

171 FERC ¶ 61,073
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. ER20-1101-000

ORDER REJECTING WHOLESALE POWER SUPPLY CONTRACTS WITHOUT
PREJUDICE

(Issued April 27, 2020)

1. On February 27, 2020, Wabash Valley Power Association, Inc. (Wabash) submitted for filing, pursuant to Federal Power Act (FPA) section 205¹ and section 35.13(a)(2) of the Commission's regulations,² 20 new wholesale power supply contracts (2020 Contracts) with 20 of its distribution cooperative members (Executing Members),³ to be included in Section 3 of its FERC Electric Tariff Volume No. 1 (Formulary Rate Tariff). Wabash also submitted notices of cancellation for its existing Wholesale Power Supply Contracts between Wabash and the Executing Members (Existing Contracts). In this order, we reject the filing, without prejudice, as discussed below.

¹ 16 U.S.C. § 824d (2018).

² 18 C.F.R. § 35.13(a)(2) (2019).

³ The Executing Members are: Boone County Rural Electric Membership Corporation; Carroll White Rural Electric Membership Corporation; Hancock Rural Telephone Corporation; Corn Belt Energy Corporation; EnerStar Power Corp.; Fulton County Rural Electric Membership 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 Rural Electric Membership Corporation; LaGrange County Rural Electric Membership Corporation; M.J.M. Electric Cooperative, Inc.; Marshall County Rural Electric Membership Corporation; Miami-Cass Rural Electric Membership Corporation; Newton County Rural Electric Membership Corporation; Noble County Rural Electric Membership Corporation; Steuben County Rural Electric Membership Corporation; and Warren County Rural Electric Membership Corporation.

I. Background

2. Wabash, a member-owned, non-profit generation and transmission cooperative that became subject to Commission regulation in 2004,⁴ supplies wholesale electric power to each of its existing members pursuant to two Existing Contracts: (1) one that was executed in 1977 that expires on April 14, 2028 (Vintage Contract); and (2) one that was executed in 2006 that commences on the expiration of the Vintage Contract and expires on December 31, 2050 (2006 Contract).⁵

3. On March 7, 2019, Wabash filed with the Commission in Docket No. ER19-1213-000 21 replacement wholesale supply contracts between Wabash and all but two of its members (2019 Contracts) and notices of cancellation of the Existing Contracts.⁶ Tipmont Rural Electric Membership Cooperative (Tipmont), a member that did not execute a 2019 Contract,⁷ protested the filing. The Commission rejected the 2019 Contracts without prejudice to Wabash refiling the contracts to include Wabash's unfiled Distributed Generation Policy, correct conflicting meter reading

⁴ *Wabash Valley Power Ass'n, Inc.*, 107 FERC ¶ 61,237 (2004).

⁵ Wabash Feb. 27, 2020 Filing at 8 (Filing).

⁶ *Id.* at 9.

⁷ On October 1, 2018, Tipmont filed a complaint against Wabash in Docket No. EL19-2-000 to terminate service under the Existing Agreements, or if Wabash sought to require Tipmont to remain as customer, for the Commission to initiate an FPA section 206 investigation into the justness and reasonableness of certain rates, terms, and conditions of the Existing Contracts. On September 19, 2019, the Commission issued an order holding this proceeding in abeyance to provide Wabash with the opportunity to prepare an FPA section 205 filing proposing rates, terms, and conditions to govern early termination of Tipmont's contracts. The Commission issued a subsequent order in that proceeding on April 20, 2020 lifting the abeyance and granting in part, denying in part, and dismissing in part as moot the complaint. *Tipmont Rural Electric Member Coop. v. Wabash Valley Power Ass'n, Inc.*, 171 FERC ¶ 61,059 (2020) (April 2020 Complaint Order). Additionally, on February 20, 2020, Wabash filed an unexecuted termination agreement between itself and Tipmont in Docket No. ER20-1041-000, which the Commission accepted, suspended for a nominal period, effective April 20, 2020, subject to refund and established hearing and settlement procedures in an order concurrently issued with the April 2020 Complaint Order. *Wabash Valley Power Ass'n, Inc.*, 171 FERC ¶ 61,053 (2020).

information, and include adjustment loss factors.⁸ The Commission stated that the Distributed Generation Policy, which provides for the amount of distributed generation that each member is permitted to own or purchase directly from sources other than Wabash, affected the amount of power the members must purchase from Wabash and must be part of the contract pursuant to the Commission's rule of reason governing the terms affecting rates and services that must be filed.⁹

II. Filing

4. Wabash states that the 2020 Contracts modify the 2019 Contracts primarily to address the concerns raised in the September 2019 Order.¹⁰ Specifically, the 2020 Contracts: (1) amend the contracts to incorporate the Distributed Generation Policy as Exhibit A; (2) state that metering will be on the low-side of each delivery point transformer rather than the high-side; (3) state that, if metering is on the high-side, the metering will be adjusted to compensate for any such transformation or distance losses; (4) add an Exhibit B to each contract listing any adjustment factors and amending the contracts to state that Wabash shall file any new or changed adjustment factors prior to implementing such adjustment factors; and (5) provide that Wabash shall test and calibrate meters at intervals of 24 (rather than 12) months.¹¹ Wabash also submits notices of cancellation for the Existing Contracts of the Executing Members.¹²

III. Notice and Responsive Pleadings

5. Notice of the 2020 Contracts was published in the *Federal Register*, 85 Fed. Reg. 12,783 (Mar. 4, 2020), with interventions and protests due on or before March 19, 2020. Tipmont filed a timely motion to intervene and protest (Protest). On April 2, 2020, Wabash filed an answer to Tipmont's protest (Answer).

⁸ *Wabash Valley Power Ass'n, Inc.*, 168 FERC ¶ 61,189, at PP 35-38 (2019) (September 2019 Order).

⁹ *Id.* P 36.

¹⁰ Filing at 9.

¹¹ *Id.* at 9-10.

¹² Two members, Tipmont and Citizens Electric Corporation, decided to not sign either the 2019 or 2020 Contract. Filing at n.7. Additionally, Parke County Rural Electric Membership Corporation (REMC) did not execute a 2020 Contract before Wabash's filing in this docket, but on April 6, 2020, Wabash filed an executed 2020 Contract with Parke County REMC in Docket No. ER20-1502-000.

A. Protest

6. In its protest,¹³ Tipmont argues that, although it has provided Wabash with a notice of termination and terms for its departure from Wabash in Docket Nos. EL19-2-000 and ER20-1041-000, it is currently still a Wabash member and will remain one until its termination rights are resolved. For this reason, Tipmont states that it has an interest in this proceeding which, it argues, could impact its interest in entering into a 2020 Contract.¹⁴ It also argues that in the proceeding in Docket No. ER19-1213-000, where the Commission granted Tipmont's motion to intervene, the Commission chose only to resolve a single issue presented in that proceeding. Tipmont contends that the issues that the Commission chose not to address are presented again here.¹⁵ Consequently, Tipmont argues that it is "directly affected by the outcome of this proceeding."¹⁶

7. Generally, in its protest, Tipmont argues that the Commission should reject the 2020 Contracts because sections 5 (Rates), 11 (Compliance with Bylaws, Policies, and Procedures), 12 (Amendments and Waivers), 13 (Incorporation of Exhibits and Schedules), 14 (Confidentiality), and 22 (Standard for Regulatory Review) of the 2020 Contracts prohibit signing members from challenging the 2020 Contracts terms either now or in the future.¹⁷ Tipmont also argues that the FPA requires that a rate filing be complete and that, by failing to include matters that significantly affect rates, terms, and conditions that must be included in filed rates, the 2020 Contracts fall short of this requirement.¹⁸ It argues, for example, that Wabash has failed to file the rates, terms, and conditions for termination of service.¹⁹ In addition to the above arguments, Tipmont argues that multiple other terms and conditions of the 2020 Contracts are unjust, unreasonable, anticompetitive, and/or discriminatory.²⁰

¹³ Because the Commission does not reach the merits of Tipmont's protest, *see infra* P 16, we have not summarized the protest or Wabash's answer in detail here.

¹⁴ Protest at 6.

¹⁵ *Id.* at 6-7.

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 16-18, 23-26, 28.

¹⁸ *Id.* at 7-15.

¹⁹ *Id.* at 7.

²⁰ Specifically, Tipmont takes issue with provisions of sections 3 (Term),

B. Answer

8. Wabash, in response, contends that the Commission should not grant Tipmont's motion to intervene because it has not demonstrated an interest that may be directly affected by the outcome of this proceeding. In particular, Wabash asserts that Tipmont has not executed a 2020 Contract and has not shown how Commission acceptance of these contracts may directly affect Tipmont's interests.²¹ In response to Tipmont's assertion that it may wish to execute a 2020 Contract in the future, Wabash states that Tipmont previously declined such an opportunity. Wabash explains that, by not executing a 2020 Contract by February 28, 2019, Tipmont forfeited its unilateral ability to execute a new contract.²² In response to Tipmont's contention that it has an interest in this proceeding as a current Wabash member, Wabash states that Tipmont fails to demonstrate how this fact has any relevance to or effect on the Commission's consideration of the 2020 Contracts.²³

9. Wabash argues that Tipmont misreads the 2020 Contracts to argue that they violate the FPA by limiting the rights of the Executing Members to challenge Wabash's rates and charges.²⁴ Wabash also generally argues that the Commission should dismiss or deny Tipmont's motion to reject the 2020 Contracts, making various arguments that Tipmont's contentions are unsupported, speculative, frivolous, and outside the scope of this proceeding.²⁵

9 (Continuity of Service), 15 (Interpretation), 18 (Governing Law, Venue), 19 (Specific Performance), 20 (Attorney Fees), 21 (Safe Harbor), and omitted section 5 of the 2006 Contract. *Id.* at 18-32. Tipmont also protested provisions of section 2 (General) and the Distributed Generation Policy, claiming that section 2 embeds a waiver allowing Wabash to assume Executing Members' mandatory purchase obligations pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA). *Id.* at 20. We note that Wabash cannot assume Executing Members' mandatory PURPA purchase obligations without express Commission authorization.

²¹ Answer at 16-17.

²² *Id.* at 17-18.

²³ *Id.* at 19.

²⁴ *Id.* at 32-34.

²⁵ *Id.* at 23-34.

IV. Discussion

A. Procedural Matters

10. With regard to Wabash's objection to Tipmont's intervention in this proceeding, under the Commission's Rules of Practice and Procedure, a would-be intervenor must demonstrate that it has a right to participate conferred by statute, order, or rule; it has or represents an interest that may be directly affected by the outcome of the proceeding, including any interest as a consumer, customer, competitor, or security holder of a party; or that its participation is in the public interest.²⁶ Here, the primary interest identified by Tipmont as being affected by this proceeding is that this proceeding "could . . . impact Tipmont's interest in entering into a 2020 Replacement Contract."²⁷ As Wabash explains, Tipmont declined to enter into a 2020 Replacement Contract within the time for doing so and no longer has any unilateral right to enter into such a contract.²⁸ However, in Docket No. ER20-1041-000, the Commission recently set for hearing and settlement judge procedures the agreement setting forth the terms applicable to Tipmont's proposed termination of its existing wholesale supply contracts with Wabash.²⁹ To the extent that Tipmont elects, based on the results of that proceeding, not to terminate its existing wholesale supply contracts with Wabash, the results of this proceeding regarding the 2020 Replacement Contracts could affect Tipmont's ability to negotiate a new wholesale supply contract with Wabash. Accordingly, we grant Tipmont's motion to intervene.

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

²⁶ 18 C.F.R. § 385.214(b)(2) (2019).

²⁷ Protest at 6.

²⁸ Answer at 17-18.

²⁹ See *Wabash Valley Power Ass'n, Inc.*, 171 FERC ¶ 61,053.

B. Substantive Matters

1. Standard of Review

12. The *Mobile-Sierra* “public interest” presumption applies only to “the rate set out in a freely negotiated wholesale-energy contract.”³⁰ Here, section 22 of the 2020 Contracts states that if:

a modification or change to [the 2020 Contracts], *including the Tariffs*, is unilaterally proposed by a Party, a non-Party or FERC acting *sua sponte*, the Parties expressly agree that the standard of review for such changes shall be the ‘Public Interest’ application of the just and reasonable standard of review.³¹

A tariff establishes a generally applicable rate and does not represent a freely negotiated wholesale-energy contract. The provision in section 22 of each 2020 Contract purporting to apply a public interest standard of review to proposed revisions to Wabash tariffs therefore represents an unlawful attempt to apply the public interest presumption to proposed changes to Wabash’s tariffs, and we therefore reject the 2020 Contracts without prejudice.³²

³⁰ *Morgan Stanley Capital Group Inc. v. Publ. Util. Dist. No.1 of Snohomish Cnty.*, 554 U.S. 527, 530 (2008); *accord NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 558 U.S. 165, 167 (2010). The Commission also has discussed application of the *Mobile-Sierra* “public interest” presumption to an agreement. *E.g.*, *Sw. Power Pool, Inc.*, 144 FERC ¶ 61,059, at P 127 (2013), *order on reh’g and compliance*, 149 FERC ¶ 61,048, at P 94 (citations omitted); *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215, at P 177 (2013), *order on reh’g and compliance*, 147 FERC ¶ 61,127, at P 108 (2014) (citations omitted).

³¹ (emphasis added). Although section 22 of the 2020 Contracts states that it applies to “a modification or change to . . . the Tariffs,” Wabash has only filed the 2020 Contracts and notices of cancellation of the Existing Contracts for consideration in this proceeding and not its Formulary Rate Tariff, which is already on file, or other tariff documents.

³² Because we find that the 2020 Contracts should be rejected on the grounds that section 22 impermissibly attempts to apply the public interest presumption to a generally applicable tariff, we do not address the question of whether the *Mobile-Sierra* presumption would apply to the 2020 Contracts.

2. Other Issues

13. We reject Wabash's filing without prejudice for the reason discussed above, and thus we find Tipmont's protest to be moot. However, we identify below other issues that Wabash may wish to clarify should it decide to file revised versions of the 2020 Contracts.

a. Sections 11 and 13 – Incorporation of Policies by Reference

14. As drafted, sections 11 and 13 may be read to incorporate by reference of, or require Executing Members to be bound by, future policies, procedures, and documents that may significantly impact jurisdictional rates, terms, or conditions without first seeking Commission approval. Section 13 suggests that only outside documents that are specifically identified or referred to in the contract are incorporated by reference, while section 11 requires Executing Members to agree to comply with, and be bound by, Wabash's Articles of Incorporation, Bylaws, Tariffs, *policies and procedures* that are adopted, amended, or superseded from time to time by the Wabash Board.

15. This structure could be interpreted to allow the Wabash Board to approve or amend a policy that significantly affects rates, terms, or conditions, pursuant to these sections but not to file the policy with the Commission even though the policy change should be included in Wabash's Formulary Rate Tariff in accordance with the Commission's "rule of reason."³³ Both sections 11 and 13 are ambiguous as to whether the contracts intend to incorporate by reference, or require Executing Members to comply with, and be bound by, policies that significantly affect rates and service terms but are not on file with and approved by the Commission. Should Wabash decide to revise and refile the 2020 Contracts, we recommend that Wabash clarify or revise these sections to eliminate the possibility that they could be interpreted as requiring compliance with provisions that significantly affect rates or terms of jurisdictional service without being filed with the Commission.

³³ For example, Wabash originally did not file its Distributed Generation Policy D-11.1, until the Commission found in its September 2019 Order that, pursuant to the Commission's rule of reason, the Distributed Generation Policy needed to be included in future contracts. September 2019 Order, 168 FERC ¶ 61,189 at PP 35-36. The Commission stated that the Distributed Generation Policy affected the amount of power the Executing Members must purchase from Wabash and must be part of the contract pursuant to the Commission's rule of reason, which requires that practices that affect rates and service significantly, and that are not so generally understood as to render recitation superfluous, must be included in the contract. *Id.* P 36.

b. Section 3 – Term

16. In its transmittal letter, Wabash requests that the 2020 Contracts become effective on or before 60 days from the date of filing, i.e. on or before April 27, 2020.³⁴ However, the recitals to each 2020 Contract define “Effective Date” as July 1, 2019. Section 3 (Term) of the 2020 Contracts states that the contract will “be effective upon the Effective Date,” and will expire on December 31, 2060, provided that the contract will automatically renew and extend on the fifth anniversary of the Effective Date and each fifth year thereafter for an additional five year renewal period unless one party provides written notice by the autorenewal date indicating it does not wish to renew the contract.³⁵

17. According to section 3, the autorenewal provision is tied to the July 1, 2019 Effective Date as defined in the contract recitals, rather than the effective date of the contracts as requested by Wabash in its transmittal. By tying the autorenewal provision to the July 1, 2019 Effective Date, while also requesting a different effective date approximately 10 months after the July 1, 2019 Effective Date, Wabash may be introducing confusion into the autorenewal provisions of the 2020 Contracts. Adding to the confusion, section 3 also states by way of example that the initial “Fifth Anniversary date of the Effective Date,” or the first autorenewal date, is January 1, 2024, which is 4.5 years rather than five years from the July 1, 2019 “Effective Date.”

³⁴ Filing at 12.

³⁵ Section 3 (Term) of the 2020 Contracts states:

This Agreement shall be effective upon the *Effective Date*; and shall remain in effect until the hour ending 24:00 on December 31, 2060 (the “Initial Term”), provided, however that this Agreement *shall automatically renew and extend on the fifth anniversary of the Effective Date* and each fifth year thereafter (each a “Fifth Anniversary”) for an additional five year renewal period (each a “Renewal Term”) unless one Party provides written notice to the other Party prior to the such Fifth Anniversary of its intent not to renew and extend the Agreement. For avoidance of doubt and by way of an example, the Term of the Agreement will be automatically extended beyond the Initial Term expiration date of December 31, 2060 to December 31, 2065 unless one of the Parties gives the other Party written notice of its intent not to renew and extend the Agreement on or before *the Fifth Anniversary of the Effective Date (i.e. January 1, 2024)* . . .
(emphasis added).

18. Should Wabash decide to revise and refile the 2020 Contracts, we find that clarification on the effective date and the autorenewal date would be helpful to avoid confusion.

c. Section 2 – General

19. Wabash states that it amended section 2 of the 2019 Contracts to incorporate a reference to the Distributed Generation Policy as Exhibit A. However, the 2020 Contracts also changed an unrelated cross-reference that was in section 2 of the 2019 Contracts, but Wabash does not provide any rationale for the proposed revision. Specifically, the 2019 Contracts referred to “the Member’s Delivery Points as hereinafter identified and defined in Section 4 hereof,” but the 2020 Contracts change this phrase to “Member’s Delivery Points as hereinafter identified and defined in Section 3 hereof.” This may be a typographical error. Section 3 provides the terms and autorenewal provisions of the 2020 Contracts, while section 4 describes the characteristics of the power delivered to the Executing Member’s delivery points. Based on the context of the provisions, reference to “Section 4” appears to be correct. Therefore, if Wabash chooses to revise and refile the 2020 Contracts, it should address this point.

The Commission orders:

Wabash’s 2020 Contracts are hereby rejected without prejudice, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.