

124 FERC ¶ 61,278
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Toledo Edison Company

Docket Nos. ER08-1020-001
EL08-65-001

ORDER GRANTING REQUEST FOR REHEARING AND CLARIFICATION

(Issued September 22, 2008)

1. This order grants Toledo Edison Company's (Toledo) request for rehearing and clarification. Specifically, the order affirms Toledo's right to file new rates for capacity and energy to American Municipal Power-Ohio, Inc. (AMP-Ohio) under an Interconnection and Service Agreement (Agreement), to become effective on January 1, 2009. In addition, the order grants Toledo's rehearing request to exclude the rate methodology issues from consideration in a pending hearing, but states that the Commission will consider these issues in Toledo's future rate application proceeding.

Background

2. On August 18, 2008, the Commission addressed Toledo's notice of cancellation of the Agreement between it and AMP-Ohio. We found that Toledo's notice of cancellation raised issues of material fact that could not be resolved based on the record before us, and that were more appropriately addressed in an expedited trial-type evidentiary hearing that we ordered. We also accepted for filing and suspended for five months, to become effective on June 1, 2009, the notice of cancellation of the Agreement.¹

3. In the August 18 Order, the Commission also addressed Toledo's petition for declaratory order. Toledo asked that the Commission affirm Toledo's right to file to increase rates for capacity and energy under the Agreement, as of January 1, 2009, if Toledo did not have a right to terminate the Agreement. Toledo argued that Section 8.01 of the Agreement provides that Toledo can unilaterally apply to the Commission for a

¹ *Toledo Edison Company*, 124 FERC ¶ 61,168, at P 30-31 (2008) (August 18 Order).

change of rates under section 205 of the Federal Power Act (FPA).² Toledo also asserted that Section 2.04 of Schedule A and B explicitly permit Toledo to file to adjust the rates for supply of capacity and energy under those schedules unilaterally for service beginning on January 1, 2009,³ and added that neither schedules contain rates for service beyond the end of 2008.

4. In its answer to the petition for declaratory order, AMP-Ohio agreed with Toledo that the rates at issue may be changed effective January 1, 2009, under section 205 of the FPA. However, AMP-Ohio also raised arguments about what would be a just and reasonable rate change. It claimed that Toledo apparently planned to purchase power and energy from other affiliates at market-based rates and pass through that cost to AMP-Ohio under a cost-of-service formula rate that would enable Toledo to recover the costs incurred by Toledo on a dollar-for-dollar basis. AMP-Ohio argued that is inconsistent with Section 3 of a Merger Settlement Agreement⁴ and Section 9.10 of the Agreement. Therefore, AMP-Ohio asked that the Commission find that Toledo may file new rates for service under Schedules A and J, to become effective January 1, 2009, but require cost-based and not market-based rates.⁵

5. Toledo responded that AMP-Ohio's rate methodology arguments expanded the scope of issues that must be decided in the proceeding. Toledo asserted that it had not finalized plans to procure electricity needed to meet any ongoing obligation it might have to AMP-Ohio, but expected that it would obtain capacity and energy through a competitive solicitation process. Toledo also claimed that AMP-Ohio erroneously

² Section 8.01 states in relevant part as follows: "Except as specified in Schedules, nothing contained herein shall be construed as affecting in any way the right of Toledo to unilaterally make application to the FERC or such other regulatory agency having jurisdiction for a change in rates under Section 205 of the Federal Power Act. . . ."

³ Section 2.04 states that "Nothing contained herein shall be construed as affecting in any way the right of Toledo to unilaterally make application to the FERC for a change in rates under Section 205 of the Federal Power Act and pursuant to the FERC's Rules and Regulations promulgated thereunder, such increase to become effective beginning January 1, 2009 or thereafter."

⁴ The Merger Settlement Agreement resolved issues raised by AMP-Ohio regarding the formation of First Energy Corp., which acquired the combined electric utility operations of Cleveland Illuminating Company, Toledo, and Ohio Edison Company. August 18 Order at P 4.

⁵ August 18 Order at P 23-24.

assumed that the generation-owning affiliates of Toledo had sole responsibility for supplying capacity and energy to AMP-Ohio under the Agreement after December 31, 2008. Toledo added that it expected to meet its power supply obligations by entering into new agreements, and there was no legal basis for transferring its power supply obligations to its affiliates. In addition, Toledo argued that there are no contractual provisions that require it to propose true cost-based rates, or prevent it from filing rates that are otherwise just and reasonable under section 205 of the FPA, even if they do not conform to the standards proposed by AMP-Ohio.⁶

6. In the August 18 Order, with respect to the request for a declaratory order, we found that the agreements appear to be subject to different interpretations regarding the rate methodology that may be applied after December 31, 2008, and therefore are ambiguous. Thus, in order to provide a more complete record to address this issue in case the Commission ultimately found that the contracts did not allow Toledo to cancel the Agreement, we set this matter for expedited hearing procedures in the hearing ordered in Docket No. ER08-1020-000.⁷ We did not make a finding regarding whether Toledo has a right to file a rate increase.

Toledo's Request For Rehearing Or Clarification

7. Toledo filed a timely request for expedited rehearing or clarification of the August 18 Order. Toledo asks that the Commission: (1) affirm Toledo's right to file new rates; and (2) exclude the rate methodology issue from consideration during the hearing prescribed in the August 18 Order, without prejudice to future consideration of these issues once Toledo submits an application under section 205 of the FPA to establish rates beginning on January 1, 2009. Alternatively, Toledo asks that the Commission clarify that the August 18 Order will not affect Toledo's upcoming filing to establish rates. Toledo also asks that the Commission act on an expedited basis, since the evidentiary hearing in these proceedings is scheduled to commence on October 20, 2008.

8. Specifically, Toledo argues that in its petition for declaratory order it only asked that the Commission affirm that Toledo may unilaterally apply under section 205 of the FPA to increase rates for sales to AMP-Ohio to become effective on January 1, 2009. Toledo asserts that Section 8.01 of the Agreement and Section 2.04 of Schedule A of the Agreement explicitly state that Toledo may adjust its rates for capacity and energy sold to AMP-Ohio beginning on January 1, 2009. Toledo adds that nothing in Schedule J of the Agreement bars Toledo from adjusting rates for capacity and energy supplied under that

⁶ *Id.* at P 25-27.

⁷ *Id.* at P 36-37.

schedule, and that there is nothing in the Merger Settlement Agreement that might be construed to prevent Toledo from proposing revised rates. Toledo adds that AMP-Ohio acknowledged that Toledo may file revised rates for sale of capacity and energy under the Agreement effective on January 1, 2009.

9. Toledo also contends that there are no rates specified in the Agreement after December, 31, 2008, and that the currently effective rates are confiscatory. It states that since section 205 of the FPA requires proposed rate schedules to be filed no later than 60 days before the proposed effective date of the rate schedule, it plans to apply to the Commission under section 205 of the FPA by November 1, 2008, to establish rates for capacity and energy under the Agreement beginning on January 1, 2009. Toledo states that a fully developed rate proposal will be included in this rate change application and may render moot the concerns identified by AMP-Ohio. Toledo asserts that if the issues are not mooted, the reasonableness of the proposed rates may be addressed in the section 205 proceeding. Moreover, Toledo argues that the Commission will have the opportunity then to ensure that the ratemaking methodology Toledo used is consistent with the Merger Settlement Agreement and adjust the rates if necessary. Essentially, Toledo argues that it is premature to address in the expedited hearing what rate methodology may be used.

10. In addition, Toledo maintains that the expedited hearing procedures ordered in the August 18 Order severely constrict the amount of time available to the parties to develop a complete evidentiary record on which the Commission may base its decision on ratemaking issues. Therefore, Toledo argues that the Commission should have rejected AMP-Ohio's rate concerns as premature. Consequently, Toledo asks that the Commission grant rehearing and exclude rate methodology issues from the hearing.

11. Furthermore, Toledo asks that, if the Commission does not grant rehearing, the Commission clarify that there is nothing in the August 18 Order that might affect Toledo's filing under section 205. Toledo asserts that based on its review of the August 18 Order, Toledo is not precluded from filing an application under section 205 of the FPA for new rates for capacity and energy prior to the conclusion of the evidentiary hearings in these proceedings.

Discussion

12. We agree with Toledo that Section 8.01 of the Agreement and Section 2.04 of Schedule A provide that Toledo may adjust its rates for capacity and energy sold to AMP-Ohio beginning on January 1, 2009. AMP-Ohio also acknowledged that Toledo may file revised rates under the Agreement.

13. In addition, we grant Toledo's rehearing request to exclude the rate methodology from the hearing. We will consider these issues once Toledo submits an application

under section 205 to establish rates beginning on January 1, 2009. We note that there are no rates specified in the Agreement after December, 31, 2008, and that section 205 requires proposed rate schedules to be filed no later than 60 days before the proposed effective date of the rate schedule. Thus, Toledo must file its proposed rate by November 1, 2008. In that proceeding we will determine whether the new rates and rate methodology are just and reasonable. Finally, we are encouraged by Toledo's statement that its rate change application may render moot the concerns raised by AMP-Ohio.

The Commission orders:

Toledo's request for rehearing and clarification is hereby granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.