

142 FERC ¶ 61,125
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

J. William Foley Incorporated

v.

Docket No. EL12-106-000

United Illuminating Company

ORDER ON COMPLAINT

(Issued February 21, 2013)

1. On October 5, 2012, pursuant to sections 206 and 306 of the Federal Power Act (FPA) and Rule 206 of the Commission's Rules of Practice and Procedure,¹ J. William Foley Incorporated (Foley) filed a complaint challenging allegedly imprudent and "excess costs" incurred by United Illuminating Company (United Illuminating) related to an underground, six-mile portion (Project Segment) of the larger Middletown-Norwalk 345 kV Transmission Line Project (M-N Project).² Foley alleges that those costs are inappropriately included in United Illuminating's transmission rate base. For the reasons explained below, the Commission will dismiss the complaint without prejudice.

I. The Complaint

2. As set forth in the complaint, Foley is a corporation organized and existing under the laws of the State of Connecticut. Foley states that it is a retail electric consumer of United Illuminating in Connecticut and it also was the general contractor for the Project

¹ 16 U.S.C. §§ 824e, 825e (2006); 18 C.F.R. § 385.206 (2012).

² Foley uses the term "excess costs," but it does not define what it considers to be an excess cost that was allegedly, imprudently incurred in the construction of the Project Segment. Based on its use of the term "excess costs," we infer that Foley is not seeking to deny United Illuminating cost recovery for all of the costs related to the Project Segment, but only some portion of those costs that Foley considers to be in excess of prudently incurred costs.

Segment³ of the M-N Project.⁴ The Project Segment work performed by Foley and its subcontractors included digging a six-mile trench and installing in that trench a concrete-encased duct bank, which consisted of conduit (i.e., pipe) intended to house electric transmission cables and fiber optic cables.

3. Foley alleges that United Illuminating's rate base is overstated because it includes excessive and imprudently incurred costs associated with the Project Segment. In support of its claim, Foley asserts that United Illuminating did not act consistent with prudent utility practice, in a reasonably prudent manner, or consistent with proper business judgment in the development of the Project Segment. Foley alleges that United Illuminating did not disclose all known underground obstacles for the planned work for the Project Segment and, as a result, the work ended up costing tens of millions of dollars more than necessary.⁵ Foley also alleges that there were major issues from polychlorinated biphenyl (PCB) soil contamination along the Project Segment route. Foley states that the PCB soil contamination caused part of the Project Segment to be shut down for approximately one year, at great expense.⁶ Foley alleges that United Illuminating approached the underground obstacles and contaminated soil issues in a manner designed to understate the cost of the Project Segment (and the resulting bids and contract award), and that this ultimately caused substantial and unnecessary cost overruns to complete the Project Segment.⁷ Furthermore, Foley argues that, having made the business decision to pay the contractors for obstacles encountered (rather than invite a large upfront bid), United Illuminating later denied paying the contractors compensation, through Change Order requests, for the additional costs incurred by the contractors as a result of the additional underground obstacles.⁸

³ The Project Segment represents United Illuminating's portion of the M-N Project and involved work on the 345 kV Cable System for Singer-Housatonic West Bank, extending from Bridgeport to Stratford, Connecticut.

⁴ The M-N Project is a 69 mile 345 kV overhead and underground transmission line designed to improve reliability and to meet the growing electricity needs of southwestern Connecticut. *See United Illuminating Co.*, 119 FERC ¶ 61,182 (2007), *order on reh'g*, 126 FERC ¶ 61,043 (2009).

⁵ Foley October 5, 2012 Complaint at P 10.

⁶ *Id.* P 12.

⁷ *Id.* P 13.

⁸ *Id.* P 18. *See infra* note 18.

4. More specifically, Foley alleges that United Illuminating: (1) did not properly staff the Project Segment; (2) did not issue accurate plans and specifications based on thorough diligence and all of the information available at the time they were created; (3) failed to disclose that it had not properly tried to identify the obstacles and utilities in the ground; and (4) failed to perform proper diligence and disclose both the characteristics of the contaminated soil and the amount of contaminated soil that would be encountered.

5. Foley alleges that, during the pre-construction phase, United Illuminating's reluctance to fully explore the extent of underground obstacles and contaminated soil issues was due to its concern that, had the Connecticut Siting Council (CSC) known of the obstacles and needed remediation, the CSC may have required an alternative plan and route for the Project Segment using overhead transmission lines, rather than the underground 345 kV line.

6. Foley states that when the M-N Project was completed in December 2008, the transmission assets were placed in service and United Illuminating's transmission rate base increased by \$300 million,⁹ approximately \$20 million of which Foley attributes to allegedly imprudent and unreasonable excess costs incurred by United Illuminating for the Project Segment,¹⁰ including: legal settlements United Illuminating entered into with two of Foley's subcontractors (Manafort and Rizzo) in the amounts of \$9.875 million and \$200,000, respectively;¹¹ claims pending against United Illuminating (excluding the settled claims with the subcontractors) totaling \$7.917 million;¹² and \$12.9 million United Illuminating incurred in costs related to the PCB soil contamination issues.¹³

7. Foley requests that the Commission investigate the alleged excess costs through a paper hearing, establish the earliest possible refund effective date, and direct the issuance of refunds reflecting the removal of imprudent, excess costs from United Illuminating's rate base.

⁹ Foley October 5, 2012 Complaint at P 64.

¹⁰ *Id.* P 71. Foley states that this estimate would be refined through a paper hearing process.

¹¹ *Id.* PP 50, 66-67.

¹² *Id.* P 50.

¹³ *Id.* P 63.

II. United Illuminating's Motion to Dismiss or Hold Proceeding in Abeyance and Answer

8. On November 5, 2012, United Illuminating submitted a motion to dismiss, or, in the alternative, hold the proceeding in abeyance, and answer to the complaint (November 5, 2012 Answer). As an initial matter, United Illuminating asserts that the complaint fails to meet the procedural requirements of Rule 206.¹⁴ In particular, United Illuminating asserts that the complaint reflects only broad claims of wrongdoing without any evidentiary basis, fails to identify the allegedly imprudent actions of United Illuminating with reasonable specificity, and fails to quantify the additional costs that Foley has incurred as a result of United Illuminating's inclusion of the allegedly imprudent costs in rate base.¹⁵

9. United Illuminating further asserts the complaint is premature, because the costs at issue are the subject of pending litigation in Connecticut Superior Court. United Illuminating argues that those amounts have not yet been, and may never be, included in United Illuminating's rate base. United Illuminating also states that, in the pending litigation, it is seeking indemnification from Foley for settlement amounts United Illuminating paid to Foley's subcontractors and, if successful, these costs will not be included in United Illuminating's rate base. United Illuminating posits that if it prevails in state court, there will be no impact on Foley as a retail ratepayer. Thus, United Illuminating asserts that the complaint is not yet ripe for Commission consideration.¹⁶

10. Moreover, United Illuminating argues that Foley improperly raises breach of contract claims in a section 206 complaint, regarding a civil construction contract that is neither on file with the Commission nor within its jurisdiction. United Illuminating further states that, even if the relevant contract is within the Commission's primary

¹⁴ November 5, 2012 Answer at 8-10.

¹⁵ United Illuminating states that instead Foley refers to: (1) its suit in Connecticut Superior Court against United Illuminating; and (2) the settlements amounts with the two subcontractors for which United Illuminating has filed a suit for indemnification from Foley in Connecticut Superior Court.

¹⁶ November 5, 2012 Answer at 11 n.24 (citing *Niagara Mohawk Power Corp.*, 114 FERC ¶ 61,098, at P 22 (2006); 18 C.F.R. §385.206(b)(1) (2012); *Flormex Energy Corp.*, 21 FERC ¶ 61,319 (1982) (rejecting application as unripe where it "lack[ed] sufficient data" to permit a determination on consistency with the public interest and "fail[ed] to supply the required exhibits under the Commission's Regulations"). *Id.* (also citing *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 139 FERC ¶ 61,102 (2012); *PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,195 (2011); *Exelon Generation Co., LLC*, 131 FERC ¶ 61,166 (2010) (all declining to entertain arguments that were not yet ripe)).

jurisdiction, this case fails the *Arkla* test,¹⁷ and, therefore, the Commission should defer to the state court.

11. If the Commission does not dismiss the complaint, United Illuminating requests that the Commission hold this proceeding in abeyance pending resolution of the pending state court litigation, or, as a last alternative, require Foley to amend the complaint to comply with the requirements of Rule 206 and afford United Illuminating the opportunity to file another answer.

12. As to substantive matters, United Illuminating asserts that Foley has failed to demonstrate that there is anything unreasonable about United Illuminating's decision, at the relevant time, to address the actual costs of underground obstacles through Change Order requests,¹⁸ rather than requiring contractors to estimate those costs and include them in a bid for a fixed price contract. Relying on *New England Power*,¹⁹ United Illuminating states that this business decision was within its discretion and the bounds of prudence.

III. Notice of Filing and Responsive Pleadings

13. Notice of Foley's complaint was published in the *Federal Register*, 77 Fed. Reg. 63,308 (2012), with interventions and comments due on or before November 5, 2012. As noted above, United Illuminating timely answered, and Exelon Corporation (Exelon) filed a timely motion to intervene.

14. On November 8, 2012, Foley filed a motion for an extension of time to respond to the November 5, 2012 Answer, and it also requested a shortened comment period for a

¹⁷ November 5, 2012 Answer at 13-14 (citing *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*) (whether the Commission will decide, in its sole discretion, to assert primary jurisdiction over contractual issues otherwise litigable in state courts depends on three factors: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission)).

¹⁸ Section 6.4(a) of the contract between Foley and United Illuminating provides that "[Foley] shall be entitled to a Change Order in the event that [Foley] encounters unknown or misidentified site conditions whose presence will cause a change in [Foley's] scope of Work or a delay in the Critical Path." November 5, 2012 Answer at 5-6.

¹⁹ *New England Power Co.*, 31 FERC ¶ 61,047, at 61,084 (1985) (*New England Power*).

response to its motion for extension of time.²⁰ On November 22, 2012, Foley submitted an answer (hereafter referred to as the November 22, 2012 Answer)²¹ to United Illuminating's November 5, 2012 Answer.

15. On December 4, 2012, Foley filed a pleading entitled "Second Amended Complaint." On December 19, 2012, United Illuminating filed another answer. Foley responded with a January 3, 2013 pleading,²² as amended on January 4, 7 and 11, 2013. On January 18, 2013, United Illuminating filed a supplemental answer to the "Second Amended Complaint" and Foley filed a response on February 3, 2013.

IV. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motion to intervene filed by Exelon serves to make it a party to this proceeding. Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2012), we accept, as timely-filed, the United Illuminating November 5, 2012 Answer.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2012), prohibits an answer to an answer, unless otherwise permitted by the decisional authority. We are not persuaded to accept any of the answers to answers and will, therefore, reject them.²³

²⁰ The comment period on the motion was shortened to and including November 16, 2012. *Notice Shortening Comment Period*, Docket No. EL12-106-000 (November 13, 2012).

²¹ On November 23, 2012 and December 5, 2012, Foley submitted amendments to the November 22, 2012 Answer.

²² Foley titled its January 3, 2013 pleading as "Complainant's Opposition to Respondent's Motion to Dismiss."

²³ Regardless of how they are titled, Foley's and United Illuminating's additional pleadings constitute impermissible answers to answers. We evaluate a pleading based on its substance, rather than its style or form. *See, e.g., Stowers Oil & Gas Co., et al. v. Natural Gas Co., Div. of Internorth, Inc.*, 27 FERC ¶ 61,001, at 61,002 n.3 (1984) ("Nor does the style in which a petitioner frames a document necessarily dictate how the Commission must treat it.").

18. Although Foley titled its December 4, 2012 pleading as a “Second Amended Complaint,” we find that, in substance, it is another answer to United Illuminating’s November 5, 2012 Answer. In the December 4, 2012 pleading, Foley submits the affidavit of Foley’s President, who swears to the same allegations already included in the October 5, 2012 complaint, and Foley provides footnotes citing the document sources for information in that complaint, including exhibits in the state court proceeding. Therefore, the December 4, 2012 pleading includes information that Foley could have submitted in its original complaint, but it did not. Instead, Foley now submits the information in response to United Illuminating’s assertions, in the November 5, 2012 Answer, that the complaint is deficient under Rule 206. Accordingly, we reject Foley’s December 4, 2012 pleading, because it is, in substance, another impermissible answer to an answer. Because we reject Foley’s December 4, 2012 pleading, we also reject Foley’s and United Illuminating’s subsequent pleadings as impermissible answers.²⁴

B. Substantive Matters

19. We will dismiss the complaint without prejudice. As an initial matter, the complaint raises only broad and unsubstantiated allegations of imprudently incurred costs,²⁵ which fail to make a *prima facie* showing warranting further proceedings before this Commission.²⁶ While Foley generally alleges that United Illuminating failed to abide by reasonable and prudent business practices, it presents no specific evidence that supports, or raises a genuine issue of material fact regarding, those claims. Instead, Foley’s only substantive evidence in the complaint concerns issues being litigated in the state court proceeding, and it fails to submit evidence to explain how those costs allegedly resulted in excessive costs that are currently being included in United Illuminating’s rate base. Also, Foley fails to provide any evidence bearing upon the prudence (or imprudence) of any specific costs incurred by United Illuminating, such as whether they were “costs which a reasonable utility management (or that of another jurisdictional entity) would have made, in good faith, under the same circumstances, and at the relevant point in time.”²⁷ Although Foley generally claims that if United

²⁴ We note that if we had accepted the “Second Amended Complaint” and additional answers, it would not have changed our determination here.

²⁵ “The Commission has long recognized that a ... complainant has a burden to do more than make mere unsubstantiated allegations to warrant a hearing.” *Interstate Power & Light Co.*, 127 FERC ¶ 61,043, at P 44 n.49 (2009).

²⁶ *See* 18 C.F.R. § 385.206(a)(2) (2012) (Rule 206(a)(2) requires a complainant to “[e]xplain how the action or inaction violates applicable statutory standards and regulatory requirements.”).

²⁷ *New England Power Co.*, 31 FERC at 61,084.

Illuminating had made different decisions, the costs to construct the Project Segment would have been less, Foley must do more than, in hindsight, second-guess utility management decisions based on the resulting costs.²⁸

20. Moreover, the complaint neither specifically quantifies nor evidences imprudent costs related to the construction of the Project Segment.²⁹ Foley approximates that removal of imprudent costs would reduce United Illuminating's rate base by at least \$20 million.³⁰ However, it does not explain or support how it estimated this total figure, provide any direct evidence of the components that make up this total figure, or provide any estimate of the financial impact on it, as a retail customer of United Illuminating. Foley states in various sections of the complaint that United Illuminating incurred an additional \$10 million in environmental costs and another \$2.9 million from its Remedial Action Plan to address the PCB soil contamination issues.³¹ However, Foley does not indicate whether these amounts are included in its total estimate of imprudent costs or provide evidence in support of those amounts.

21. While, as noted above, the complaint here fails to specify and support exactly which alleged imprudently incurred costs United Illuminating purportedly included in its rate base, such costs, if any, may be better determined following resolution of the pending litigation in state court. At that time, Foley may choose to file a new section 206 complaint, if it believes United Illuminating's transmission rate base includes costs that were imprudently incurred.

22. For the above reasons, we dismiss the complaint without prejudice.

²⁸ *Id.*

²⁹ 18 C.F.R. § 385.206(a)(4) (2012) (Rule 206(a)(4) requires a complainant to "[m]ake a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction.").

³⁰ Foley October 5, 2012 Complaint at P 71. As noted above, Foley identifies approximately \$30.892 million in costs for legal settlements, claims pending against United Illuminating, and costs related to the PCB soil contamination issues but does not explain how these costs relate to its claim that removal of imprudent costs would reduce United Illuminating's rate base by at least \$20 million. *See supra* P 6.

³¹ *Id.* P 63.

The Commission orders:

The complaint is hereby dismissed without prejudice, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.