

171 FERC ¶ 61,059  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick, Bernard L. McNamee,  
and James P. Danly.

Tipmont Rural Electric Member Cooperative v.  
Wabash Valley Power Association, Inc.

Docket No. EL19-2-000

ORDER GRANTING COMPLAINT IN PART, DENYING IN PART, AND  
DISMISSING IN PART AS MOOT

(Issued April 20, 2020)

1. On October 1, 2018, pursuant to sections 206 and 306 of the Federal Power Act (FPA)<sup>1</sup> and Rule 206 of the Commission's Rules of Practice and Procedure,<sup>2</sup> Tipmont Rural Electric Member Cooperative (Tipmont) filed a complaint (Complaint) against Wabash Valley Power Association, Inc. (Wabash), requesting that the Commission find that Tipmont may terminate service early under its all-requirements wholesale power supply contracts with Wabash. If Tipmont is required to remain a customer and take service from Wabash, Tipmont requests that the Commission investigate certain rates, terms, and conditions of wholesale service under the all-requirements contracts. During the course of the Complaint proceeding, both parties submitted comments indicating their willingness to have the issues related to the rates, terms, and conditions for the termination of Tipmont's service addressed in a new FPA section 205 filing by Wabash.<sup>3</sup> On September 19, 2019, the Commission issued an order holding this proceeding in abeyance to provide Wabash the opportunity to prepare an FPA section 205 filing proposing rates, terms, and conditions to govern early termination of Tipmont's

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<sup>1</sup> 16 U.S.C. §§ 824e, 825e (2018).

<sup>2</sup> 18 C.F.R. § 385.206 (2019).

<sup>3</sup> Wabash Answer at 7; Tipmont Response at 16-17.

contracts.<sup>4</sup> On February 20, 2020, in Docket No. ER20-1041-000, Wabash submitted an unexecuted early termination agreement with Tipmont (Agreement).

2. In this order, we lift the abeyance and grant in part, deny in part, and dismiss in part as moot the Complaint, as discussed below. In a concurrent order, the Commission accepts and suspends the Agreement and establishes hearing and settlement judge procedures.<sup>5</sup>

### **I. Complaint**

3. Tipmont asserts that it is a non-jurisdictional rural electric cooperative serving 21,000 members in parts of eight counties in west central Indiana. Tipmont states that it is a member of Wabash, a FERC-jurisdictional generation and transmission cooperative.<sup>6</sup>

4. According to Tipmont, it purchases requirements service from Wabash under terms and conditions in two wholesale power supply contracts that are on file with the Commission (1977 Contract and 2006 Contract, and collectively, Contracts), as well as the related Wabash Formula Rate Tariff. Tipmont explains that the 1977 Contract governs requirements service until 2028 and that the 2006 Contract extends that service through 2050.<sup>7</sup>

5. Tipmont states that it wishes to terminate the Contracts effective January 1, 2020 and is prepared to pay any stranded costs that Wabash demonstrates will result from such early termination, calculated in accordance with the Commission's requirements.<sup>8</sup> Tipmont asserts, however, that it is Wabash's position that early termination of service is governed by Article II of Policy D-2 (Buyout Policy), which was adopted by Wabash's Board of Directors (Board) and referenced in the 2006 Contract. Tipmont states that Wabash maintains that Article II of the Buyout Policy requires Tipmont to give Wabash 10-years' notice of termination of service, and also requires Tipmont to pay stranded

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<sup>4</sup> *Tipmont Rural Electric Member Coop. v. Wabash Valley Power Ass'n, Inc.*, 168 FERC ¶ 61,161, at P 16 (2019) (September 19 Order).

<sup>5</sup> *Wabash Valley Power Ass'n, Inc.*, 171 FERC ¶ 61,053 (2020).

<sup>6</sup> Complaint at 8-9. Wabash states that it became subject to Commission regulation after paying off its Rural Utilities Service debt in 2004. Wabash Answer, Conrad Aff. ¶ 5.

<sup>7</sup> Complaint at 8-9.

<sup>8</sup> *Id.* at 1-2.

costs at a rate that Wabash has unilaterally established and that is subject to modification at any time during the 10-year period after Tipmont provides its notice of termination.

6. Tipmont argues that, because Wabash failed to file the Buyout Policy under section 205 of the FPA, the Buyout Policy is ineffective and legally unenforceable because it affects rates and service, and specifically includes the rates for early termination of the Contracts. Further, Tipmont alleges that the Buyout Policy is required to be filed under Order No. 888, which, according to Tipmont, makes clear that the recovery of stranded costs is subject to an FPA section 205 or 206 filing that is approved by the Commission.<sup>9</sup> Tipmont further argues that, even if filed, the Buyout Policy cannot apply to Tipmont because: (1) the FPA's 60-day prior notice requirement has not been satisfied; (2) the Buyout Policy is unjust and unreasonable; and (3) any modification of the Buyout Policy nullifies the policy and requires Board approval prior to refiling. Arguing that the Buyout Policy is unjust and unreasonable, Tipmont claims it seeks early termination of the 1977 Contract under Order No. 888.<sup>10</sup>

7. Tipmont identifies three additional Contract and Formula Rate Tariff provisions that it argues are not just and reasonable. However, Tipmont states it is willing to withdraw these arguments if the parties successfully negotiate just and reasonable terms for the termination of Tipmont's service. First, Tipmont requests that the Commission find that Board Policy D-11 (Distributed Generation Policy) directly affects rates, terms, and conditions for wholesale service, and thus must be filed under FPA section 205. Tipmont asserts that the Distributed Generation Policy sets forth the rates, terms, and conditions for the use of activities that Tipmont can take on its own distribution system to reduce the amount of power, as measured at the wholesale meter, that Tipmont requires.<sup>11</sup> Tipmont contends that, once the Distributed Generation Policy is filed, the Commission

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<sup>9</sup> *Id.* at 18 (citing *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, at 21,644 (1996) (cross-referenced at 75 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *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. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002)).

<sup>10</sup> *Id.* at 16-21, 25.

<sup>11</sup> *Id.* at 35.

should either reject the limitations contained therein or at a minimum initiate an investigation into the justness and reasonableness of the policy.<sup>12</sup>

8. Tipmont also alleges that Sections 1.8 and 1.18 of the Formula Rate Tariff (the Optional Riders) similarly limit and establish the terms and conditions for distributed alternatives to service from Wabash and are thus unjust and unreasonable. Section 1.8 of the Formula Rate Tariff, the Optional Co-op Solar Energy Rider, allows members to purchase energy produced from certain solar generation resources, either owned by Wabash or for which Wabash has contracted to purchase the output and associated renewable energy credits.<sup>13</sup> Section 1.18 of the Formula Rate Tariff, the Optional Demand Response Program Rider, allows participating members to receive compensation based on the “deemed load reduction capability installed at the end-use customer premises of a Member as of June 1 of each year during the months of June, July and August.”<sup>14</sup>

9. Second, Tipmont argues that Wabash acts contrary to the Contracts by proposing to build and own transmission projects under Midcontinent Independent System Operator, Inc.’s (MISO) post-Order No. 1000 planning process, and to pass through associated transmission development costs to members in wholesale power rates.<sup>15</sup> Tipmont argues that the Contracts prohibit Wabash from engaging in this activity. Tipmont cites section 3 of the 1977 Contract, which reads:

It is understood by and between the parties that the expressed intent of [Wabash] is to not own, operate or maintain any transmission Facilities and/or substations except as such ownership, operation and maintenance may inure to [Wabash] by reason of Transmission Participation Agreements and Transmission, Operating and Maintenance Agreements with other suppliers, which suppliers own and operate bulk transmission systems. Accordingly, ownership, operation and maintenance of transmission, sub-transmission, substations and other related facilities may be owned by the Member, by the supplier pursuant to contracts with said supplier or

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<sup>12</sup> *Id.* at 36.

<sup>13</sup> *Id.* at 37. Wabash, FERC Electric Tariff Volume 1 – Formulary Rate Tariff, § 1.8.I-II Optional Co-op Solar Energy Rider (9.0.0).

<sup>14</sup> Wabash, FERC Electric Tariff Volume 1 – Formulary Rate Tariff, § 1.18.III Optional Demand Response Program Rider (7.0.0).

<sup>15</sup> Complaint at 37-38 (quoting 1977 Contract at § 3).

pursuant to transmission participation arrangements. Meters and metering equipment shall be furnished, maintained and read pursuant to the mutual agreement between the parties hereto.<sup>16</sup>

Tipmont maintains that Wabash has been incurring and passing through to members in wholesale power rates transmission development costs associated with projects Wabash proposes to build contrary to express provisions of the Contracts. Tipmont argues that, to the extent such costs have been passed through the formula rate, these costs should be refunded to Tipmont with interest. Tipmont states that nothing in the Contracts would prevent Wabash from entering into separate transmission development agreements with members that wish to participate in these endeavors and bear associated costs.<sup>17</sup>

10. Finally, Tipmont argues that the Formula Rate Tariff lacks appropriate protocols that would allow Tipmont to determine the reasonableness of the application of Wabash's formula and the annual rate determination.<sup>18</sup> Tipmont alleges that Wabash is careful about the information it discloses to members. Tipmont explains that, annually, each Board member receives projected financial statements, a power supply summary, an administrative and general expense report, salary and benefit information, forecasted borrowings and capital expenditures and other reports as needed or requested by the Board. Tipmont also explains that there is an annual true-up mechanism to ensure that actual costs incurred during the year are collected. Tipmont alleges that this process is insufficient and argues that Wabash should have to adopt standard protocols similar to those found in transmission formula rates.<sup>19</sup>

## **II. Notice of Filing and Responsive Pleadings**

11. Notice of the Complaint was published in the *Federal Register*, 83 Fed. Reg. 50,916 (Oct. 10, 2018), with interventions and protests due on or before October 22, 2018. On October 9, 2018, Wabash filed a motion requesting an extension of time to submit its answer. On October 16, 2018, the Commission extended the comment period to and including November 5, 2018.

12. On November 5, 2018, Wabash filed its answer to the Complaint (Answer). On November 19, 2018, Tipmont filed a request for leave to respond and response to

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<sup>16</sup> *Id.* The 2006 Contract contains identical language.

<sup>17</sup> *Id.* at 38.

<sup>18</sup> *Id.* at 39.

<sup>19</sup> *Id.*

Wabash's Answer (Tipmont Response), and on November 30, 2018, Wabash filed a motion for leave to reply and reply to Tipmont's Response (Wabash Reply).

**A. Wabash Answer**

13. Wabash argues that the Commission should reject Tipmont's request to terminate the Contracts early. Wabash contends that the early termination provisions of the Contracts explicitly provide for a 10-year notice and buyout term. Wabash asserts that these provisions have been in effect for more than two decades and governed the exit of three members that left Wabash after it became a public utility in 2004.<sup>20</sup>

14. Wabash states that the Buyout Policy requires that the departing member execute an agreement that memorializes the terms of early termination of the Contracts. The Buyout Policy further requires that an escrow agreement also be executed and attached to the agreement.<sup>21</sup> Wabash explains that the agreement establishes the procedures, rights, and obligations of the exiting member and Wabash under which the member withdraws from membership in Wabash and terminates its obligations under the Contracts, and that this agreement is filed with the Commission.<sup>22</sup> Wabash argues that the Commission should follow the process established in section 12 of the 2006 Contract, which allows it to file either an executed or unexecuted agreement, depending on whether Wabash and Tipmont agree to the rates, terms, and conditions. Wabash argues that once it submits the agreement pursuant to FPA section 205, Tipmont can raise any and all relevant issues before the Commission.<sup>23</sup>

15. Wabash explains that it has not filed the Buyout Policy because it does not meet the Commission's "rule of reason" for the kinds of materials related to service under a rate schedule that need to be filed pursuant to section 205 of the FPA.<sup>24</sup> Wabash states that the Buyout Policy is expressly referenced in the termination provisions of the 1977 Contract and the Commission therefore would review the Buyout Policy in conjunction

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<sup>20</sup> Wabash Answer at 23.

<sup>21</sup> *Id.* at 28.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.* at 39-40.

with the agreement modifying the 1977 Contract, as it would do with business manuals and other implementing policies of public utilities.<sup>25</sup>

16. Wabash contends that Order No. 888 does not apply to the Contracts. Wabash argues that the 1977 Contract as amended has an explicit buyout provision that makes 18 C.F.R. § 35.26 inapplicable to the 1977 Contract.<sup>26</sup> Wabash argues that Tipmont's circumstances are not analogous to those giving rise to Order No. 888.

17. With regard to the Distributed Generation Policy, Wabash asserts that it does not meet the Commission's threshold for filing under section 205 of the FPA. Wabash argues that Tipmont merely suggests that the Commission should investigate the justness and reasonableness of the additional Contract and Formula Rate Tariff provisions Tipmont identifies and that it does not assert that the provisions are unjust and unreasonable. Wabash further argues that Tipmont has adduced no evidence of unjustness and unreasonableness.<sup>27</sup>

18. Wabash argues that the Contracts do not prohibit Wabash from incurring transmission development costs. Wabash asserts that the relevant excerpts of section 3 of the 1977 Contract provide that members may own transmission facilities and expresses its general intent not to own, operate, or take responsibility in the maintenance of transmission facilities or substations, except in cases where those assets have been acquired in connection with agreements with other suppliers that own and operate transmission assets.<sup>28</sup> Wabash explains that it has been working diligently to improve transmission reliability for its members, including Tipmont, by working with interconnected transmission owners to improve reliability and constructing and owning transmission facilities to serve members. Wabash adds that these costs are recoverable from members under the Contracts and the Formula Rate Tariff on file at the Commission, and therefore the Commission should deny Tipmont's allegations and request for refunds.<sup>29</sup>

19. Finally, Wabash contends that Tipmont's request for filed formula rate protocols is unnecessary because the members themselves through the Board decide the level of the

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<sup>25</sup> *Id.* at 40 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,073, at P 23 (2015) (*MISO*)).

<sup>26</sup> *Id.* at 43-44.

<sup>27</sup> *Id.* at 46.

<sup>28</sup> *Id.* at 48-49.

<sup>29</sup> *Id.* at 49.

cost-based formula rate. Wabash argues that the process by which Wabash develops the formula rate is detailed in Section 1.3 of the Formula Rate Tariff, and Tipmont provides no evidentiary basis demonstrating that this process is unjust and unreasonable. Wabash submits that there is no basis for the Commission to find “appropriate” protocols “of the sort” that the Commission requires for investor-owned utilities and regional transmission organizations (RTOs). Wabash states that if the members through the Board decide that more specificity in Section 1.3 is needed, the Board will take up that task. Wabash notes that Tipmont has never made such a proposal to the Board.<sup>30</sup>

## **B. Tipmont Response**

20. Tipmont argues that in Order No. 888, the Commission did not exempt Generation and Transmission cooperatives that are public utilities from open access and stranded cost regulations.<sup>31</sup> Tipmont asserts that Wabash is a transmission owner and has no right to be treated differently from any other public utility transmission owner that is subject to Order No. 888 and other Commission orders and regulations. Therefore, Tipmont contends that under Order No. 888, the option for requirements customers to request termination of service in order to participate in the competitive wholesale market applies to Tipmont as it applies to a wholesale customer of an investor-owned electric utility.<sup>32</sup>

21. Tipmont argues that the Buyout Policy is not analogous to RTO business practice manuals, which are not required to be filed under section 205 of the FPA and the “rule of reason.” Tipmont asserts that business practice manuals do not set forth the essential rates and related terms of wholesale service but are instead designed to provide implementation details for complex RTO activities. Tipmont argues that the Buyout Policy sets forth a rate for termination of wholesale service and contains the essential terms and conditions that go with that rate; therefore, according to Tipmont, section 205 unambiguously requires that the Buyout Policy be filed and approved as just and reasonable before it can go into effect.<sup>33</sup> Tipmont states that it may not be necessary for the Commission to resolve this legal issue because of Wabash’s statement that if Wabash and Tipmont are unable to reach agreement on the rates, terms, and conditions for termination of service, Wabash will unilaterally file an unexecuted agreement pursuant to section 205. Tipmont asserts that Wabash further acknowledges that the rates, terms, and conditions in the Buyout Policy will be subject to Commission review in that

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<sup>30</sup> *Id.* at 50.

<sup>31</sup> Tipmont Response at 10.

<sup>32</sup> *Id.* at 11.

<sup>33</sup> *Id.* at 15-16.



proceeding.<sup>34</sup> Tipmont states that it would not object to having the termination-related issues raised in this Complaint decided in the context of section 205, so long as Wabash's offer is not merely a delaying tactic or an effort to evade Commission review.<sup>35</sup> Tipmont submits that Tipmont and Wabash do not agree on the rates, terms, and conditions set forth in the Buyout Policy relating to Tipmont's termination of service, and therefore no reason exists for Wabash not to promptly make the unilateral section 205 filing of an unexecuted agreement that it has committed to make in its Answer.<sup>36</sup>

22. Tipmont asserts that the Distributed Generation Policy is unjust and unreasonable because it puts Wabash in charge of determining the rates, terms, and conditions under which members will be allowed to purchase power from Wabash's distributed generation and storage competitors. Regarding the transmission development cost issue, Tipmont reiterates that the provision unambiguously states that Wabash will not own or operate transmission facilities other than in connection with participation agreements. Tipmont states that Wabash has admitted to constructing and owning transmission facilities to serve members. Tipmont argues that the Contracts are clear that Wabash will not own additional transmission facilities, and therefore any charges for such ownership are not permitted. Tipmont contends that because it did not contract to pay for additional transmission facilities developed and owned by Wabash, it cannot be held responsible to pay for that service.<sup>37</sup>

### C. Wabash Reply

23. Wabash reiterates that the stranded cost provisions of Order No. 888 are not applicable and not intended to provide the buyout obligation measure for early contract termination, particularly where the contract includes a detailed buyout process voluntarily agreed to by both parties. Wabash alleges that Tipmont has not substantively responded to that demonstration, nor has it acknowledged that it is contractually bound by the buyout terms of the 1977 Contract, as amended, which incorporate the Buyout Policy.<sup>38</sup>

24. Wabash argues that Tipmont wants all of the benefits and none of the burdens of Wabash membership and the Contracts, leaving those burdens for Wabash's remaining members. Wabash also reiterates that, if the parties cannot agree to an agreement,

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<sup>34</sup> *Id.* at 16.

<sup>35</sup> *Id.* at 16-17.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 23.

<sup>38</sup> Wabash Reply at 2.

Wabash can file the rate, terms, and conditions of the buyout in an unexecuted contract pursuant to section 205 of the FPA.<sup>39</sup>

25. Wabash states that, while Tipmont claims that the Distributed Generation Policy directly affects the terms of wholesale power service to Wabash's members, Tipmont provides no analysis or examples to support that assertion. Wabash reiterates that the Distributed Generation Policy does not meet the threshold for filing under section 205 and asserts that Tipmont has not demonstrated otherwise.<sup>40</sup> Wabash submits that Tipmont has not provided any evidence that the Distributed Generation Policy prohibits Tipmont from pursuing opportunities to reduce its electricity costs. Wabash adds that the current version of the Distributed Generation Policy applicable to Tipmont and consistent with its all-requirements obligations under the Contracts limits only Tipmont's ability to purchase power from distributed generation sources that are not qualifying facilities under the Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>41</sup> Wabash alleges that Tipmont believes it should be able to disregard its voluntary contractual obligation to purchase all of its power from Wabash and purchase power from any interconnected generation source even if it is not a PURPA qualifying facility.<sup>42</sup>

26. With regard to the transmission development cost issue, Wabash alleges that Tipmont did not respond to Wabash's Answer showing that no such prohibition from owning or operating transmission facilities exists in section 3 of the 1977 Contract. Thus, Wabash asserts that Tipmont has not shown that section 3 unambiguously prohibits Wabash's ownership of transmission facilities.<sup>43</sup>

### **III. September 19 Order and Subsequent Filings**

27. In the September 19 Order, the Commission held this proceeding in abeyance, noting that the parties stated that issues related to the rates, terms, and conditions for the termination of Tipmont's service could be addressed in a section 205 filing made by Wabash. The Commission provided Wabash 90 days to prepare and file an FPA section 205 filing proposing rates, terms, and conditions to govern the early termination of Tipmont's Contracts, if Wabash decided to submit such a filing. If Wabash did not

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<sup>39</sup> *Id.* at 9-11.

<sup>40</sup> *Id.* at 13-14.

<sup>41</sup> 16 U.S.C. § 824a-3.

<sup>42</sup> Wabash Reply at 14.

<sup>43</sup> *Id.* at 15.

submit such a filing within that time, the Commission directed Wabash to submit a status report indicating whether—and, if so, when—Wabash intended to make such a filing.<sup>44</sup>

28. On December 12, 2019, Wabash filed a status report, stating that Wabash intended to file an unexecuted early termination agreement containing the rates, terms, and conditions for the early termination of the Contracts on or before February 21, 2020.<sup>45</sup> On December 27, 2019, Tipmont filed a comment, stating that Wabash does not need an additional two months to make its filing, and that the terms of this agreement are significantly more onerous than those in the Buyout Policy addressed in the Complaint.<sup>46</sup>

29. On February 20, 2020, in Docket No. ER20-1041-000, Wabash filed the Agreement.

#### **IV. Determination**

##### **A. Procedural Matters**

30. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We accept Tipmont's Response and Wabash's Reply because they have provided information that assisted us in our decision-making process.

##### **B. Substantive Matters**

31. In light of Wabash's filing of the Agreement, which the Commission is addressing concurrently in Docket No. ER20-1041-000, we lift the abeyance established in the September 19 Order. As discussed below, we grant the Complaint in part, deny in part, and dismiss in part as moot.

##### **1. Buyout Policy**

32. Tipmont argues that FPA section 205 unambiguously requires that the Buyout Policy be filed and approved as just and reasonable before it can go into effect. However, Tipmont states, it may not be necessary for the Commission to resolve this legal issue if Wabash unilaterally files an agreement pursuant to FPA section 205. Moreover, Tipmont

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<sup>44</sup> September 19 Order, 168 FERC ¶ 61,161 at P 16.

<sup>45</sup> Status Report at 2.

<sup>46</sup> Comment at 1-2.

states, it would not object to having the termination-related issues raised in this Complaint decided in the context of a section 205 proceeding.<sup>47</sup>

33. We dismiss as moot Tipmont's arguments about the Buyout Policy. Because the Commission in a concurrent order is accepting Wabash's filing of the Agreement in Docket No. ER20-1041-000 and is establishing hearing and settlement judge procedures to address the justness and reasonableness of Wabash's proposed buyout amount and buyout period for Tipmont's termination,<sup>48</sup> we need not address the issues Tipmont raised in the Complaint about the Buyout Policy in this proceeding.

## 2. Applicability of Order No. 888 to Early Termination

34. We deny Tipmont's request to terminate the 1977 Contract early under Order No. 888. In Order No. 888, the Commission stated that a customer may seek to modify an existing wholesale requirements contract if the contract was executed on or before July 11, 1994.<sup>49</sup> The Commission explained that July 11, 1994 was the appropriate contract cut-off date because, as of that date, "the industry was put on notice of the proposal to disallow prospectively extra-contractual recovery of stranded costs."<sup>50</sup> The Commission then stated that, to modify an *existing* wholesale requirements contract, a customer would no longer have the burden of establishing that it is in the public interest to permit the modification of such contract.<sup>51</sup> Here, we find the 1977 Contract to be a "new" requirements contract such that the Order No. 888 provisions that allow a wholesale customer to unilaterally modify an existing requirements contract do not apply.

35. Order No. 888 makes clear that when a wholesale requirements contract "is extended or *renegotiated* for an effective date after July 11, 1994," it becomes a "'new' requirements contract."<sup>52</sup> Tipmont and Wabash renegotiated the 1977 Contract when it

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<sup>47</sup> Tipmont Response at 16-17.

<sup>48</sup> *Wabash Valley Power Ass'n, Inc.*, 171 FERC ¶ 61,059 (2020).

<sup>49</sup> Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 12,374.

<sup>50</sup> Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 21,641.

<sup>51</sup> Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 12,403.

<sup>52</sup> Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 21,639 (emphasis added); e.g., *Orange & Rockland Utils., Inc.*, 76 FERC ¶ 61,037, at 61,190-91 (1996) (explaining that the parties' contracts were new wholesale requirements contracts pursuant to Order No. 888 because Orange and Rockland executed stranded cost amendments on May 13, 1996, thereby renegotiating its contracts to be effective after July 11, 1994).

was amended in 2006.<sup>53</sup> Thus, we find that the amended 1977 Contract is a new wholesale requirements contract, not an existing contract for purposes of terminating early pursuant to Order No. 888.

36. We dismiss as moot the parties' arguments regarding the applicability of the stranded cost provisions of Order No. 888. These issues are before the Commission as part of the Agreement filed by Wabash in Docket No. ER20-1041-000, and are addressed in the order being issued concurrently in that proceeding.<sup>54</sup>

### 3. Distributed Generation Policy

37. We find that the Distributed Generation Policy must be filed under FPA section 205 and grant the Complaint on this issue. Section 205(c) of the FPA requires public utilities to file "the classifications, practices, and regulations affecting [jurisdictional] rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."<sup>55</sup> The Commission determines what agreements "'affect or relate to' electric service" according to the "rule of reason."<sup>56</sup> Under the "rule of reason," public utilities must file practices "'that affect rates and service significantly, that are realistically susceptible of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous."<sup>57</sup>

38. According to the Contracts, Wabash must sell and deliver to Tipmont, and Tipmont must purchase and receive, all power and energy which Tipmont shall require to operate its system—except for distributed generation as defined by the Distributed Generation Policy.<sup>58</sup> The Distributed Generation Policy sets forth, among other things, Tipmont's rights to use distributed generation to offset its energy requirements under the

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<sup>53</sup> Complaint, Attachment B at § 12.

<sup>54</sup> *Wabash Valley Power Ass'n, Inc.*, 171 FERC ¶ 61,059 (2020).

<sup>55</sup> 16 U.S.C. § 824d(c).

<sup>56</sup> *MISO*, 152 FERC ¶ 61,073 at P 22 (citation omitted).

<sup>57</sup> *Tri-State Generation and Transmission Ass'n, Inc.*, 170 FERC ¶ 61,223, at P 49 & n.89 (2020) (quoting *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985); citing *Demand Response Coal. v. PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,061, at P 17 (2013)).

<sup>58</sup> Complaint, Attachment A at § 1; Attachment B at § 1.

Contracts.<sup>59</sup> We find that, under the “rule of reason,” the Distributed Generation Policy has a significant effect on Tipmont’s requirements service, is realistically susceptible of specification, and is not so generally understood in any contractual arrangement as to render recitation superfluous. For these reasons, we direct Wabash to file the Distributed Generation Policy under FPA section 205 within 60 days of the date of this order.<sup>60</sup>

#### **4. Optional Riders**

39. We find that Tipmont has not demonstrated that the terms and conditions in the Optional Riders are unjust, unreasonable, unduly discriminatory, or preferential under FPA section 206.<sup>61</sup> We find that the Complaint provides no support for its allegations that these Formula Rate Tariff provisions limit and establish terms and conditions that unjustly and unreasonably affect Tipmont. We thus deny the Complaint on this issue.

#### **5. Transmission Development Costs**

40. We find that Tipmont has not demonstrated that Wabash has been incurring transmission development costs contrary to the Contracts. As an initial matter, while the Contracts state that Wabash does not generally intend to own or operate transmission facilities, we find that section 3 of the 1977 Contract expressly contemplates Wabash owning transmission facilities, stating that “such ownership, operation and maintenance may inure to [Wabash] by reason of Transmission Participation Agreements and Transmission, Operating and Maintenance Agreements with other suppliers, which suppliers own and operate bulk transmission systems.”<sup>62</sup>

41. We further find that Tipmont has not demonstrated that Wabash has been incurring transmission development costs outside of the circumstances under which the Contracts contemplate transmission ownership by Wabash. Wabash states that it has been “working with interconnected transmission owners to improve reliability and

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<sup>59</sup> *Id.* Attachment F at § 5.

<sup>60</sup> *See Wabash Valley Power Ass’n, Inc.*, 168 FERC ¶ 61,189, at PP 35-36 (2019) (finding that provisions of the unfiled distributed generation policy that specify the amount and types of resources that a member may use to reduce its requirements purchases from Wabash under contract significantly affect rates, terms, and conditions of service, and refusing to accept the contracts without Wabash including such provisions as part of the filed rate).

<sup>61</sup> *See* 16 U.S.C. § 824e(b).

<sup>62</sup> Complaint, Attachment A at § 3; *see also id.* Attachment B at § 5.

constructing/owning transmission facilities to serve [m]embers.”<sup>63</sup> Although Tipmont deems this statement dispositive,<sup>64</sup> we disagree. We find that section 3 of the 1977 Contract specifically allows for Wabash to work with transmission owners to own, operate, or maintain transmission facilities “by reason of Transmission Participation Agreements and Transmission, Operating and Maintenance Agreements” and to the extent costs are incurred consistent therewith, Wabash is acting consistent with section 3.<sup>65</sup> We find that Tipmont has not demonstrated that Wabash’s activities are inconsistent with the Contracts, and we deny the Complaint on this point.

## 6. Formula Rate Protocols

42. We find that Tipmont has failed to demonstrate that Wabash should be required to file revised formula rate protocols. Tipmont provides insufficient support for its allegations, simply asserting that the process under the existing protocols is “insufficient to determine the reasonableness of the application of the formula and the annual rate determination.”<sup>66</sup> Moreover, while Tipmont suggests that the adoption of “protocols of the sort typically included in transmission formula rates would be appropriate,”<sup>67</sup> Tipmont fails to point to any precedent where the Commission imposed such a requirement on an electric cooperative like Wabash whose Formula Rate Tariff applies to members taking service under wholesale power contracts.<sup>68</sup> As such, we deny the Complaint on this issue.

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<sup>63</sup> Wabash Answer at 49.

<sup>64</sup> Tipmont Response at 23.

<sup>65</sup> While the 1977 Contract does not define the terms “Transmission Participation Agreements” or “Transmission, Operating and Maintenance Agreements,” the third “Whereas” clause in the 1977 Contract provides that Wabash “proposes to enter into a Transmission Participation Agreement with Public Service Company of Indiana, Inc., and further proposes to enter into other such Transmission Participation Agreements with other utilities or enter into arrangements for the transmission of electrical energy generated, purchased or otherwise obtained to [Wabash’s] members.” *See* Complaint, Attachment A at Introduction.

<sup>66</sup> *Id.* at 39.

<sup>67</sup> *Id.*

<sup>68</sup> In fact, the Commission has declined to require revisions to formula rates in bilateral power sales agreements to adopt protocols as it has required in formula rates under open access transmission tariffs, finding the precedent on formula rate protocols under open access transmission tariffs, which relate to transparency and ability to participate in development of

The Commission orders:

(A) The Complaint is hereby granted in part, denied in part, and dismissed in part as moot, as discussed in the body of this order.

(B) Wabash is hereby directed to file the Distributed Generation Policy within 60 days of the date of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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annual updates to the formula rate, were not applicable to such bilateral power sales agreements. *Old Dominion Elec. Coop.*, Opinion No. 553, 158 FERC ¶ 61,045, at P 117 (2017), *order on reh'g*, Opinion No. 553-A, 162 FERC ¶ 61,262 (2018).