

124 FERC 61,168
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.

Toledo Edison Company

Docket Nos. ER08-1020-000
EL08-65-000

ORDER ACCEPTING AND SUSPENDING FILING, ESTABLISHING EXPEDITED
HEARING PROCEDURES, AND ON PETITION FOR DECLARATORY ORDER

(Issued August 18, 2008)

I. Introduction

1. This order accepts for filing and suspends for five months, to become effective on June 1, 2009, a notice of cancellation of an Interconnection and Service Agreement (Agreement)¹ between Toledo Edison Company (Toledo)² and American Municipal Power-Ohio, Inc. (AMP-Ohio). It also establishes expedited hearing procedures on issues raised in the filing and Toledo's petition for declaratory order.

¹ The Agreement was made effective on December 1, 1989. Under it, Toledo supplies 42 MW of capacity and energy that AMP-Ohio needs to serve its municipal utility system members located in Toledo's service territory.

² Toledo states that it is an electric public utility subsidiary of First Energy Corp. (FirstEnergy) and engages in the distribution and sale of electric energy. Toledo states that it is affiliated with Cleveland Electric Illuminating Company (CEI), Ohio Edison Company (Ohio Edison), and Pennsylvania Power Company, among others.

II. Toledo's Notice Of Cancellation - Docket No. ER08-1020-000

A. Toledo's Arguments

2. Toledo argues that section 8.01 of the Agreement³ provides for an initial term through December 31, 2008, and provides that the Agreement may be terminated by either party at any time thereafter upon three years notice. Based on this provision, by letter dated December 14, 2005, Toledo states that it advised AMP-Ohio that the Agreement was to be terminated as of December 31, 2008. Toledo has now filed a notice of cancellation under section 205 of the Federal Power Act (FPA).⁴ It requests that the Commission waive the 120-day prior notice requirement and accept the notice of cancellation for filing to become effective on January 1, 2009.

3. Toledo explains that the rates under the Agreement are substantially below current market rates, and Toledo has determined that it is no longer in its economic interest to continue to supply capacity and energy to AMP-Ohio under the Agreement. It notes that it has divested all of the generation capacity that it owned when the Agreement was negotiated, and is currently buying the power needed to supply AMP-Ohio under the Agreement under another contract that will expire on December 31, 2008.

4. Toledo states that when the Agreement was negotiated, it was a subsidiary of Centerior Energy Corp. (Centerior). In 1996, Centerior entered into a merger agreement with Ohio Edison that provided for the formation of FirstEnergy, which would acquire the combined electric utility operations of CEI, Toledo, and Ohio Edison. Toledo states that in order to resolve the issues raised by AMP-Ohio related to the merger, the parties entered into an agreement (Merger Settlement Agreement). The Commission approved the merger, subject to the requirement that the applicants fulfill the commitments in the Merger Settlement Agreement.⁵

³ Section 8.01 states that: "This Agreement . . . shall remain in effect through December 31, 2008, and thereafter unless written notice is given by either party to terminate the Agreement at least three years in advance of the termination date proposed by the party. . . . Except as specified in Schedules, nothing contained herein shall be construed as affecting in any way the right of Toledo to unilaterally make application to the FERC or such other regulatory agency having jurisdiction for a change in rates under section 205 of the Federal Power Act. . . ."

⁴ 16 U.S.C. § 824d (2006).

⁵ *Ohio Edison Company, et al.*, 81 FERC ¶ 61,110 (1997), *reh'g denied*, 85 FERC ¶ 61,203 (1998).

5. Toledo states that appended to the Agreement are service schedules under which AMP-Ohio may purchase various services from Toledo for resale to the municipal utility systems being served under the Agreement, including Service Schedule A – Base Capacity and Energy Service and Service Schedule J –Interruptible Base Capacity and Energy Service.⁶ Toledo explains that the parties modified the Agreement to reflect sections 7(a) and (b) of the Merger Settlement Agreement, which contain Toledo’s agreement to freeze the rates and charges under Schedules A and J at 1997 levels, and to implement specified reductions in rates to be effective “through the remaining term” of the Agreement.⁷ Toledo claims that section 7(e) of the Merger Settlement Agreement expresses the intent of the parties that Toledo waived its right to seek further modifications of rates and charges, except under limited circumstances, and that AMP-Ohio waived its right to terminate its power purchases under Schedules A and J, for the remaining term of the Agreement.⁸

⁶ Toledo states that Base Capacity and Energy Service is capacity and energy that has been reserved in advance by AMP-Ohio and is supplied by Toledo on a firm basis. AMP-Ohio may choose to purchase a portion of this capacity and energy as Interruptible Base Capacity and Energy Service, charges for which are substantially lower than those for Base Capacity and Energy Service.

⁷ Section (7) states in relevant part as follows: “The Parties agree to make the following changes affecting the TECO/AMP-Ohio Agreement. (a) Effective January 1, 1998, TECO . . . shall freeze all rates and charges applicable under Service Schedules A, B, and J of the current TECO/AMP-Ohio Agreement at 1997 levels. . . . (b) Effective January 1, 1998, TECO . . . shall reduce the monthly bill to AMP-Ohio . . . for service taken under Schedules A, B, and J of the TECO/AMP-Ohio Agreement by ten percent . . . and effective January 1, 2006 such reduction shall be twenty point one percent (20.1%) per month, for service taken under such schedules thereafter *through the remaining term* of the TECO/AMP-Ohio Agreement. (c) If the TECO/AMP-Ohio Agreement is terminated in accordance with section 16(a) below, and transmission and ancillary services are obtained in accordance with the FirstEnergy OAT [sic], the amount to be paid for service taken under the FirstEnergy OAT [sic] and Schedules A and J shall be calculated in accordance with the procedure attached as part of Appendix F. . . .”

⁸ Section 7(e) states in relevant part as follows: “Except as otherwise set forth herein, the Parties waive any rights they may have to seek termination of Schedules A, B, and J of the TECO/AMP-Ohio Agreement, or future modification of the rates and charges contained in Schedules A, B and J; provided, however, if significant changes in environmental, regulatory or tax law or regulations or in the interpretation or application of such laws or taxes increase or decrease TECO’s costs either party, may seek to change the rates hereunder. . . .”

6. Toledo also explains that the parties agreed to reduce rates under the Agreement because of AMP-Ohio's claim that under Order No. 888,⁹ AMP-Ohio had the right to terminate the bundled services provided under the Agreement, including the bundled services under Schedules A and J. Toledo states that its parent company, FirstEnergy, disputed AMP-Ohio's right to terminate those schedules, and as a result, the parties agreed to modify the rates being charged by Toledo and to waive any rights to seek termination of Schedules A, B,¹⁰ and J for the remainder of the term of the Agreement. Toledo argues that section 16(b) of the Merger Settlement Agreement provided assurance that termination of the Agreement by AMP-Ohio would not affect its obligation to purchase capacity and energy under Schedules A and J for the remaining term of the Agreement.¹¹

⁹ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A FERC Stats. & Regs. ¶ 31,048, *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 sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁰ Toledo states that Schedule B is not currently in effect.

¹¹ Section 16 states in relevant part as follows: “(a) Effective upon consummation of the merger, the current TECO/AMP-Ohio Agreement, the OE Partial Requirements Tariff, and the CEI Interconnection Agreement with Cleveland and Painesville may be terminated by AMP-Ohio or the respective municipality at each's option, except to the extent of AMP-Ohio's obligation to purchase power and energy as provided in Paragraph 16(b), and converted to NITS or service under the FirstEnergy Companies' OAT [sic]. (b) If the TECO/AMP-Ohio Agreement is terminated, FirstEnergy and AMP-Ohio agree that AMP-Ohio will carry forward the Base Capacity (Schedule A) and Interruptible Base Capacity (Schedule J) commitment, and applicable related terms and conditions in the TECO/AMP-Ohio Agreement (as modified by paragraph B.7 hereof).”

7. Toledo also argues that the course of conduct of the parties supports its position. It states that the Merger Settlement Agreement was implemented through two filings at the Commission that revised the rates in the Agreement in Schedules A and J, for each year from 1998 through the end of 2008. Toledo adds that consistent with sections 7(e) and 16(b) of the Agreement, a revised section 2.03(a) of Schedule A and new section 2.05 of Schedule J provided that Toledo and AMP-Ohio waived any rights they may have had to seek termination of those schedules.¹²

8. Toledo argues that the parties' course of performance, i.e., the two filings that implemented the Merger Settlement Agreement, proves that the parties recognized that the Agreement may be terminated after December 31, 2008, because neither of those filings modified section 8.01 of the Agreement or otherwise restricted Toledo's right to terminate the Agreement effective December 31, 2008. Therefore, Toledo contends that under section 8.01 of the Agreement, the Agreement remains in effect through December 31, 2008. Toledo asserts that Schedules A and J specify the rates to be charged by Toledo for the supply of Base Capacity and Energy Service and Interruptible Capacity and Energy Service during each year of the Agreement through December 31, 2008, but do not establish rates beyond that date.¹³

¹² Exhibit 3 attached to the filing is a redlined version of Schedules A and J (the two schedules at issue in this case) filed in Docket No. ER08-1020-000 to implement the Merger Settlement Agreement. Article 2 of each schedule shows revised charges through 2008, and section 2.03(b) of Schedule A was replaced with the language in section 7(e) of the Merger Settlement Agreement. Section 2.04 of Schedule A was not changed and states that "[n]othing contained herein shall be construed as affecting in any way the right of Toledo to unilaterally make application to the FERC for a change in rates under section 205 of the Federal Power Act and pursuant to the FERC's Rules and Regulations promulgated thereunder, such increase to become effective beginning January 1, 2009 or thereafter." Redlined Schedule J, Article 2 shows revised rates through 2008. Section 2.05 of Schedule J was added and includes the language in section 7(e) of the Merger Settlement Agreement.

¹³ Toledo notes that AMP-Ohio filed a complaint for declaratory judgment against FirstEnergy and Toledo in the Court of Common Pleas for Franklin County, Ohio, asking that the court find that FirstEnergy and Toledo may not terminate or modify the rates in Schedules A or J. Toledo states that the case was removed to the United States District Court for the Southern District of Ohio, and the court dismissed the complaint on the basis that it lacked subject matter jurisdiction. *American Municipal Power-Ohio, Inc. v. FirstEnergy Corp., et al.*, United States District Court for the Southern District of Ohio, No. 2:07-CV-577, Opinion and Order issued March 31, 2008. Toledo states that no party has appealed this decision.

B. Notice Of Filing And Responses

9. Notice of Toledo's filing was published in the *Federal Register*, 73 Fed. Reg. 33,074 (2008), with protests and interventions due on or before June 19, 2008.

1. Ohio's Motion For Leave To Intervene And Protest

10. AMP-Ohio filed a timely motion to intervene and protest, stating that it protests the cancellation, but only insofar as the cancellation notice encompasses Schedules A and J of the Agreement.¹⁴ AMP-Ohio supports Toledo's request for waiver of the 120-day prior notice requirement.

11. AMP-Ohio argues that the plain meaning of section 7(e) of the Merger Settlement Agreement is that Toledo waived its right to terminate Schedules A and J. It asserts that in 1997, in order to eliminate AMP-Ohio's opposition to the merger, in the Merger Settlement Agreement FirstEnergy, Toledo and FirstEnergy contracted away their right to terminate Schedules A, B, and J of the Agreement. AMP-Ohio also claims that as a result of the mitigation measures in the Merger Settlement Agreement, among the benefits it obtained was the right to continue buying power and energy under Schedules A and J at rates to be determined by the Commission for power transactions after December 31, 2008.

12. AMP-Ohio contends that Toledo seeks to terminate Schedules A and J based solely on extrinsic evidence. Toledo's argument that section 7(e) of the Merger Settlement Agreement was included to protect Toledo against AMP-Ohio's alleged threat to terminate the rate schedules at issue here under Order No. 888 is an after-the-fact rationalization that does not explain why the waiver of rights applies to both parties to the Agreement. AMP-Ohio explains that it was concerned about anticompetitive conduct as a result of the proposed merger; therefore, it wanted to have at least some of FirstEnergy's low-cost generation available in its mix of power supplies beyond 2008.

¹⁴ AMP-Ohio states that it is a non-profit Ohio corporation organized in 1971, and that its members are all municipalities that own and operate utility systems some of which also operate electric generating and distribution facilities. AMP-Ohio states that its primary purpose is to assist its member communities in meeting their electric and energy needs and AMP-Ohio is a full or partial requirements supplier for many of its members. Since 1989, it has purchased power and energy from Toledo for resale to the fourteen municipal utility members in its Northwest AMP-Ohio service group under the terms of the Agreement and rate schedules that are the subject of the notice of cancellation.

13. AMP-Ohio points out that “for the remaining term of the Agreement” does not appear in the waiver section, section 7(e) of the Merger Settlement Agreement. Although those words are in section 7(b) of the Merger Settlement Agreement, they do not relate to the parties’ waiver of their termination rights, but to the end point of the 20.1 percent reduction provided in section 7(b) of the Merger Settlement Agreement. AMP-Ohio argues that the words in section 7(e) of the Merger Settlement Agreement “waive any rights they may have to seek termination of Schedules A, B, and J . . .” can be read to mean that Toledo was assured that AMP-Ohio would not stop buying, and AMP-Ohio was assured that a merged FirstEnergy with enhanced control over low-cost generation would not stop selling, beyond the date when Toledo’s pre-merger sales obligation could otherwise have been terminated.

14. AMP-Ohio adds that the Agreement does not have a set term or self-executing date, and would not end unless one party gave appropriate notice. AMP-Ohio notes that while the schedules contain rates only through December 31, 2008, they do provide for the filing of new, compensatory rates for service beyond that date.

2. Toledo’s Answer

15. Toledo filed an answer to AMP-Ohio’s motion to intervene in Docket No. ER08-1020-000. Toledo asserts that contemporaneous records in FirstEnergy’s files show that AMP-Ohio consistently maintained during the settlement discussions leading to the Merger Settlement Agreement that it had the right to seek termination of the Agreement at that time because of Order No. 888. Toledo asserts that it was assured that AMP-Ohio would continue to purchase electricity at the revised rates in Schedules A and J through December 31, 2008. AMP-Ohio received a substantial reduction in rates below those negotiated in 1989, with the assurance that Toledo would not seek further modification of those rates through December 31, 2008. Toledo explains that this mutual waiver explains why the parties waived any rights they might have to take certain actions.

16. Moreover, Toledo contends that section 7(b) of the Merger Settlement Agreement refers to the remaining term of the Agreement, and the “remaining term” phrase is consistent with Toledo’s interpretation that AMP-Ohio waived its claimed right to terminate Schedules A and J prior to December 31, 2008, while Toledo waived its right to modify rates and charges prior to that date, subject to limited exceptions in section 7(e) of the Merger Settlement Agreement.

17. Toledo again notes that the Agreement has been modified twice to implement the Merger Settlement Agreement, but section 8.01 of the Agreement has never been modified. It argues that AMP-Ohio does not explain why the Agreement was not modified to eliminate Toledo’s right to cancel if that right had been waived as part of the Merger Settlement Agreement.

18. Toledo adds that although AMP-Ohio argues that the rates, terms, and conditions under which it is currently purchasing capacity and energy from other sources cannot be duplicated in today's market, there is nothing in the Agreement, Merger Settlement Agreement, or Commission precedent that allows AMP-Ohio to continue to purchase electricity in perpetuity at rates that are below the competitive market price of electricity.

III. Toledo's Petition For Declaratory Order – Docket No. EL08-65-000

A. Toledo's Arguments

19. Toledo also filed a petition for declaratory order, requesting that the Commission affirm that it may unilaterally apply under section 205 of the FPA to increase the rates under the Agreement, as of January 1, 2009. Toledo states that if the Commission accepts its notice of cancellation, that would obviate the need for a declaratory order.

20. Toledo points out that section 8.01 of the Agreement provides that Toledo can unilaterally apply to the Commission for a change of rates under section 205 of the FPA. Toledo asserts that section 2.04 of Schedules A and B explicitly permit Toledo to adjust the rates for supply of capacity and energy under those schedules unilaterally for service beginning on January 1, 2009, and that neither schedule contains rates for service beyond 2008.¹⁵ Neither of the filings made to modify the Agreement to implement the Merger Settlement Agreement modified section 8.01 of the Agreement, which shows that the parties intended to retain Toledo's right under section 205 of the FPA to modify its rates or service after December 31, 2008, if the Agreement is not cancelled on that date.

B. Notice Of Filing And Responses

21. Notice of Toledo's filing was published in the *Federal Register*, 73 Fed. Reg. 32,702-703 (2008), with protests and interventions due on or before June 30, 2008.

¹⁵ Section 2.04 states that "Nothing contained herein shall be construed as affecting in any way the right of Toledo to unilaterally make application to the FERC for a change in rates under section 205 of the Federal Power Act and pursuant to the FERC's Rules and Regulations promulgated thereunder, such increase to become effective beginning January 1, 2009 or thereafter."

C. Amp-Ohio's Motion For Leave To Intervene And Petition

22. AMP-Ohio filed a motion to intervene and answer the petition for declaratory order. It agrees with Toledo that the rates at issue may be changed effective January 1, 2009, under section 205 of the FPA. However, AMP-Ohio stresses that it does not agree with: (1) the statements in the petition related to the termination filing in Docket No. ER08-1020-000; (2) the misstatements of AMP-Ohio's position in the petition; and (3) the implied view of Toledo that the cost-based rates it would file for service after December 31, 2008, may only be pass-throughs of market-based rates Toledo is charged by its generating-owning affiliates.

23. With regard to how the future rates should be calculated, AMP-Ohio claims that Toledo apparently plans to purchase power and energy from other FirstEnergy affiliates at market-based rates and pass through that cost to AMP-Ohio under a cost-of-service formula rate that would enable Toledo to recover the costs incurred by Toledo on a dollar-for-dollar basis. AMP-Ohio argues that there are two problems with this. First, by assuming that it will be the seller, Toledo misstates the role that it should be playing in the post-2008 transactions. AMP-Ohio argues that under section 3 of the Merger Settlement Agreement, Toledo's responsibility to sell power under Schedules A and J extends to all FirstEnergy affiliates that now have responsibility for power sales, including the generation-owning subsidiaries of FirstEnergy created as a result of the divestiture of Toledo's generation.¹⁶ AMP-Ohio argues that it appears that the drafters of the Merger Settlement Agreement contemplated further restructuring of FirstEnergy and took pains to assure that the basis of the parties' agreement would be maintained. Therefore, AMP-Ohio asserts that because the obligation to make power sales will fall on FirstEnergy's generation-owning subsidiaries after December 31, 2008, there is no need for a multi-party transaction that transforms the market-based pricing of one FirstEnergy affiliate to cost-based pricing of another before those costs are passed on to AMP-Ohio. However, if there are structural reasons why FirstEnergy would prefer to continue the sales from Toledo, AMP-Ohio has no objection, as long as they are priced based on the costs of that generation.

¹⁶ Section 3 of the Merger Settlement Agreement states:

“Any obligation undertaken by any Party under this Agreement shall extend to any affiliate which has or shall have responsibility for any of the matters covered by this agreement and to any entity voluntarily created by the FirstEnergy Companies as a result of a divestiture, to the extent such new entity would solely have responsibility for any of the matters otherwise covered by this agreement.”

24. AMP-Ohio contends that the second major problem with Toledo's plan to pass through a cost-of-service rate the cost of purchases at market-based rates is that it is inconsistent with section 9.10 of the Agreement. That provision requires the parties to negotiate in good faith to restore the benefits and burdens of the Agreement in order to avoid any windfall benefits or burdens on either party. Thus, AMP-Ohio maintains that it is not required to abandon the benefits of true cost-based rates for which it bargained and to assume the burden of market-based rates. It asks the Commission to declare that Toledo may file new rates for service under Schedules A and J, to become effective January 1, 2009; but require cost-based rates, not market-based rates, in accordance with the overall structure and intent of the Agreement and the Merger Settlement Agreement.

D. Toledo's Answer In Docket No. EL08-65-000

25. Toledo filed an answer to AMP-Ohio's motion to intervene, asserting that AMP-Ohio is actually seeking affirmative relief from the Commission and has expanded the scope of issues the Commission must decide in this proceeding. Thus, Toledo states that its answer provides information and insights that are intended to assist the Commission in the proper performance of its duties under the FPA.

26. First, Toledo argues that it has not finalized plans to procure the electricity needed to meet any ongoing obligation it may have to AMP-Ohio, but expects that it would obtain capacity and energy through a competitive solicitation process. Toledo asserts that it has no basis to assume that an affiliated supplier would win any such competitive solicitation process, and has no commitments from its affiliates to serve load after 2008. Second, Toledo states that AMP-Ohio erroneously assumes that the generation-owning affiliates of Toledo have sole responsibility for supplying capacity and energy to AMP-Ohio under the Agreement after December 31, 2008. Rather, if the Commission rejects the notice of cancellation or suspends its effectiveness beyond January 1, 2009, the obligation of continuing to supply capacity and energy to AMP-Ohio under the Agreement will continue to be Toledo's. As Toledo expects to meet that obligation by entering into new agreements to purchase capacity and energy, it asserts that there is no legal basis for transferring its power supply obligations to its affiliates. Third, Toledo claims that there are no contractual provisions that require it to propose true cost-based rates, or that prevent it from filing rates that are otherwise just and reasonable under section 205 of the FPA, even if they do not conform to the standards proposed by AMP-Ohio.

27. Toledo concludes that the Commission should issue a declaratory order affirming: (1) Toledo's right to establish new rates for the supply of capacity and energy to AMP-Ohio under Schedules A and J of the Agreement after December 31, 2008, under section 205 of the FPA, if the Agreement is not cancelled as of that date; (2) that Toledo is not limited to the filing of true cost-based rates, as proposed by AMP-Ohio; (3) that neither the Agreement nor the Merger Settlement Agreement bar Toledo from seeking rate relief

based on its costs of purchasing the necessary capacity and energy in the wholesale markets; and (4) that no other FirstEnergy affiliate is responsible for supplying capacity and energy to AMP-Ohio under Schedules A and J of the Agreement.

IV. Discussion

A. Procedural Matters In Docket No. ER08-1020-000

28. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motion to intervene of AMP-Ohio serves to make it a party to this proceeding.

29. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Toledo's answer because it has provided information that assisted us in our decision-making process.

B. Expedited Hearing Procedures In Docket No. ER08-1020-000

30. We find that Toledo's notice of cancellation of the Agreement raises issues of material fact (including, the intent of the parties regarding the apparently conflicting provisions, i.e., section 8.01 of the Agreement that provides that either party can terminate the Agreement on or after January 1, 2009, with three years prior notice, and section 7(e) of the Merger Settlement Agreement, section 2.03(b) of Schedule A of the Agreement, and section 2.05 of Schedule J of the Agreement which provides that the parties waive any rights to terminate Schedules A, B, and J) that cannot be resolved based on the record before us, and that are more appropriately addressed in the expedited trial-type evidentiary hearing that we are ordering below.

31. Thus, we will accept Toledo's notice of cancellation of the Agreement, to be suspended for five months. The Commission may impose a five month suspension of the termination of an expiring contract when such termination may have significant, adverse effects on the coordination and operation of interconnected facilities.¹⁷ Likewise, in this case, we want to ensure that AMP-Ohio's customers have the power during the suspension period and will have the time to arrange for another power supplier, if necessary.

32. The Commission intends to act expeditiously in reaching a final determination so that the parties will have sufficient time to arrange for their power supply. Accordingly,

¹⁷ *Pacific Gas and Electric Company*, 123 FERC ¶ 61,228, at P 18 (2008).

we direct the presiding administrative law judge to issue an initial decision no later than December 1, 2008. We also direct the parties to file briefs on exceptions no later than 12 days after the date the initial decision is issued, and to file briefs opposing exceptions no later than 10 days after briefs on exceptions are filed.

33. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute.

C. Procedural Matters In Docket No. EL08-65-000

34. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motion to intervene of AMP-Ohio serves to make it a party to this proceeding.

35. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Toledo's answer because it has provided information that assisted us in our decision-making process.

D. Hearing Procedures In Docket No. EL08-65-000

36. Toledo asks that the Commission affirm that it may unilaterally apply under section 205 of the FPA to increase rates for supply of capacity and energy under the Agreement, as of January 1, 2009. Although AMP-Ohio agrees with Toledo that the rates at issue may be changed effective January 1, 2009, it asks the Commission to require rates based on the costs of Toledo's generation-owning affiliates, not on a pass-through of purchases made at market prices, in accordance with the overall structure and intent of the Agreement and the Merger Settlement Agreement.

37. The agreements appear to be subject to different interpretations regarding the rate methodology that should be applied after December 31, 2008, and therefore are ambiguous. Accordingly, in order to provide a more complete record to address this issue in case the Commission ultimately finds that the contracts do not allow Toledo to cancel the Agreement, we will also set this matter for expedited hearing procedures in the hearing ordered above.

The Commission orders:

(A) Toledo's proposed notice of cancellation is hereby accepted for filing and suspended for five months, to become effective June 1, 2009.

(B) Toledo's proposed notice of cancellation and petition for declaratory order are set for expedited hearing, for the reasons discussed in the body 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 Agreement and Merger Settlement Agreement, as discussed in the body of this order.

(D) A presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall, within five (5) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, D.C. 20426. Such a 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.

(E) Unless the proceeding settles in its entirety, the presiding judge shall issue an initial decision no later than December 1, 2008. Brief on exceptions shall be due twelve days after the date of the initial decision but no later than December 13, 2008, and briefs opposing exceptions shall be due ten days after the filing of briefs on exceptions but no later than December 23, 2008.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

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