171 FERC ¶ 61,053
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Wabash Valley Power Association, Inc. Docket No. ER20-1041-000

ORDER ACCEPTING AND SUSPENDING PROPOSED EARLY TERMINATION AGREEMENT, AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued April 20, 2020)

1. On February 20, 2020, Wabash Valley Power Association, Inc. (Wabash) filed, pursuant to section 205 of the Federal Power Act (FPA)[1] and section 35.13 of the Commission's regulations,[2] an unexecuted agreement (Agreement) for early termination of wholesale power supply contracts between Wabash and Tipmont Rural Electric Membership Cooperative (Tipmont) as a new Section 3.023.003.001 of its FERC Electric Tariff Volume No. 1 (Formula Rate Tariff). In this order, we accept and suspend for a nominal period Wabash's proposed Agreement, to become effective April 20, 2020, subject to refund, and establish hearing and settlement judge procedures. Concurrently with this order, the Commission is issuing an order on Tipmont's related complaint against Wabash in Docket No. EL19-2-000.[3]

[1] 16 U.S.C. § 824d (2018).

[2] 18 C.F.R. § 35.13 (2019).

[3] *Tipmont Rural Electric Member Coop. v. Wabash Valley Power Ass'n, Inc.*, 171 FERC ¶ 61,059 (2020).

I. Background

2. Wabash is a generation and transmission cooperative consisting of 25 members, 23 of which are non-profit distribution cooperatives such as Tipmont. In 1977, Tipmont entered into an all-requirements wholesale power supply contract (1977 Contract) with Wabash for a term of approximately 40 years that was extended to terminate in 2028. In 2004, after repurchasing its Rural Utilities Service debt, Wabash became subject to the Commission's jurisdiction and filed the 1977 Contract with the Commission along with its Formula Rate Tariff.[4]

3. In 2006, Tipmont entered into a new all-requirements wholesale power supply contract with Wabash that provides for service from 2028 until 2050 (2006 Contract).[5] The 2006 Contract also amended certain terms of the 1977 Contract to add provisions addressing early termination and incorporated by reference the terms of an unfiled Wabash board policy (Buyout Policy).[6]

4. On October 1, 2018, Tipmont filed a complaint requesting that the Commission find that Tipmont may terminate service early under its contracts with Wabash (Complaint). In seeking to terminate service early, Tipmont argued that: (1) the Buyout Policy is ineffective and legally unenforceable because Wabash failed to file the Buyout Policy under FPA section 205; and (2) pursuant to Tipmont's right to terminate service early under Order No. 888,[7] this policy would be unjust and unreasonable even if it had been filed. Tipmont also argued that certain other contract and formula rate provisions

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[4] *See Wabash Valley Power Ass'n*, 107 FERC ¶ 61,327 (2004).

[5] Wabash, Transmittal Letter, Docket No. ER07-1298-000, at 3, 5 (filed Aug. 22, 2007); *see Wabash Valley Power Ass'n*, Docket No. ER07-1298-000 (2007) (delegated order accepting contracts for filing).

[6] We refer to the 1977 Contract and the 2006 Contract collectively as the Contracts.

[7] *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).

were unjust and unreasonable.[8] On September 19, 2019, the Commission issued an order holding the Complaint in abeyance to provide Wabash time to propose terms of early termination for Tipmont in a FPA section 205 filing, should Wabash decide to submit such a filing.[9] On February 20, 2020, Wabash submitted the instant Agreement that contains proposed rates, terms, and conditions to implement Tipmont's early termination of its membership and contracts with Wabash.

II. Filing

5. The Agreement provides that Tipmont's contracts will remain in effect for 10 years from the effective date of the Agreement and that Tipmont must make a monthly deposit of $0.014/kWh (buyout rate) of power purchased by Tipmont from Wabash or any other supplier during the previous calendar month. In support, Wabash includes testimony and a study that calculates Tipmont's buyout amount of $132 million as the estimated increase in remaining members' rates over the remainder of Tipmont's Contracts that is associated with Tipmont's early withdrawal.[10] Wabash states that the study considers Wabash's projected fixed and power supply costs, and assumes that revenues from excess energy and capacity sales to Midcontinent Independent System Operator, Inc. (MISO) following Tipmont's departure are used to lower the buyout amount for Tipmont. In support of its proposal, Wabash argues that any adverse impacts on the enforceability or security provided by the contracts could affect Wabash's credit rating.[11] Wabash requests an effective date of April 20, 2020.

III. Notice and Responsive Pleadings

6. Notice of Wabash's filing was published in the *Federal Register*, 85 Fed. Reg. 11,361 (Feb. 27, 2020), with interventions and protests due on or before March 12, 2020. On

[8] Tipmont, Complaint, Docket No. EL19-2-000, at 6-8, 16-21, 25, 33-39 (filed Oct. 1, 2018).

[9] *Tipmont Rural Electric Member Coop. v. Wabash Valley Power Ass'n, Inc.*, 168 FERC ¶ 61,161, at P 16 (2019).

[10] The study also calculates that Tipmont's buyout amount would be $319 million if Wabash had proposed an immediate early termination option for Tipmont. Ex. WV-JAC at 31-32.

[11] Ex. WV-JAC at 22-24, 27, 35.

February 24, 2020, Tipmont filed a motion for an extension of the comment period. On March 2, 2020, the Commission denied the request.[12]

7. Timely motions to intervene and comments supporting Wabash's filing were submitted by: Carrol White Rural Electric Membership Corporation; Corn Belt Energy Corporation; Fulton County Rural Electric Membership Corporation; Hancock Rural Telephone Corporation; Heartland Rural Electric Membership Corporation; Hendricks County Rural Electric Membership Corporation; Jasper County Rural Electric Membership Corporation; Jay County Rural Electric Membership Corporation; Kankakee Valley Rural Electric Membership Corporation; Kosciusko County Rural Electric Membership Corporation; Marshall County Rural Electric Membership Corporation; Miami-Cass County Rural Electric Membership Corporation; M.J.M. Electric Cooperative, Inc.; Newton County Rural Electric Membership Corporation; Parke County Rural Electric Membership Corporation; and Warren County Rural Electric Membership Corporation. Tipmont and United Power, Inc. filed timely motions to intervene. On March 12, 2020, Tipmont filed a protest and motion for partial summary disposition. On March 24, 2020, Wabash filed an answer to Tipmont's motion for partial summary disposition, a motion for leave to answer Tipmont's protest, and answer. On March 31, 2020, Tipmont filed a motion to respond and response. On April 3, 2020, Wabash filed an answer to Tipmont's motion to respond and response.

IV. Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

9. 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 a protest and/or answer unless otherwise ordered by the decisional authority. We accept Wabash's answers and Tipmont's response because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

10. As discussed below, we find that Order No. 888's stranded cost policy does not apply to Tipmont's Contracts. In addition, we find that there are issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly,

[12] Notice Denying Extension of Time, Docket No. ER20-1041-000 (Mar. 2, 2020).

we accept and suspend the proposed Agreement for a nominal period, to become effective April 20, 2020, subject to refund. We also concurrently lift the abeyance in the Complaint proceeding and address certain issues therein.[13]

1. Applicability of Order No. 888

a. Tipmont Protest

11. Tipmont seeks summary disposition of certain issues based on the application of Order No. 888 and relevant Commission regulations and requests either paper hearing or expedited hearing procedures on other factual issues. Tipmont argues that the Commission should revise the Agreement to allow Tipmont to terminate as soon as reasonably practicable.[14] Tipmont first argues that Wabash must use the Commission's formula for stranded cost recovery under 18 C.F.R. § 35.26(c)(2)(iii) (2019). Tipmont contends that this formula was designed to make the selling utility and its other customers whole from the loss of a customer.[15] Tipmont asserts that it has a right to request early termination, subject to payment of stranded costs, consistent with the Commission's opinion in *Village of Belmont*.[16]

12. Tipmont also argues that, pursuant to 18 C.F.R. § 35.26(c)(3) (2019), Wabash inappropriately seeks to charge Tipmont stranded costs based on a reasonable expectation of a 30-year service period, and that there is a rebuttable presumption that this reasonable expectation of a service period should be no more than 10 years.[17] Tipmont further argues that Wabash cannot charge Tipmont for stranded costs based on service provided

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[13] *Tipmont Rural Electric Member Coop. v. Wabash Valley Power Ass'n, Inc.*, 171 FERC ¶ 61,059 (2020).

[14] Protest at 26-29. Alternatively, Tipmont asks the Commission to reject the Agreement and concurrently establish a refund effective date in the Complaint proceeding. Tipmont argues that outright rejection of the Agreement without a concurrent order establishing a refund date in the Complaint proceeding would unfairly benefit Wabash at Tipmont's expense by further delaying the implementation of just and reasonable termination provisions. *Id.* at 2.

[15] *Id.* at 4, 11-14.

[16] *Id.* at 22-23 (citing *Village of Belmont,* et al*. v. Wisc. Power & Light Co*., 83 FERC ¶ 61,108 (1998), *order on initial decision*, Opinion No. 451, 95 FERC ¶ 61,334, at 62,193 (2001)).

[17] *Id.* at 4-5, 14-15.

under the 2006 Contract because Wabash failed to include an explicit stranded cost provision in this contract as required by Commission regulations.[18]

13. Tipmont next argues that, under Order No. 888, Wabash cannot require Tipmont to take service for 10 years and simultaneously pay stranded costs based on an assumed additional 20 years of service.[19] Tipmont also argues that the Commission's regulations and Order No. 888 limit Wabash's stranded cost recovery to the estimate it provided Tipmont in March 2018—$59.5 million—unless Wabash can show a change in that estimate before the date of the Complaint.[20] However, Tipmont maintains that, based on its calculations using the Commission's stranded cost formula in Order No. 888, Tipmont's stranded cost obligation (not accounting for returned patronage capital) is $40.1 million.[21]

b. Wabash Answer

14. Wabash contends that Tipmont's reliance on Order No. 888 is misplaced because Tipmont seeks early termination of its Contracts rather than access to alternative suppliers using Wabash's transmission facilities under Order No. 888. Wabash asserts that Order No. 888 only provides for the recovery of extra-contractual stranded costs when stranded costs are attributable to the fundamental industry changes instituted by Order No. 888 and when the parties' bundled wholesale power contracts do not address stranded-cost recovery.[22] Wabash concludes that Order No. 888 is inapplicable because Wabash does not directly provide transmission service and has never been in a position to limit Tipmont's transmission access. Wabash argues that upon early termination, Tipmont would not become an unbundled transmission customer of Wabash. Furthermore, Wabash concludes that Order No. 888 is inapplicable because the 2006 Contract explicitly provides for early termination and buyout of the contracts.[23] Wabash adds that it is only aware of one instance in which a distribution cooperative attempted to abrogate a

[18] *Id. s*at 15-17.

[19] *Id.* at 20-21.

[20] *Id.* at 24-26. Tipmont also argues that Wabash proposes to recover costs from Tipmont several times higher than in Wabash's 2018 estimate and pursuant to a different methodology. *Id.* at 24-25 (citing Wabash, Reply, Docket No. EL19-2, Aff. ¶¶ 3-4 (filed. Nov. 30, 2018)).

[21] *Id.* at 9.

[22] Wabash Answer at 2-3.

[23] *Id.* at 13-18.

wholesale power contract with a generation and transmission cooperative pursuant to Order No. 888, and states that the Commission rejected that proposal.[24]

15. Wabash further maintains that Tipmont's reliance on *Village of Belmont* is misplaced because that proceeding involved pre-Order No. 888 bundled wholesale power contracts and the Commission's accompanying decision did not discuss whether a buyout provision could include both a long notice provision as well as a buyout obligation.[25] Wabash also argues that its estimate of Tipmont's buyout in 2018 is irrelevant because Order No. 888 does not apply to Tipmont's early termination and because Tipmont failed to provide proper notice.

16. Wabash argues that Tipmont has failed to demonstrate that its contract provisions injure the public interest such that Tipmont should be permitted to abrogate its Contracts without complying with the Contracts' early termination provisions.[26] Wabash asserts that the Commission and courts have consistently held that there is a strong public interest in ensuring that electric cooperative members uphold their contractual obligations in order to prevent the shifting of fixed costs to other members.[27] Wabash also argues that the enforceability of the Contracts' early termination provisions directly affect Wabash's financing and credit rating.[28]

c. Tipmont Response

17. Tipmont contends that because both factors, i.e., the presence of fundamental industry changes instituted by Order No. 888 and the absence of contract provisions for stranded cost recovery cited by Wabash for the recovery of extra-contractual stranded

[24] *Id.* at 3-4 (citing *N. Va. Elec. Coop. v. Old Dominion Elec. Coop.*, 114 FERC ¶ 61,240 (*Old Dominion*), *reh'g denied*, 116 FERC ¶ 61,173 (2006) (*Old Dominion Rehearing*)).

[25] *Id.* at 29.

[26] *Id.* at 19-20 (citing *Old Dominion*, 114 FERC ¶ 61,240 at P 18; *Old Dominion Rehearing*, 116 FERC ¶ 61,173 at P 11).

[27] *Id.* at 20-23 (citing *Ne. Rural Electric Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 2012 WL 12888335, at *6 (S.D. Ind. March 29, 2012), *vacated and remanded on other grounds*, 707 F.3d 883 (7th Cir. 2013)).

[28] *Id.* at 9.

costs under Order No. 888 are present here the stranded cost regulations apply. Tipmont also asserts that Wabash makes several incorrect assumptions in its rebuttal.[29]

18. Tipmont asserts that Wabash incorrectly suggests that the stranded cost regulations in Order No. 888 do not apply because Wabash acquires transmission service for its wholesale customers under the MISO Open Access Transmission, Energy and Operating Reserves Market Tariff and does not directly provide transmission service. Tipmont contends that whether a transmission owner provides transmission service directly or through a Regional Transmission Owner (RTO) or Independent System Operator (ISO) is irrelevant because functional unbundling under Order No. 888 means that the merchant function of the transmission owner was required to take service for its bundled wholesale customers under either its own tariff or that of an RTO/ISO. According to Tipmont, there would have been no reason for RTOs/ISOs to adopt stranded cost provisions if the unbundling of transmission services associated with RTO/ISO membership resulted in an inability to claim stranded costs under the Commission's regulations.[30] Tipmont maintains that Wabash's practice constitutes functional unbundling and asserts that Order No. 888 is clear that the stranded cost regulations apply to unbundled wholesale contracts. Tipmont also notes that the costs of transmission are included in Wabash's formula rate and that Wabash has represented that the 1977 Contract is a bundled wholesale contract in other proceedings.[31]

19. Tipmont also disputes Wabash's contention that Wabash has never been in a position to limit Tipmont's access to transmission or alternative power supplies.[32] Tipmont states that Wabash is a joint owner of the transmission system in Indiana to which Tipmont is interconnected, and argues that Tipmont was previously unable to access alternative wholesale suppliers until Order No. 888 established open access to the jointly-owned transmission system. Tipmont avers that Wabash's reliance on *Old Dominion* suggests that Tipmont had options to access alternative supplies, whereas by

[29] Tipmont Response at 1-3.

[30] *Id.* at 4-5.

[31] *Id.* at 3, 5-7 (citing *Midwest Indep. Sys. Operator, Inc.*, 107 FERC ¶ 61,191 (2004), *order on agreements*, 108 FERC ¶ 61,236, at app. B (2004), *order on reh'gs and compliance filings*, 111 FERC ¶ 61,042, *order on reh'gs*, 112 FERC ¶ 61,311 (2005)).

[32] *Id.* at 2-4.

contrast, Old Dominion effectively had no transmission facilities and was fully dependent on others for transmission.[33]

20. Tipmont also argues that the Contracts do not address stranded cost recovery. Tipmont asserts that it would be illogical to exempt a contract from the stranded cost recovery provisions of Order No. 888 when the 2006 Contract merely references the unfiled Buyout Policy that gives members the right to establish stranded cost charges.[34]

d. Wabash Response

21. Wabash avers that it has no ability to control access to the jointly-owned transmission system that it uses to provide wholesale requirements service to Tipmont. Wabash contends that it was Duke Energy Indiana, LLC, not Wabash, that provided transmission service to Tipmont prior to turning over functional control of the associated transmission facilities to MISO.[35] In addition, Wabash argues that the stranded cost provisions of Order No. 888 do not apply because the Contracts do not provide for bundled wholesale power and transmission service.[36]

e. Commission Determination

22. We deny Tipmont's request for summary disposition. We note that Order No. 888 permitted extra-contractual recovery of stranded costs only for pre-Order No. 888 contracts, and only under certain circumstances.[37] By contrast, the recovery of early termination charges for new contracts must be consistent with the explicit terms of the contract.[38] In the concurrent order issued in Docket No. EL19-2-000, the Commission denies Tipmont's request to terminate the 1977 Contract early under Order No. 888, finding that the 1977 Contract is a new contract, not an existing contract, for purposes of

[33] *Id.* at 8.

[34] *Id.* at 9-12.

[35] Wabash Response at 4-6.

[36] *Id.* at 8.

[37] *See, e.g.*, 18 C.F.R. § 35.26 (c)(1) (v)-(vii), (c)(2) (2019) (explaining the circumstances and evidentiary demonstration necessary for the recovery of wholesale stranded costs associated with existing wholesale requirements contracts).

[38] 18 C.F.R. § 35.26(c)(1)(ii) ("No public utility or transmitting utility may seek recovery of stranded costs associated with a new wholesale requirements contract if such contract does not contain an exit fee or other explicit stranded cost provision.").

Order No. 888.[39] We find that, to the extent Tipmont's arguments rely on provisions in the Commission's regulations that only apply to stranded cost recovery for existing contracts, those arguments are misplaced.

23. Further, in *Town of Norwood*, the court found that Order No. 888 did not preclude the use of an early termination fee as a means of enforcing a customer's existing contractual obligation through the contract term.[40] We find that Wabash is similarly not precluded by Order No. 888 from proposing to recover costs associated with Tipmont's early termination of service for its contractual obligations through 2050.

2. Buyout Period and Amount

a. Tipmont Protest

24. Tipmont argues that the Commission should summarily rule that it is unduly discriminatory for Wabash to require that Tipmont continue to take service for 10 years when, according to Tipmont, Wabash's board policy provides that the other members that executed the Consolidated Contracts are subject to a requirement to take service for only three years in addition to a buyout payment.[41] Tipmont avers that it is similarly situated to those other members because Tipmont takes the same service and imposes the same costs to serve per unit of demand and energy. Tipmont maintains that it imposes the same planning obligations on Wabash as other customers. Tipmont argues that Wabash has determined three years is the necessary notice period for its planning purposes, and that Commission precedent entitles Wabash to nothing longer.[42]

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[39] *Tipmont Rural Electric Member Coop. v. Wabash Valley Power Ass'n, Inc.*, 171 FERC ¶ 61,059, at P 35 (2020).

[40] *See, e.g.*, *Town of Norwood v. FERC*, 202 F.3d 392, 398-99 (1st Cir. 2000) ("[T]he restrictions in Order No. 888 are no more than conditions on stranded cost recovery *under that order* and do not preclude the Commission from allowing tariffs that permit somewhat similar recovery whenever a customer purports to disregard an existing contractual obligation").

[41] Protest at 17-18. On February 27, 2020, Wabash submitted revisions to consolidate, amend, and restate these contracts into a single contract (Consolidated Contracts). Wabash, Filing, Docket No. ER20-1101-000 (filed Feb. 27, 2020).

[42] Protest at 17-20 (citing *Kentucky Utils. Co.*, Opinion No. 169, 23 FERC ¶ 61,317, at 61,668, *order on reh'g*, Opinion No. 169-A, 25 FERC ¶ 61,205 (1983), *vacated and remanded sub nom. Kentucky Utils. Co. v. FERC*, 766 F.2d 239 (6th. Cir. 1985) (*Kentucky*)).

25. Regarding the buyout amount, Tipmont alleges numerous substantive errors in Wabash's calculations that produce excessive costs.[43] Tipmont asserts that the Commission's stranded cost formula may overstate Wabash's actual losses as a result of Tipmont's termination of service, noting for example that Wabash has several power purchase agreements that will expire prior to 2028.[44] Tipmont further contends that the buyout rate is more than 2.5 times greater than MISO's estimated cost of building a new gas combustion turbine in the amount of Tipmont's peak load.[45] Tipmont contends that Wabash used a discount rate that does not represent the actual cost of financing the assets that give rise to stranded costs.[46] In addition, Tipmont maintains that Wabash improperly included fixed and variable costs, such as transmission costs, that are unsupported and unrelated to power supply.[47] Tipmont avers that Wabash's energy and capacity price forecasts are based on unrealistic assumptions.[48]

26. Tipmont maintains it should be credited an amount of $16.6 million to reflect its patronage capital, thus reducing Tipmont's obligation to $23.5 million.

b. Wabash Answer

27. Wabash argues that the proposed 10-year buyout period is not unduly discriminatory because Tipmont has the same right to a 10-year buyout under the 1977 Contract and a three-year buyout under the 2006 Contract as Wabash's other members. Wabash further argues that the 10-year buyout period is reasonable because Wabash's lenders required a 10-year term when Wabash exited bankruptcy. Wabash maintains that Tipmont did not sign one of the Consolidated Contracts and thus is not similarly situated to the members who did.[49]

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[43] Protest at 8-11, 29-36.

[44] *Id.* at 31.

[45] *Id.* at 32.

[46] *Id.* at 33.

[47] *Id.* at 33-34.

[48] *Id.* at 34-36.

[49] Wabash Answer at 28 & n.63.

28. Regarding the buyout amount, Wabash contends that the immediate return of Tipmont's patronage capital would be unduly discriminatory and would unreasonably deny remaining members' access to this working capital. Wabash states that since 2015, the three former Wabash members have each received their proportionate share of patronage capital in accordance with Wabash's bylaws.[50] In addition, Wabash maintains that it correctly used its current rather than average cost of debt as the discount rate for calculating the buyout amount.[51] Wabash also disagrees with Tipmont's assertion that it has 580 MW of purchased power capacity expiring in 2028, as well as Tipmont's suggestion that all benefits of expiring purchased power agreements of plant retirements should be credited against Tipmont's buyout obligation.[52] Finally, Wabash maintains that its energy, natural gas, and capacity price forecasts are reasonable and consistent with current market conditions.[53]

c. Commission Determination

29. As an initial matter, we deny Tipmont's request for summary disposition. We disagree with Tipmont that the three-year term that Tipmont alleges is set forth in the pending Consolidated Contracts should apply to the Agreement governing termination of Tipmont's membership in Wabash and the Contracts. Tipmont did not execute a Consolidated Contract and thus is not similarly situated to the parties and entitled to the benefit of that bargain.[54]

30. Though Tipmont argues that Commission precedent only entitles Wabash to require three years' notice for planning purposes, we disagree, and find that the *Kentucky* proceedings cited by Tipmont are not applicable. The *Kentucky* proceedings address the notice period to terminate service at the end of the term of an evergreen contract, not

[50] Wabash Answer at 35-36.

[51] *Id.* at 36.

[52] *Id.* at 37-38.

[53] *Id.* at 38-46.

[54] *TranSource, LLC v. PJM Interconnection, L.L.C.*, 152 FERC ¶ 61,229 (2015), *order on initial decision*, Opinion No. 566, 168 FERC ¶ 61,119, at P 240 (2019) ("[A] finding of undue discrimination requires a showing that (1) two classes of customers are treated differently; and (2) the two classes of customers are similarly situated. The courts have consistently upheld this longstanding approach to undue discrimination.").

early termination of an existing contract.[55] Moreover, in *Kentucky*, the Commission emphasized that an essential purpose of a cancellation notice was to assist the utility to plan and program its future generating and distribution capability.[56] Here, Tipmont had contracted for service through 2050, and Wabash had an expectation of providing service through 2050. Nonetheless, we recognize that it may be appropriate to provide for a shorter notice period, and therefore a shorter Agreement, for example, to the extent that Tipmont's buyout amount compensates Wabash for the corresponding increase in Wabash's costs.

31. Our preliminary analysis indicates that Wabash's filing has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. We find that Wabash's filing raises issues of material fact that cannot be resolved based on the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Specifically, we find that Wabash has not demonstrated that the buyout period, in combination with the buyout amount, is just and reasonable. After determining the just and reasonable buyout amount for the entire remaining terms of the 1977 Contract and the 2006 Contract (Full Buyout Amount), the hearing next should consider the just and reasonable term of the Agreement, and the appropriate corresponding adjustment to the Full Buyout Amount to account for the payments made by Tipmont during the term of the Agreement. Accordingly, we accept and suspend for a nominal period the proposed Agreement, to become effective April 20, 2020, subject to refund, and set the buyout period and amount for hearing and settlement judge procedures.

32. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures commence. 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.[57] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge

[55] *Kentucky*, 23 FERC ¶ 61,317 at 61,667 ("The contracts also provide that, after the initial term [of three or five years] has run, service will be continued 'from year to year thereafter until cancelled by three years notice by either party.'").

[56] *See id.* at 61,668.

[57] 18 C.F.R. § 385.603 (2019).

based on workload requirements which determine judges' availability.[58] The settlement judge shall report to the Chief Judge and the Commission within thirty (30) days of the date of the appointment of the settlement judge, 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.

The Commission orders:

(A) Wabash's filing is hereby accepted for filing and suspended for a nominal period, to become effective April 20, 2020, subject to refund, as discussed in the body of this order.

(B) Tipmont's motions for partial summary disposition are hereby denied, as 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 the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the proposed Agreement, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering 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, 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 a 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.

(E) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a 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

[58] 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 (5) days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (http://www.ferc.gov/legal/adr/avail-judge.asp).

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 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 Commission, 888 First Street, NE, Washington, DC 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.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.