ MetEd argues that the Commission should decline to consider Ontelaunee's untimely challenges to the Interconnection Agreement under the principles of res judicata and collateral estoppel. In addition, it claims that the

⁹ "The doctrine of res judicata holds that a judgment on the merits in a prior suit bars a second suit involving identical parties . . . based on the same cause of action." *Nat'l Comm. for the New River, Inc. v. FERC*, 433 F.3d 830, 834 (D.C. Cir. 2005) (quoting *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004)).

¹⁰ Collateral estoppel is "the doctrine which prohibits relitigation of the same issue in a different claim." *Williams Natural Gas Co.*, 83 FERC ¶ 63,015, at 65,115-16 (1998) (citing 46 Am. Jur. 2d Judgments §516 (1994)).

¹¹ MetEd admits that technically, Commission orders approving the rates and terms of jurisdictional agreements are not considered res judicata or collateral estoppel, because the Commission can always institute a new proceeding to change such rates or terms based on evidence showing that they are no longer just and reasonable in light of changed circumstances. MetEd Answer at 6.

Commission has an established administrative policy that bars parties from relitigating rate issues in the absence of a showing that circumstances have significantly and materially changed.

Commission Determination

12. We reject MetEd's argument that res judicata and collateral estoppel bar Ontelaunee from challenging the Interconnection Agreement in this proceeding. Section 20.3 of the Interconnection Agreement preserves Ontelaunee's rights under the Federal Power Act (FPA), which includes the right to challenge provisions within the agreement under section 206. The fact that Ontelaunee's predecessor did not challenge certain provisions when the Interconnection Agreement was filed does not mean that it waived the right, specifically preserved in the contract, to challenge those provisions later.¹² Moreover, a finding that a rate is just and reasonable in one proceeding does not foreclose a contrary finding in a subsequent proceeding.¹³ In any case, the issue set for hearing below (whether Ontelaunee is being assessed costs that are outside the filed rate) was not litigated and could not have been litigated in the proceeding in which the Interconnection Agreement was filed.

2. Timeliness

Positions of the Parties

13. MetEd argues that the Commission's recent decision in *FPL Energy Marcus Hook v. PJM Interconnection*¹⁴ is another reason for dismissing the complaint. In *Marcus Hook*, Complainant FPL Energy Marcus Hook, LP (FPL Energy) sought to challenge the

¹² See *Duke Energy Hinds, LLC*, 117 FERC ¶ 61,210 at P 28 (2006).

¹³ See, e.g., *Tagg Brothers v. Moorhead*, 280 U.S. 420, 445 (1930) (a rate order is not res judicata; every rate order may be succeeded by another); *Texas Eastern Transmission Corp.*, 893 F.2d 767, 774 (5th Cir. 1990) (a finding that a rate is reasonable in one proceeding does not foreclose a contrary finding in a subsequent proceeding); *Utah Power & Light Co.*, 27 FERC ¶ 61,258 at 61,485, *reh'g denied*, 28 FERC ¶ 61,088 (1984), *aff'd sub nom. Sierra Pacific Power Co. v. FERC*, 793 F.2d 1086 (9th Cir. 1986) (res judicata does not bar a party from seeking reconsideration of whether to roll in rates in a second rate case).

¹⁴ MetEd cites *FPL Energy Marcus Hook, LP v. PJM Interconnection, LLC*, 118 FERC ¶ 61,169 (2007) (*Marcus Hook*).

costs to which it had agreed in its Interconnection Service Agreement (ISA) two years after signing it. In rejecting FPL Energy's claim, the Commission relied on section 37.4 of the PJM tariff, which gives the generator the right to challenge its cost responsibility by invoking arbitration or proposing alternative interconnection terms. MetEd states that the Commission in *Marcus Hook* found that "FPL Energy, therefore, cannot, under the PJM tariff, raise those issues almost two years after signing the ISA."

14. MetEd, in its Amended Answer argues that,

as the Commission observed in its order approving the 1999 version of the PJM tariff, interconnection customers, who, like Ontelaunee, entered into an interconnection agreement with the transmission owner retained "the option to proffer alternatives and to challenge PJM's rejection of those alternatives through the ADR procedures. This provides the applicant with a vehicle to sponsor less costly projects."¹⁵ Ontelaunee thus enjoyed the same protections provided by section 37.4 of the PJM tariff: it had the ability to challenge the TO's [Regional Transmission Owner's] terms and conditions for interconnection, and to request arbitration. Ontelaunee's predecessor did neither. Instead, it filed with the Commission in support of the Ontelaunee IA.

15. Therefore, MetEd argues, just as the generator in *Marcus Hook* could not raise challenges to the interconnection charges in its ISA "almost two years after signing the ISA," Ontelaunee cannot challenge the charges its predecessor-in-interest agreed to pay in the Interconnection Agreement seven years after that agreement was signed.

Commission Determination

16. We reject as inapposite MetEd's argument that *Marcus Hook* requires that the complaint be dismissed. Here, section 37.4 of the PJM tariff, on which the Commission relied in *Marcus Hook*, does not apply to the matters at issue in the present case. Further, MetEd misquotes the 1999 Order, which states:

PJM further explains that, upon completion of a Facilities Study, PJM ISO will recommend the necessary facilities and upgrades. The TO or the interconnection customer may offer alternatives to PJM ISO's

¹⁵ MetEd cites *PJM Interconnection, LLC*, 87 FERC ¶ 61,299 at 62,199 (1999) (1999 Order).

recommendation which the ISO can accept or reject. If PJM ISO rejects the alternative, the TO or the customer has the option of pursuing its alternative through the ADR procedures. Finally, a TO may require the execution of a separate Interconnection Agreement between the merchant generator and the TO to whose facilities the merchant generator will interconnect.¹⁶

The “alternatives” that are mentioned in the 1999 Order are for “necessary facilities and upgrades” following a Facilities Study and not for charges or cost allocation in the IA itself, as MetEd implies. Therefore we reject MetEd’s request to dismiss the complaint on the basis of lack of timeliness.

3. Standard of review

Positions of the Parties

17. Ontelaunee asserts that in both sections 2.6 and 21.4 of the Interconnection Agreement, Ontelaunee expressly reserved its rights to file a complaint under section 206 of the FPA and that, consistent with Commission precedent,¹⁷ where previously-accepted interconnection agreements contain such language, the appropriate standard for modifying the Interconnection Agreement is the “just and reasonable” standard set forth in the FPA.

18. Section 2.6 of the Interconnection Agreement states, in relevant part:

In the event of a changing law or regulation. . . the Parties will negotiate in good faith any amendment . . . to this Agreement . . . Nothing in this Agreement shall limit the rights of the Parties or the FERC under section 205 or 206 of the Federal Power Act and FERC’s Rules and Regulations thereunder.

19. Section 21.4 of the Interconnection Agreement states:

Nothing in this Article 21 shall restrict the rights of any Party to file a complaint with FERC under relevant provisions of the Federal Power Act.

¹⁶ 87 FERC ¶ 61,299 at 62,197.

¹⁷ Ontelaunee cites *Duke Energy Hinds, LLC, v. Entergy Services, Inc.*, 102 FERC ¶ 61,068 at P 21 (2003) (*Duke Hinds*), order on reh’g, 117 FERC ¶ 61,210 (2006).

20. MetEd argues that when a complainant seeks to modify an agreement pursuant to section 206 of the FPA, the Commission will review the request for modification based on either the *Mobile-Sierra*¹⁸ “public interest” standard or the “just and reasonable” standard, depending on the terms of the agreement. Contrary to Ontelaunee’s arguments, MetEd asserts that the public interest standard, and not the just and reasonable standard, applies to Ontelaunee’s request that the Commission modify the Interconnection Agreement.

21. MetEd claims that section 20.3 is the only provision that is relevant to determining the applicable standard of review when Ontelaunee seeks to modify the Interconnection Agreement.¹⁹ Section 20.3 of the Interconnection Agreement states:

Nothing contained in this Agreement shall be construed as affecting in any way the ability of the Power Producer to exercise its rights under the applicable rules and requirements of the Federal Power Act and pursuant to FERC’s rules and regulations promulgated thereunder.

MetEd states that, in a previous proceeding using substantially identical language, the Commission applied the public interest standard rather than the just and reasonable standard to the complaint.²⁰

¹⁸ See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

¹⁹ MetEd states that sections 20.1 and 20.2 of the Interconnection Agreement are “clearly inapplicable to the instant case.” MetEd Answer at 9.

Section 20.1 of the Interconnection Agreement states:

This Agreement may not be amended or modified except by a written instrument signed by each of the Parties hereto.

Section 20.2 of the Interconnection Agreement states:

Nothing contained in this Agreement shall be construed as affecting in any way the right of the Company [MetEd] to unilaterally make application to FERC for a change in rates, terms, and conditions, charges, classification of service, rule, or regulation under Section 205 of the Federal Power Act or applicable laws and requirements.

²⁰ MetEd cites *Kiowa Power Partners, LLC v. Public Service Co. of Oklahoma*, 110 FERC ¶ 61,118 (2005) (*Kiowa*).

22. MetEd contends that neither section 2.6 nor section 21.4 permits Ontelaunee to submit this Complaint under the section 206 just and reasonable standard. Relying on the prefatory language in section 2.6, MetEd argues that section 2.6 concerns only the actions that the parties may take in response to “a changing law or regulation or the issuance of an order or other directive by a regulatory authority with jurisdiction over either Party that affects or may reasonably be expected to affect either Party’s performance under this Agreement.” The section is inapplicable to Ontelaunee’s complaint, MetEd continues, because there is no indication that Ontelaunee filed the complaint in response to a changing law or regulation or a directive from a regulatory authority that might affect either party’s ability to perform, and Ontelaunee does not allege that it did so.

23. MetEd also argues that section 21.4 permits either party to file a complaint with the Commission “under relevant provisions of the Federal Power Act,” in the context of a claim or dispute under Article 21 of the Interconnection Agreement (entitled “Disputes”). Article 21 applies to “[a]ny claim or dispute, which either Party may have against the other, arising out of the Agreement.” However, Ontelaunee’s Complaint does not “arise out” of the Interconnection Agreement, MetEd reasons, because Ontelaunee does not allege that MetEd has violated the terms of the Interconnection Agreement as written or otherwise misinterpreted or misapplied the Interconnection Agreement. Rather, Ontelaunee argues that the Interconnection Agreement should be modified in a number of ways.

Commission Determination

24. We agree with Ontelaunee that the just and reasonable standard of review is appropriate since Commission precedent and applicable provisions of the Interconnection Agreement provide for such a result. As we found in *Duke Hinds*,²¹ where provisions in an Interconnection Agreement allow either party to unilaterally request changes under FPA sections 205 or 206, the Commission has the authority to require changes to the contracts under the just and reasonable standard. Sections 20.2 and 20.3 of the Interconnection Agreement grant MetEd and Ontelaunee, respectively, a unilateral right to request that the Commission modify the Interconnection Agreement under section 205 or 206. Although section 20.1 also states that the parties may not amend or modify the agreement “except by a written instrument signed by each of the Parties,” sections 20.2 and 20.3 expressly protect the parties’ unilateral filing rights with language stating that no provision of the Interconnection Agreement shall be construed “as affecting in any way”

²¹ *Duke Hinds*, 102 FERC ¶ 61,068 at P 21.

their unilateral filing rights.²² Taken as a whole, we conclude that section 20 preserves the parties' unilateral filing rights and the application of the just and reasonable standard.

25. Further, we reject MetEd's argument that the *Kiowa* decision requires application of the public interest standard in this case. In *Kiowa*, the provision at issue in the interconnection agreement stated that the agreement itself "may be amended by and only by a written instrument duly executed by each of the Parties" and was silent on whether the parties preserved their unilateral filing rights.²³ Here, in contrast, there is no provision that can be read as overriding the parties' preservation of their unilateral rights to make filings under the just and reasonable standard of FPA sections 205 and 206. Therefore, we determine that the just and reasonable standard of review applies here. Under this standard, a complainant has the burden of proving that a rate or charge is unjust or unreasonable.²⁴ Below, we examine whether Ontelaunee has met its burden.

4. Company Annual Capital Recovery Rate

26. Ontelaunee complains that the company annual capital recovery rate (capital recovery rate) of 18 percent per annum is excessive. Ontelaunee also contends that it conflicts with 18 C.F.R. § 35.19a(a)(2) computing interest. Ontelaunee states that when this method is used, the Company's capital recovery rate drops to 8.17 percent per annum. Ontelaunee requests that the Commission revise the Interconnection Agreement to reduce the capital recovery rate to 8.17 percent and to refund, with interest, the amount Ontelaunee has paid under the existing rate structure.

27. MetEd argues that the capital recovery rate is not based on an interest rate as Ontelaunee suggests. Rather, it is derived from the Commission's fixed charge rate methodology. MetEd notes that the capital recovery rate of 18 percent per annum is a negotiated rate agreed to by the parties and accepted by the Commission in ER00-1855-000. MetEd also notes that the rate was agreed to in part because Calpine, Ontelaunee's predecessor, felt that it could not construct the interconnection facilities any cheaper and wanted to induce MetEd to undertake a highly compressed construction schedule.

²² Additionally, MetEd itself acknowledges that section 20.1 does not apply here. See *supra* note 20.

²³ *Kiowa*, 110 FERC ¶ 61,118 at P 10.

²⁴ *Cities of Anaheim, Azusa, Banning, Colton, and Riverside, Cal. v. CAISO*, 95 FERC ¶ 61,197 (2001).

28. MetEd also argues that it is permitted, under section 10.1 of PJM's OATT, to: (1) recover the costs and expenses associated with the operation, maintenance, inspection, testing, modification, taxes and carrying or capital replacement charges for all Attachment Facilities related to the interconnection service provided for under the Interconnection Agreement ; and (2) any other charges applicable to the interconnection customer mutually agreed upon and accepted by the Commission.

Commission Determination

29. We deny Ontelaunee's request to revise the Interconnection Agreement to reflect a lower capital recovery rate and to require MetEd to refund, with interest, the difference it has paid under the existing rate structure. As MetEd correctly states, the rate was agreed to by the parties and accepted by the Commission in Docket No. ER00-1855-000. Ontelaunee has failed to meet its burden of showing that the rate is unjust, unreasonable, or unduly discriminatory.

5. Transmission Credits

30. Ontelaunee claims that it has been improperly denied transmission credits for network upgrades it has funded. It claims that under Commission precedent, MetEd may not directly assign the costs of network upgrades to Ontelaunee.²⁵ In support of its claims, Ontelaunee states that the North Temple substation, which was reconfigured to accommodate the interconnection, is located at or beyond the point of interconnection and is therefore a network facility. Since it is paying for the upgrade costs, Ontelaunee requests that the Commission require MetEd to provide transmission credits to Ontelaunee with interest.

31. MetEd argues that Ontelaunee's request for transmission credits is baseless. MetEd maintains that the Company Additional Facilities reflected in the Interconnection Agreement were for the sole purpose of interconnecting Ontelaunee's generating unit to MetEd's Transmission System and, as such, they are interconnection facilities and not network upgrades.

32. MetEd also argues that Ontelaunee is not entitled to transmission credits because under PJM's interconnection rules, the generator pays for 100 percent of the cost of all network upgrades.

²⁵ Ontelaunee cites *Nevada Power Co.*, 101 FERC ¶ 61,036 at P 8 (2002).

Commission Determination

33. As we stated in Order No. 2003, independent transmission providers such as PJM were given flexibility to deviate from the Order No. 2003 *pro forma* interconnection agreement provisions, including those dealing with the payment of transmission credits.²⁶ Also, we accepted PJM's proposal to revise its OATT provision to require interconnection customers to pay for 100 percent of all network upgrades.²⁷ Accordingly, we deny Ontelaunee's request for transmission credits.²⁸

6. The Company Additional Facilities

a. Actual Cost v. Estimated Cost

Positions of the Parties

34. Ontelaunee alleges that the \$7,479,403 Additional Facilities Cost is excessive, is not supported by MetEd's filings, and is not part of its filed rate under the Interconnection Agreement, which provides for a total cost of \$5,689,600. Ontelaunee also argues that while section 1.1(g) of the Interconnection Agreement purports to preserve MetEd's right to adjust the Additional Facilities Cost in accordance with a July 20, 1999 letter agreement between MetEd and Calpine, the letter agreement was never filed with the Commission. It contends that the letter agreement is a Contribution in Aid of Construction (CIAC) Agreement and should have been filed with the Commission. Ontelaunee asserts that the Commission should find that the Company Additional Facilities Cost is \$5,689,600, and require MetEd to refund the difference between the amount Ontelaunee has paid MetEd to date and the \$5,689,600 from the Interconnection Agreement, with interest.

²⁶ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 698 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005)), *aff'd sub nom. National Association of Regulatory Utility Commissioners v. FERC*, No. 04-1148 (D.C. Cir. Jan. 12, 2007).

²⁷ *PJM Interconnection, LLC*, 110 FERC ¶ 61,099 at P 8-9 (2005).

²⁸ *See Old Dominion Electric Cooperative v. PJM Interconnection, LLC*, 119 FERC ¶ 61,052 (2006).

35. MetEd contends that the \$5,689,600 was a cost estimate provided at the time the Interconnection Agreement was executed in February 2000 and that \$7,479,403 is the actual cost of the work conducted by MetEd to accommodate the interconnection. MetEd states that Appendix E, section 3.1(a) of the Interconnection Agreement, specifies that the \$5,689,600 is an estimate and that the Interconnection Customer will pay for all actual costs incurred by MetEd under the Interconnection Agreement. MetEd also claims that the Commission has never required that the actual costs charged to a party under a jurisdictional agreement be filed, as long as the basis for the charges is set out in detail in the Interconnection Agreement. MetEd contends that at a meeting in early 2002 with Calpine it justified the actual cost of \$7,479,403, which Calpine accepted.²⁹ In response to Ontelaunee's claim that the 1999 letter agreement is a CIAC agreement that should have been filed, MetEd states that the letter agreement simply memorializes a limited scope of work amounting to \$50,000 begun by MetEd prior to signing the Interconnection Agreement. MetEd has nonetheless attached the 1999 letter agreement to its answer.

36. In its Amended Answer, MetEd further refutes Ontelaunee's claim that it should have filed the final cost with the Commission by stating that "the bulk of the increase that Ontelaunee complains of were actually caused by design changes in the interconnection facilities either requested by Ontelaunee or agreed to by the parties at the time."³⁰ In the attached affidavit, however, it states that in the course of the work and after the initial cost estimate had been released, Ontelaunee decided that it wished to reconfigure the generator substation "from a radial to a ring bus design in the generator substation" and add fiber optic cable, thus requiring extra equipment and extra work that were not included in the original estimate.

b. Lump Sum Payment

Positions of the Parties

37. Ontelaunee complains that MetEd refuses to allow it to make a lump sum payment based on the remaining balance of the \$5,689,600 Company Additional Facilities Cost reflected in Appendix E of the Interconnection Agreement.

²⁹ MetEd Aff. at 2.

³⁰ MetEd Amended Answer at 21. MetEd does not explain who the "parties" are or when the agreement took place.

38. MetEd initially argued that the Interconnection Agreement contains no provisions permitting prepayment or lump-sum payments. Nevertheless, in its Amended Answer, MetEd states that it is willing to allow Ontelaunee to “buy out” the Interconnection Agreement as long as it is based on the remaining balance of the \$7,479,403 in actual costs incurred.

Commission Determination

39. As MetEd correctly states, Appendix E, Article V specifically requires the customer to pay for the actual costs of work performed by MetEd. However, it is unclear from MetEd’s answers whether the difference between the estimated and actual costs is the result of a request by Ontelaunee to reconfigure the facilities after 2005, when it became the new owner and after the interconnection was in place, or whether it is the result of a request by Calpine and occurred sometime between when the Interconnection Agreement was signed (or when the interconnection was energized) and 2005. As discussed above, it would appear from the affidavit attached to MetEd’s Amended Answer that it was Ontelaunee that requested the reconfiguration. If so, that would imply that the reconfiguration occurred after the interconnection was completed and should be treated as a separate agreement as opposed to an extension of the estimated costs, as MetEd would have us believe.

40. Also, upon review of the Interconnection Agreement and accompanying one-line diagram, it appears that MetEd and Calpine had already contemplated the generator substation to be in a ring bus configuration and radial with respect to the rest of the MetEd system. In contrast, however, in reviewing MetEd’s transmission one-line diagrams found in PJM’s 2006 and 2007 FERC Form 715 submissions, we find that the generator substation configuration is identical to what was originally filed in the Interconnection Agreement. Both of these findings appear to contradict MetEd’s claim that it modified the generator substation configuration from a “radial to a ring bus design” after the initial estimate was released to Ontelaunee and raises the question of whether or when the reconfiguration occurred.³¹

41. If all of the facilities had been built under the Interconnection Agreement at the request of Calpine, the \$7,479,403 in actual costs would be an extension of the estimated

³¹ A radial configuration describes how the generator connects to the rest of the bulk power system, while a ring bus design describes the breaker configuration at the generator substation. The two designs are not mutually exclusive.

cost and, therefore, would be the Company Additional Facilities Cost for which Ontelaunee would be responsible for paying. However, should certain facilities have been built at the request of Ontelaunee in 2005, when Ontelaunee became the new customer and after the interconnection was energized in 2002, then the \$7,479,403 could not be an extension of the estimated cost since it would reflect both the cost of facilities built under the Interconnection Agreement and facilities constructed under a separate arrangement after Ontelaunee became the new customer. If this is the case, the new Company Additional Facilities Cost and any O&M charges would then need to be filed with the Commission as an amendment to the Interconnection Agreement or under a separate agreement between MetEd and Ontelaunee, along with appropriate cost support.

42. Since it is unclear from the record as to whether all of the facilities were built under the Interconnection Agreement at the request of Calpine or whether certain facilities were reconfigured at the request of Ontelaunee and, similarly, whether the difference between the estimated and actual costs is an extension of the estimated cost in the Interconnection Agreement or represents the addition of new facilities that should have been the subject of a different agreement that should have been filed with the Commission, we will set these issues for hearing.

43. With regard to the 1999 Letter Agreement, we find that it is a jurisdictional agreement that should have been filed with the Commission. Accordingly, MetEd is directed to file the 1999 Letter Agreement. Additionally, we determine that, because the level of the lump sum payment hinges on the outcome of what constitutes the actual Company Additional Facilities Cost, we will also set this issue for hearing.

7. O&M Charges

Positions of the Parties

44. Ontelaunee complains that the North Temple Substation Maintenance Charge and General Facilities Maintenance Charge are O&M charges imposed by MetEd for work performed on network facilities. Ontelaunee asserts that the Commission has previously held that a transmission provider cannot directly assign the cost of O&M work performed on network facilities since they benefit all users on the system.

45. Further, Ontelaunee alleges that it is already being assessed O&M charges in the Company Additional Facilities Charge. Ontelaunee requests that the Commission order MetEd to eliminate the North Temple Substation Maintenance and the General Facilities Maintenance Charges from the Interconnection Agreement and require MetEd to refund with interest the revenues it has improperly received.

46. MetEd argues that the North Temple Substation and General Facilities Maintenance Charges relate to previously existing facilities that were subsequently reconfigured to accommodate the interconnection and the Ontelaunee Facility. According to MetEd, the O&M component in the Company Additional Facilities Charge is applied to the new Ontelaunee interconnection facilities.³² Therefore, no double-counting exists. MetEd also maintains that it is entitled to collect these types of O&M charges under Appendix 2, Attachment O, section 10.1 of the PJM OATT.

Commission Determination

47. The Commission previously has determined that under the PJM tariff, O&M costs for network upgrades (as that term is defined in the PJM tariff) are the responsibility of the transmission owner, and O&M costs for Attachment Facilities are the responsibility of the interconnecting generator.³³ Our review of Attachment 3 to Appendix H of the Interconnection Agreement indicates that the point of interconnection is where the single circuit 230 kV transmission circuit connecting the Ontelaunee Facility to MetEd's transmission system dead ends at the North Temple substation. Thus, the North Temple substation is a network facility. Since Ontelaunee has been paying O&M charges for work at the North Temple substation in violation of the PJM tariff, it is entitled to a refund plus interest for any O&M charges it has paid for network upgrades.

48. We will set for hearing whether O&M costs are duplicated in the Company Additional Facilities Charge and the amount of refunds properly due for O&M costs.

D. Hearing and Settlement Judge Procedures

49. Upon review of the filing, we find that the parties' pleadings raise issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below. As discussed above, both the complaint and the answer to the complaint raise concerns about various unresolved issues, including the level of the Company Additional Facilities Charge, the calculation of the lump sum payment, and the imposition of O&M charges. Such issues cannot be resolved based on the filings submitted to date, and the hearing and settlement procedures are necessary to examine the issues raised by the parties to these filings. In particular, the issues include, but are not limited to: (1) whether all of the

³² MetEd Amended Answer at 20.

³³ *PJM Interconnection, L.L.C.*, 104 FERC ¶ 61,154 at P 19-21 (2003), *reh'g denied*, 109 FERC ¶ 61,236 at P 18 (2004).

facilities were built under the Interconnection Agreement at the request of Calpine or, if not, which of the facilities were reconfigured at the request of Ontelaunee after the Interconnection Agreement was executed; (2) whether the entire \$7,479,403 Company Additional Facilities Cost is the actual cost of the facilities at issue or is the actual cost of the facilities at issue plus an additional cost resulting from design changes requested by Ontelaunee; (3) based on the determination of the actual Company Additional Facilities Cost, what the Company Additional Facilities Charge and lump sum payment should be; (4) if certain facilities were built as a result of design changes by Ontelaunee, whether those facilities should have been the subject of a separate agreement that should have been filed with the Commission; and (5) whether O&M costs are duplicated in the Company Additional Facilities Charge and the amount of refunds properly due for O&M costs.

50. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure. If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose. The settlement judge shall make an initial report to the Chief Judge and the Commission within thirty (30) days of the date of appointment 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.

51. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date of the filing of the complaint, but no later than five months after the filing of such complaint.³⁴ Consistent with our general policy of providing maximum protection to customers,³⁵ we will set the refund effective date as of the date of the filing of Ontelaunee's complaint, or November 7, 2006.

³⁴ Section 206(b) of the FPA was amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005).

³⁵ See, e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶61,413, at 63,319 (1993); *Canal Electric Co.*, 46 FERC ¶61,153, at 61,539, *reh'g denied*, 47 FERC ¶61,275 (1989).

52. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the ALJ to provide a report to the Commission in advance of the conclusion of the 180-day period. Here, given that the 180-day period has already passed due in part to the abeyance request and subsequent failed ADR efforts of the parties, the Commission cannot follow its normal procedure. Although we do not have the benefit of the presiding judge's decision, based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of hearing procedures or, if the case were to go to hearing immediately, by February 15, 2008. We thus estimate that if the case were to go to hearing immediately we would be able to issue our decision within approximately 4 months of the filing of briefs on exceptions and briefs opposing exceptions, or by August 15, 2008.

The Commission orders:

(A) The complaint is denied in part as discussed in the body of this order.

(B) MetEd is directed to file the Interconnection Agreement as a service agreement under PJM's OATT since MetEd is a member of PJM and to file an amendment to the Interconnection Agreement stating that the Ontelaunee Facility has been transferred from Calpine to Ontelaunee. MetEd is further directed to file its 1999 Letter Agreement as it is a jurisdictional agreement. The filings under this ordering paragraph must be submitted within thirty (30) days of the date of this order.

(C) 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 by 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 I), a public hearing shall be held concerning the various issues relating to the complaint as described in this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2006), the Chief 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.

(E) Within thirty (30) days of being appointed by the Chief Judge, the settlement judge shall file an initial report with the Commission and the Chief Judge 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 every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding 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.

(G) The refund effective date established pursuant to section 206(b) of the Federal Power Act, as amended by section 1285 of the Energy Policy Act, is November 7, 2006.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.