

168 FERC ¶ 61,161
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tipmont Rural Electric Member Cooperative

Docket No. EL19-2-000

v.

Wabash Valley Power Association, Inc.

ORDER HOLDING PROCEEDING IN ABEYANCE

(Issued September 19, 2019)

1. On October 1, 2018, pursuant to sections 206 and 306 of the Federal Power Act (FPA)¹ and Rule 206 of the Commission's Rules of Practice and Procedure,² Tipmont Rural Electric Member Cooperative (Tipmont) filed a complaint against Wabash Valley Power Association, Inc. (Wabash), requesting that the Commission find that Tipmont may terminate service as of January 1, 2020 under its all-requirements wholesale power supply contracts with Wabash, subject to Tipmont paying any demonstrated stranded costs that Wabash may incur as a result of such early termination. 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. As discussed below, this proceeding shall be held in abeyance.

I. Complaint

2. Tipmont states 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.³

¹ 16 U.S.C. §§ 824e, 825e (2012).

² 18 C.F.R. § 385.206 (2019).

³ Complaint at 8-9. Wabash states that it became subject to Commission regulation after paying off its Rural Utilities Service debt in 2004. Answer, Conrad Aff. ¶ 5.

3. Tipmont states that it purchases requirements service from Wabash under terms and conditions in two wholesale power supply contracts that are on file with the Commission (1977 Tipmont Contract and 2006 Tipmont Contract, and collectively, Contracts), as well as the related Wabash formula rate tariff. Tipmont explains that the 1977 Tipmont Contract governs requirements service until 2028 and that the 2006 Tipmont Contract extends that service through 2050.⁴

4. 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.⁵ 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 and referenced in the 2006 Tipmont 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 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.

5. In its complaint, Tipmont states that Wabash never filed the Buyout Policy with the Commission and because Wabash failed to file the Buyout Policy, the Buyout Policy is ineffective and legally unenforceable.⁶ Tipmont argues the Buyout Policy purports to set forth rates, terms and conditions associated with early termination of the Contracts and thus needed to be filed with the Commission under section 205 before it could be made effective. Tipmont further argues that, if filed, the Buyout Policy can only be enforced prospectively and to the extent it is found to be just and reasonable. Tipmont contends that, "due to [Wabash's] failure to file [the Buyout Policy], no existing terms and conditions for Tipmont's termination of service are in effect in accordance with the FPA."⁷

6. In addition to a finding that the Buyout Policy has no effect, Tipmont also seeks a finding that the issue of a reasonable stranded cost level, based on Tipmont's desired termination date, should be resolved pursuant to the policies reflected in Order No. 888

⁴ Complaint at 8-9.

⁵ *Id.* at 1-2.

⁶ *Id.* at 16.

⁷ *Id.* at 21.

and related precedent thereunder.⁸ Tipmont requests that the Commission initiate a proceeding to establish the just and reasonable level of stranded costs, if any, and that the Commission assign the proceeding to a settlement judge.⁹

7. Tipmont also challenges other board policies, formula rate tariff provisions, and actions by Wabash as unjust and unreasonable. 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.¹⁰

II. Notice of Filing and Responsive Pleadings

8. Notice of the complaint was published in the *Federal Register*, 83 Fed. Reg. 50,916 (2018), with interventions and protests due on or before October 22, 2018. On October 9, 2018, Wabash filed a motion requesting a 14-day extension of time to submit its answer and on October 16, 2018, the Commission's Secretary issued a notice extending the comment period to and including November 5, 2018.

9. On November 5, 2018, Wabash filed its answer to the complaint. On November 19, 2018, Tipmont filed a request for leave to respond and response to 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).

10. In its answer, Wabash argues that Article II of the Buyout Policy applies during the term of the 1977 Tipmont Contract, and therefore applies to Tipmont's proposed termination of the Contracts. Wabash contends that the Buyout Policy requires that the departing member remain an all-requirements customer of Wabash for 10 years after providing notice of termination and execute the form of supplemental agreement memorializing terms of early termination of the Contracts, and that an escrow agreement be established in the form attached to the supplemental agreement.¹¹ Wabash contends that the supplemental agreement establishes the procedures and the rights and obligations of the exiting member and Wabash under which the member withdraws from Wabash

⁸ *Id.* at 40.

⁹ *Id.* at 2.

¹⁰ *Id.* at 6-8, 33-39.

¹¹ Answer at 28.

and terminates its contract obligations. Moreover, Wabash states, the supplemental agreement is filed with the Commission pursuant to section 205 of the FPA.¹²

11. Wabash states that, “[i]f they [Wabash and Tipmont] cannot agree [to a buyout contract],” Wabash can “file the rate, terms and conditions of the buyout in an unexecuted contract pursuant to [FPA s]ection 205 for Commission review, at which time Tipmont can raise any and all relevant issues before the Commission.”¹³

12. Wabash also responds to Tipmont’s additional arguments concerning Wabash’s board policies, formula rate tariff provisions, and its actions involving transmission development activities.¹⁴ Wabash contends that Tipmont provided no evidence that these board policies, tariff provisions and actions are unjust and unreasonable. Therefore, Wabash argues that the Commission should dismiss these additional claims.

13. In its response, Tipmont says it “would not object to having the termination-related issues raised in this [c]omplaint decided in the context of [s]ection 205,” so long as Wabash’s offer is not merely a delaying tactic or an effort to evade Commission review.¹⁵ 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.”¹⁶ Therefore, Tipmont states, no reason exists for Wabash not to promptly make the unilateral section 205 filing of an unexecuted supplemental agreement that it has committed to make in its answer.¹⁷ Tipmont also reiterates its arguments regarding Wabash’s other board policies and actions, as well as its willingness to drop these issues if it is able to reach agreement on the termination of service from Wabash.¹⁸

¹² *Id.* at 28-29.

¹³ *Id.* at 7.

¹⁴ *Id.* at 46-50.

¹⁵ Tipmont Response at 16-17.

¹⁶ *Id.* at 17.

¹⁷ *Id.*

¹⁸ *Id.* at 20-23.

14. In its reply, Wabash reiterates that, if the parties cannot agree to a buyout contract, Wabash can file the rate, terms, and conditions of the buyout in an unexecuted contract pursuant to section 205.¹⁹ Furthermore, Wabash disputes Tipmont's additional arguments, contending that they are meritless and unsupported.²⁰

III. Determination

A. Procedural Matters

15. 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

16. This proceeding raises several issues related to Wabash's terms for the termination of Tipmont's service, its board policies, formula rate tariff provisions, and its actions involving transmission development activities. We note, however, that both parties have stated that issues related to the rates, terms, and conditions for the termination of Tipmont's service, including those surrounding the Buyout Policy, could be addressed in a section 205 filing made by Wabash,²¹ and that Tipmont has indicated its willingness to withdraw the other issues raised in its complaint if the parties are able to reach agreement on the termination of service issues.²² In light of these representations, we will hold the complaint in abeyance, pending further Commission action, to provide Wabash time to prepare an FPA section 205 filing proposing rates, terms, and conditions to govern the early termination of Tipmont's contracts, should Wabash decide to submit the section 205 filing contemplated in its pleadings. If Wabash does not submit such a section 205 filing within 90 days of the date of this order, we direct Wabash to submit a status report to the Commission no later than that date indicating whether—and, if so, when—Wabash intends to make such a filing.

¹⁹ Wabash Reply at 11.

²⁰ *Id.* at 13-15.

²¹ *See* Answer at 7; Tipmont Response at 16-17; Wabash Reply at 11.

²² *See* Complaint at 6, 33; Tipmont Response at 22.

The Commission orders:

(A) Tipmont's complaint is hereby held in abeyance, as discussed in the body of this order.

(B) Wabash is directed to submit a status report to the Commission within 90 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.