

150 FERC ¶ 61,159
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

Frankfort Plant Board and the Cities of Bardwell,
Barbourville,, Berea, Corbin, Falmouth, Madisonville,
Paris, and Providence, Kentucky

Docket Nos. EL15-20-000

v.

Kentucky Utilities Company

Kentucky Utilities Company

ER14-2505-000
EL14-102-000

(Consolidated)

ORDER ON COMPLAINT, ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES, AND CONSOLIDATING PROCEEDINGS

(Issued February 27, 2015)

1. On November 10, 2014, Frankfort Plant Board and the Cities of Bardwell, Barbourville, Berea, Corbin, Falmouth, Madisonville, Paris, and Providence, Kentucky (collectively, the Departing Municipals) filed a complaint pursuant to section 306 of the Federal Power Act (FPA) and Rules 206 and 212 of the Commission's Rules of Practice and Procedure.¹ The complaint asserts that Kentucky Utilities Company (Kentucky Utilities) violated its wholesale requirements contracts with the Departing Municipals when it proposed modifications to the Construction Work In Progress (CWIP) costs portion of Kentucky Utilities' formula rate wholesale requirements contracts with the Departing Municipals in Docket No. ER14-2505-000. In this order, we set the complaint for hearing and settlement judge procedures and consolidate the complaint proceeding

¹ 16 U.S.C. § 825e (2012); 18 C.F.R. §§ 385.206 and 385.212 (2014).

with the ongoing hearing and settlement judge proceedings in Docket Nos. ER14-2505-000 and EL14-102-000. Further, we establish a refund effective date of November 10, 2014.

I. Background

2. The Departing Municipals each own and operate a municipal electric distribution system in Kentucky and are parties to power supply contracts with Kentucky Utilities. Kentucky Utilities is a transmission-owning, vertically integrated utility that operates in Kentucky and Virginia that provides wholesale requirements service, pursuant to contracts negotiated between 2008 and 2009, to 12 Kentucky municipals, including the Departing Municipals (collectively, the Kentucky Municipals).²

3. The Departing Municipals state that the “full background of this dispute and context is well documented” in Docket No. ER14-2505-000.³ As relevant background, the Departing Municipals state that, in September 2008, Kentucky Utilities filed to update its formula rate requirements contracts with the 12 Kentucky Municipals including the proposed revisions to collect 100 percent of pollution control CWIP and 50 percent of other CWIP. The Kentucky Municipals protested this proposal. Kentucky Utilities and the Kentucky Municipals ultimately reached a settlement utilizing the proposed CWIP allocation. The Departing Municipals state that Kentucky Utilities agreed to file to cease collecting CWIP upon receipt of notice of termination from one of the Kentucky Municipals. The Departing Municipals state that section 4.1.3.4 of the resulting agreements (the 2009 Contracts) contains this CWIP filing requirement.⁴

² Departing Municipals November 10, 2014 Complaint at 4 (2014 Complaint). The three Kentucky Municipals that are not complainants are the Benham Power Board (Benham) and the cities of Bardstown and Nicholasville, Kentucky.

³ *Id.* at 5.

⁴ *Id.* at 6. Section 4.1.3.4 of the 2009 Contract provides that:

If either Party exercises its right to fully or partially terminate service under this Agreement, within sixty (60) days after the terminating Party has provided its notice of termination, Seller will make a Section 205 filing with the Commission to modify the rate formula for Buyer and request approval to cease collecting CWIP from the Buyer for that portion of Seller’s Load Obligation which is being terminated. Such filings(s) will request that they be made effective as of the filing date.

4. On April 21, 2014, the Departing Municipals provided five years' notice of termination⁵ and thereby triggered section 4.1.3.4 of the 2009 Contracts. Even though 60 days from April 21 fell on June 20, 2014, the Departing Municipals agreed to extend Kentucky Utilities' CWIP filing deadline to July 21, 2014, and eventually, to July 25, 2014. According to the Departing Municipals, on July 25, 2014, Kentucky Utilities made the required filing in Docket No. ER14-2505-000. They argue, however, that, inconsistent with section 4.1.3.4 of the 2009 Contracts, Kentucky Utilities only filed to remove CWIP costs "related to projects that are not anticipated to be in service before April 30, 2019 (April 30, 2017 for [City of Paris])."⁶

5. The Departing Municipals protested and filed a motion for summary disposition, arguing that the plain language of section 4.1.3.4 requires Kentucky Utilities to seek approval to cease collecting all CWIP, effective June 20, 2014. On September 23, 2014, the Commission issued an order accepting Kentucky Utilities' filing, effective June 20, 2014, subject to refund, and initiating hearing and settlement judge procedures. The order also instituted an investigation under section 206 of the FPA,⁷ in Docket No. EL14-102-000, to determine whether a "further [rate] decrease may be warranted" and established "a refund effective date at the earliest date possible, . . . the date the notice of the initiation of the investigation . . . [was] published in the *Federal Register*," i.e., September 30, 2014.⁸

II. Complaint

6. The Departing Municipals renew their arguments from the proceeding in Docket Nos. ER14-2505-000 and EL14-102-000. They again contend that section 4.1.3.4 of the 2009 Contracts requires Kentucky Utilities to file to stop including CWIP in its rates to the Departing Municipals and that Kentucky Utilities' course of performance and subsequent statements confirm this interpretation. The Departing Municipals ask the Commission to direct Kentucky Utilities to file to cease collecting all CWIP from the Departing Municipals, effective June 20, 2014, and to refund all overcharges.⁹ To

⁵ City of Paris, Kentucky only provided three years' notice to terminate, consistent with the requirements in its contract with Kentucky Utilities.

⁶ 2014 Complaint at 9 (citing Kentucky Utilities July 25, 2014 Filing at 4).

⁷ 16 U.S.C. § 824e (2012).

⁸ *Kentucky Utils. Co.*, 148 FERC ¶ 61,225, at P 24 (2014).

⁹ 2014 Complaint at 14.

support this request, the Departing Municipals assert that by granting this complaint summarily, the Commission can avoid the expenditure of time and resources by the parties, Commission Trial Staff, and the Commission. Furthermore, if the Commission does not grant the Departing Municipals' complaint, the Departing Municipals request consolidation with the proceedings in Docket Nos. ER14-2505-000 and EL14-102-000.

III. Notice of Filing and Responsive Filings

7. Notice of the complaint was published in the *Federal Register*, 79 Fed. Reg. 68,883 (2014), with interventions and answers due on or before December 1, 2014. On December 1, 2014, Kentucky Utilities filed an answer to the complaint. On December 15, 2014, the Departing Municipals filed an answer to Kentucky Utilities' answer.

8. In its answer, Kentucky Utilities reiterates the arguments it made in response to the Departing Municipals' arguments in Docket No. ER14-2505-000. In reply, the Departing Municipals reiterate their earlier contentions and contradict Kentucky Utilities' arguments. Additionally, the Departing Municipals state that they seek clarification that the "appropriate effective date for any relief awarded for overcollection of CWIP is June 20, 2014" and note that Kentucky Utilities' answer does not state any objection to this date.¹⁰

IV. Discussion

A. Procedural Matters

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the Departing Municipals' answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

10. We find that the complaint 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. Accordingly, we will set the complaint for investigation and a trial-type, evidentiary hearing under section 206 of the FPA. Because of the existence of common issues of law and fact, we will consolidate this

¹⁰ Departing Municipals December 15, 2014 Answer at 7-8.

proceeding with the proceeding in Docket Nos. ER14-2505-000 and EL14-102-000 for purposes of settlement, hearing, and decision.

11. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers,¹¹ we will establish the refund effective date at the earliest date possible, i.e., November 10, 2014. However, we note that the Commission may order refunds for past periods where a public utility has either misapplied a formula rate or charged rates contrary to the filed rate.¹²

12. 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 are commenced. 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.¹³ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁴ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order concerning the status of settlement discussions. Based on this report, the

¹¹ See, e.g., *Seminole Elec. Coop., Inc. v. Florida. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

¹² See, e.g., *City of Pella, Iowa v. Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,135, at P 111 (2014); *DTE Energy Trading, Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,062, at P 28, *order on reh'g*, 113 FERC ¶ 61,214 (2005), *reh'g denied*, 119 FERC ¶ 61,109 (2007); *Quest Energy, L.L.C. v. Detroit Edison Co.*, 106 FERC ¶ 61,227, at P 21 (2004). This protection would apply if Kentucky Utilities' filing in Docket No. ER14-2505-000 violated the requirements imposed in section 4.1.3.4 of the 2009 Contracts.

¹³ 18 C.F.R. § 385.603 (2014).

¹⁴ 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 days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (<http://www.ferc.gov/legal/adr/availjudge.asp>).

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.

13. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of hearing procedures, or, if the case were to go to hearing immediately, by November 30, 2015. Thus, we estimate that if the case were to go to hearing immediately, we would be able to issue our decision within approximately six months of the filing of briefs on and opposing exceptions, or July 29, 2016.

The Commission orders:

(A) 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 by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning this complaint. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(B) Docket No. EL15-20-000 is hereby consolidated with Docket Nos. ER14-2505-000 and EL14-102-000 for purposes of settlement, hearing, and decision. However, the hearing shall be held in abeyance to provide time for settlement judge procedures.

(C) The settlement judge in Docket Nos. ER14-2505-000 and EL14-102-000 shall determine the procedures best suited to accommodate the consolidation ordered herein.

(D) 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.

(E) The refund effective date established in Docket No. EL15-20-000 pursuant to section 206(b) of the Federal Power Act will be November 10, 2014.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.