

UNITED STATES OF AMERICA 107 FERC ¶ 61,327
FEDERAL ENERGY REGULATORY COMMISSION

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

Wabash Valley Power Association, Inc.

Docket Nos. ER04-789-000
and ER04-802-000

ORDER ACCEPTING AND SUSPENDING PROPOSED TARIFF AND
CONTRACTS, AND ESTABLISHING HEARING AND SETTLEMENT JUDGE
PROCEDURES

(Issued June 29, 2004)

1. On April 30, 2004, Wabash Valley Power Association, Inc. (Wabash Valley) submitted a Formula Rate Tariff establishing rates for power sales to Wabash Valley's members and thirty two contracts providing for wholesale power sales and/or transmission services. In this order, the Commission accepts the Formula Rate Tariff and the full twenty-eight requirements contracts with Wabash Valley's members, suspends them for a nominal period to take effect July 1, 2004, subject to refund, and establishes hearing and settlement judge procedures. It also conditionally accepts the other four contracts, to become effective July 1, 2004. This order benefits customers by providing an opportunity to investigate the justness and reasonableness of Wabash Valley's proposed Formula Rate Tariff and contracts with its members.

I. Background

2. Wabash Valley is a member owned, not-for-profit generation and transmission cooperative currently providing full-requirements wholesale electric service to its member distribution cooperatives in Indiana, Illinois, Michigan and Ohio. More than 50 percent of Wabash Valley's members' load is located within the footprint of Midwest Independent Transmission System Operator (Midwest ISO). Wabash Valley was one of the founding transmission-owning members of Midwest ISO and provides service over its transmission facilities under the Midwest ISO open access transmission tariff. Wabash Valley, PSI Energy, Inc. (PSI) and Indiana Municipal Power Agency (IMPA) jointly own the transmission system facilities designated by Midwest ISO as Cinergy Zone 3. These facilities are operated pursuant to the Transmission and Local Facilities Ownership, Operation and Maintenance Agreement (Transmission and Local Facilities Agreement) among Wabash Valley, PSI and IMPA.

3. As a borrower from the Rural Utilities Service (RUS), Wabash Valley is not currently a public utility under the Federal Power Act. Wabash Valley is currently refinancing its outstanding debt, and plans to repurchase all of its RUS debt on June 30, 2004. Upon paying off its RUS debt, Wabash Valley will be subject to regulation by the Commission as a public utility.

4. In the instant filing, Wabash Valley has submitted a Formula Rate Tariff establishing rates for full requirements power sales to Wabash Valley's members and thirty two contracts providing for wholesale power sales and/or transmission services.¹ The tariff uses a formula rate to account for operating expenses and margin requirements in development of energy and capacity charges. In addition, the tariff's formula rate includes three temporary rate riders designed to collect certain costs that have been deferred from the period prior to the transition to Commission jurisdiction. The tariff's rate design includes high load factor and medium load factor rates, each with a seasonal rate option, and certain other rates. Wabash Valley states that the proposed Formula Rate Tariff is based on a settlement that was recently approved by the Indiana Utility Regulatory Commission (Indiana Commission).

II. Notice of Filing and Responsive Pleadings

5. Notices of the filings were published in the Federal Register, 69 Fed. Reg. 27,912 (2004), and 69 Fed. Reg. 26,589 (2004), with interventions and protests due on or before May 21, 2004. On May 27, 2004, in Docket No. ER04-789-000, and on June 3, 2004, in Docket No. ER04-802-000, Midwest filed motions to intervene, protests and comments out-of-time. On June 8, 2004, Wabash Valley filed an answer to Midwest's protest. On June 15, 2004, Midwest filed a supplement to its protest. On June 22, 2004, Wabash Valley filed an answer stating that the Commission should reject Midwest's June 15, 2004 supplement.

¹ Twenty eight contracts provide for full requirements power sales to Wabash Valley's twenty seven members (one member, Midwest Energy Cooperative (Midwest) is served under two separate contracts, each serving the load of a separate service area of Midwest) under the rates, terms and conditions of the Formula Rate Tariff. The other four contracts include: (1) the Transmission and Local Facilities Agreement between Wabash Valley, PSI and IMPA; (2) a borderline power sales agreement between Wabash Valley and Northern Indiana Public Service Company (Northern Indiana); (3) an Ownership and Operation Agreement for the Vermillion Generating Facility between Wabash Valley and Duke Energy Vermillion (Duke); and (4) a Special Agreement for Transmission and Electric Service Between and among Northeastern Rural Electric Membership Corporation (Northeastern), Wabash Valley and Steel Dynamics, Inc.

III. Discussion

A. Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), we will grant Midwest's motion to intervene out-of-time given its interest in these proceedings, the early stage of the proceedings, and the absence of any undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Wabash Valley's and Midwest's answers because they have provided information that assisted us in our decision-making process.

B. Proposed Formula Rate Tariff and Full Requirements Contracts with Members

7. Midwest states that Wabash Valley's proposed Formula Rate Tariff results in an 11.6 percent rate increase to Midwest, that Wabash Valley's unilateral filing of the proposed rate increase violates Midwest's full requirements contracts with Midwest and the Mobile-Sierra doctrine,² and that the proposed rate increase has not been shown to be just and reasonable.

8. Midwest notes that section 4(b) of its 1977 contract with Wabash Valley, for service for the area formerly served by one of its predecessors, Fruit Belt Electric Cooperative (1977 Contract), provides that rate revisions may be proposed by the Wabash Valley Board of Directors, but, however, "no such revisions shall be effective unless approved by the applicable regulatory authorities." Midwest states that, initially, the applicable regulatory authority under this contract was the Indiana Commission but that, on June 26, 1986, jurisdiction over the contract was assumed by the Michigan Public Service Commission (Michigan Commission). Midwest states that Wabash Valley has not received approval from the Michigan Commission for its proposed Formula Rate Tariff, and, therefore, Midwest suggests, the Formula Rate Tariff should not be applied to Midwest under this contract.

9. Midwest states that paragraph 3 of its 2000 contract with Wabash Valley, for service for the area formerly served by the other of its predecessors, Southeastern Michigan Cooperative (2000 Contract), expressly provides that, if the contract is no longer within the jurisdiction of the Michigan Commission, "the rate shall not be in excess of a cost based just and reasonable rate, which rate, if not agreed upon, shall be

² See United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

subject to the arbitration pursuant to Paragraph 23 hereof.” Paragraph 23 provides that arbitration shall be binding, and appealable only for violation of law or extreme abuse of discretion. Further, Midwest notes, paragraph 17 provides that no amendment or modification to the contract shall be enforceable unless reduced to writing and executed by both parties. Midwest states that no arbitration has taken place and no agreement exists between Midwest and Wabash Valley. Therefore, according to Midwest, the Formula Rate Tariff should not be applied to Midwest under this contract.

10. Midwest further contends that the proposed tariff has not been shown to be just and reasonable in the following respects: (a) it fails to provide basic customer protections to ensure that the rate calculations pursuant to the formula are performed accurately; (b) Wabash Valley fails to support the proposal except on the basis that it reflects a non-precedential settlement; and (c) Wabash Valley’s description of its budget process fails to justify that process as an inadequate basis for projecting cost inputs for the formula rate. Lastly, Midwest contends that the three temporary rate riders contained in the Formula Rate Tariff would constitute unlawful retroactive ratemaking if approved by the Commission.

Commission Conclusion

11. Regarding Midwest’s Mobile-Sierra concerns, we find them unavailing. The 2000 Contract, filed here for the first time, arguably attempts to bind the Commission to a “public interest” standard of review when the Commission first reviews that contract.³ We will not apply a “public interest” standard in cases where we have not previously determined the contracts to be just and reasonable.⁴

12. The language of the 1977 Contract, that rate changes not take effect unless approved by the applicable regulatory authorities, similarly does not preclude application of the proposed Formula Rate Tariff to Midwest under that contract. As of July 1, 2004, the proposed effective date, this Commission will exercise exclusive jurisdiction over the rates, terms and conditions of wholesale electric service and transmission in interstate

³ It is far from clear that the language of paragraph 17 of the 2000 Contract requires that the standard of review is a “public interest” standard of review, given that paragraph 3 provides that the rate shall not exceed a cost-based just and reasonable rate. The language of paragraph 3 suggests that the standard of review is a “just and reasonable” standard of review. Nevertheless, we assume for the purposes of argument that the 2000 Contract seeks to impose a “public interest” standard of review. As we explain in the text above, though, that reading is unavailing.

⁴ See, e.g., ITC Holdings Corp., 102 FERC ¶ 61,182 at P 77 (2003).

commerce provided by Wabash Valley, not the Michigan Commission (i.e., this Commission will be the applicable regulatory authority under the contract, not the Michigan Commission).

13. The other concerns raised by Midwest involve issues of material fact that cannot be resolved based on the record before us and are more appropriately addressed in the trial-type evidentiary hearing ordered below.

14. Our preliminary analysis of Wabash Valley's proposed Formula Rate Tariff and its proposed full requirements contracts with its members indicates that they have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept them for filing, suspend them for a nominal period to be effective July 1, 2004, as requested, subject to refund, and set them for a hearing.

15. Given the common issues of fact and law, we will consolidate Docket Nos. ER04-789-000 and ER04-802-000 for purposes of hearing and decision.

16. While we are setting the proposed Formula Rate Tariff and full requirements contracts with Wabash Valley's members 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, the hearing will be held in abeyance and we will provide for a settlement judge pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁵ 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 settlement judge for this purpose.⁶ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of the 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.

⁵ 18 C.F.R. § 385.603 (2003).

⁶ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

C. Other Contracts

17. For the Transmission and Local Facilities Agreement between Wabash Valley, PSI and IMPA, Wabash Valley simply filed a certificate of concurrence in lieu of filing the rate schedule, noting that the contract is on file as a Cinergy Operating Companies rate schedule. Similarly, for the Ownership and Operation Agreement for the Vermillion Generating Facility by and between Wabash Valley and Duke, Wabash Valley simply filed a certificate of concurrence in lieu of filing the rate schedule, noting that the contract is on file as a Duke rate schedule. However, section 35.1 of the Commission's regulations 18 C.F.R. § 35.1 (2003), requires the filing of full and complete rate schedules. Subject to Wabash Valley filing these two contracts in conformance with 18 C.F.R. §§ 35.1 and 35.9 (2003), within thirty days of the date of this order, the Commission will accept for filing to become effective July 1, 2004: (1) the Transmission and Local Facilities Agreement between Wabash Valley, PSI and IMPA; (2) the borderline power sales agreement between Wabash Valley and Northern Indiana; (3) the Ownership and Operation Agreement for the Vermillion Generating Facility by and between Wabash Valley and Duke; and (4) the Special Agreement for Transmission and Electric Service Between and among Northeastern, Wabash Valley and Steel Dynamics, Inc.

The Commission orders:

(A) Wabash Valley's proposed Formula Rate Tariff and its proposed full requirements contracts with its members are hereby accepted for filing and suspended, to be effective July 1, 2004, subject to refund, as discussed in the body of this order.

(B) The Transmission and Local Facilities Agreement between Wabash Valley, PSI and IMPA, the borderline power sales agreement between Wabash Valley and Northern Indiana, the Ownership and Operation Agreement for the Vermillion Generating Facility by and between Wabash Valley and Duke, and the Special Agreement for Transmission and Electric Service Between and among Northeastern, Wabash Valley and Steel Dynamics, Inc. are hereby conditionally accepted for filing to be effective July 1, 2004, as discussed in the body of this order.

(C) Wabash Valley is hereby directed to file the Transmission and Local Facilities Agreement between Wabash Valley, PSI and IMPA and the Ownership and Operation Agreement for the Vermillion Generating Facility by and between Wabash Valley and Duke, in conformance with 18 C.F.R. §§ 35.1 and 35.9 (2003), within thirty days of the date of this order.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held to address the reasonableness of Wabash Valley's proposed Formula Rate Tariff and its proposed full requirements contracts with its members, as discussed in the body of this order. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (E) and (F) below.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2003), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(F) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and with the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 30 days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(G) If settlement judge procedures fail, and a trial-type evidentiary hearing is to be held, a presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a conference in this proceeding, to be held within approximately fifteen (15) days of the date on which the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E. Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding 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.

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(H) Docket No. ER04-789-000 is hereby consolidated with Docket No. ER04-802-000 for purposes of hearing and decision.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.