

132 FERC ¶ 61,102
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Town of Edinburgh, Indiana

Docket No. EL10-8-000

v.

Indiana Municipal Power Agency

ORDER DISMISSING COMPLAINT

(Issued August 4, 2010)

1. On October 29, 2009, the Town of Edinburgh, Indiana (Edinburgh) filed a complaint against Indiana Municipal Power Agency (IMPA), alleging a variety of improper rate calculations and rate-setting methodologies that Edinburgh asserts contribute to excessively high rates charged by IMPA in violation of sections 211A¹ and 206² of the Federal Power Act (FPA). As discussed below, the Commission will dismiss Edinburgh's claims under sections 206 and 211A for reasons discussed below.

I. Background

2. Edinburgh is one of IMPA's fifty-three municipal electric utility members.³ IMPA provides bundled full-requirements services to Edinburgh and its other members under power sales contracts.⁴ Unlike other power sales contracts between IMPA and its members, the IMPA-Edinburgh contract is a grandfathered agreement—i.e., one executed prior to the date that Order No. 888 became effective and continuing under pre-Order

¹ 16 U.S.C. § 824j-1 (2006).

² 16 U.S.C. § 824e (2006).

³ Edinburgh October 29, 2009 Filing at 10 (Complaint); IMPA November 18, 2009 Filing at 7 (Answer).

⁴ Answer at 9.

No. 888 rates and terms.⁵ Edinburgh states that it does not receive service over any IMPA-owned distribution facilities but rather is directly connected via its own 69 kV/12.47 kV substation to 69 kV transmission lines which are part of a Joint Transmission System (Joint System) owned by IMPA and two partners.⁶ IMPA has members in Midwest Independent Transmission System Operator (Midwest ISO) transmission pricing Zones 5, 17, and 23, and in the American Electric Power Balancing Area of PJM Interconnection LLC.⁷ Relative to the transmission component of its bundled service rates, IMPA charges each member, including Edinburgh, a blended multi-zonal rate rather than a rate based exclusively on the zone or zones in which a particular member is located—Edinburgh and its entire retail load are located entirely within Zone 5.⁸ Members that take transmission service at voltage levels of less than 138 kV pay additional charges.⁹ In February 2002, IMPA transferred operational control over its Joint System facilities to Midwest ISO, which is now the exclusive provider of transmission service within its footprint.¹⁰

3. Notably, both Edinburgh and IMPA acknowledge that claims similar to those filed with the Commission have been before an Indiana state court for more than three years and were set for trial in April 2010.¹¹

⁵ Complaint at 15; Answer at 49. *See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). *See also Pontook Operating Ltd. Partnership v. Public Service Co. of New Hampshire*, 94 FERC ¶ 61,144, at 61,550 (2001) (discussing the effect of a “grandfathered agreement”).

⁶ Complaint at 15-16.

⁷ *Id.* at 10.

⁸ *Id.* at 4, 19-20; Answer at 16.

⁹ Complaint at 20.

¹⁰ *Id.* at 2 n.1.

¹¹ *Id.* at 25; Answer at 4-6. A trial was held in late April 2010, though a decision has not been rendered.

II. Notice and Filings

4. Notice of Edinburgh's complaint was published in the *Federal Register*, 74 Fed. Reg. 57,669 (2009), with IMPA's answer, as well as any interventions and protests, due on or before November 18, 2009.

5. On November 18, 2009, IMPA filed its answer. On the same date, Wabash Valley Power Association filed a timely motion to intervene. National Rural Electric Cooperative Association (NRECA), American Public Power Association (APPA), and MEAG Power (MEAG), each filed timely, unopposed motions to intervene and comments.¹²

6. On December 9, 2009, Edinburgh filed a motion for leave to reply to IMPA's answer and incorporated a reply. On December 23, 2009, IMPA filed an answer to Edinburgh's December 9 filing. On January 7, 2010, Edinburgh filed a response to IMPA's December 23 answer and on January 12, 2010, IMPA filed a response to Edinburgh's January 7 filing.

III. Summary of Complaint, Answer, and Subsequent Pleadings

7. In its complaint, Edinburgh alleges that IMPA, an "unregulated transmitting utility" under section 211A of the FPA, violated section 211A by failing to charge Edinburgh for the provision of transmission service at rates comparable to those that IMPA charges itself for the same service.¹³ Edinburgh asserts that it was over-charged by at least \$1.98 million for the period from 2003 through 2009.¹⁴ In addition, Edinburgh alleges that IMPA has violated sections 211A and 206 of the FPA because IMPA improperly charges a blended zonal rate for transmission services that is

¹² APPA's comments question the applicability of FPA section 206 to IMPA, a public body, and the applicability of FPA section 211A to what it characterizes as an "intra-joint action agency contractual dispute." APPA Motion to Intervene, Nov. 18, 2009, at 4. NRECA's comments question the applicability of section 211A for the same reasons cited by APPA. NRECA Motion to Intervene, Nov. 18, 2009, at 2-3. MEAG's comments mirror those provided by other commenters, adding that section 211A does not appear to provide the Commission with refund authority and encouraging the Commission to exercise its discretion under section 211A to defer ruling on the non-refund related relief sought by Edinburgh. MEAG Motion to Intervene, Nov. 18, 2009, at 4-5.

¹³ Complaint at 1.

¹⁴ *Id.*

significantly higher than the Midwest ISO zonal rate for the single zone—Zone 5—in which Edinburgh takes transmission service. Edinburgh alleges that, in further violation of FPA sections 211A and 206, IMPA charges a premium to its members taking electricity at voltages below 138 kV, amounting to an improper subsidization of those members taking service at 138 kV and above.

8. Edinburgh acknowledges that, unlike section 206 of the FPA, which empowers the Commission to proactively identify and remedy instances of rate discrimination, per the statutory language, any exercise of section 211A authority by the Commission is discretionary.¹⁵ Nonetheless, Edinburgh asserts that any exercise of discretion by the Commission must be conducted in a reasonable, consistent, and non-arbitrary manner and that IMPA's improper pricing of transmission service is exactly the type of conduct that Congress envisioned would give rise to Commission review under section 211A.¹⁶

9. Edinburgh further argues that a variety of improper rate calculations and rate-setting methodologies employed by IMPA contribute to excessively high rates in violation of sections 211A and 206. These include alleged miscalculations by IMPA of its "Template Rate," which Edinburgh contends is the rate IMPA charges itself, Midwest ISO, and others, for transmission service provided over the Joint System in Midwest ISO Zone 5.¹⁷ Edinburgh also alleges that IMPA violates the filed-rate doctrine¹⁸ by charging members a blended, multi-zonal transmission rate instead of the lower-priced, Zone 5 Template Rate, which it contends is the rate required under the Midwest ISO tariff.¹⁹

10. In its answer, IMPA argues that a full examination of the relevant legislative history of section 211A of the FPA indicates that the provision was enacted by Congress solely to prevent non-jurisdictional owners of transmission from denying open-access

¹⁵ *Id.* at 30.

¹⁶ *Id.* at 30-31.

¹⁷ *Id.* at 18, 32.

¹⁸ The filed-rate doctrine holds that a company can claim no rate as a legal right that is other than the filed rate, whether that rate has been fixed or merely accepted by the Commission. *Arizona Public Service Co.*, 27 FERC ¶ 61,174, at 61,319 (1984).

¹⁹ Complaint at 39-45. Edinburgh also alleges the charged rates violate the *Mobile-Sierra* doctrine. See *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). However, Edinburgh has failed to sufficiently explain how this doctrine, which relates to the standard of review for a proposed change to an existing rate, is implicated.

transmission, either through outright refusals to provide access or by extending access at rates so significantly non-comparable as to effectively preclude service.²⁰ IMPA therefore asserts that section 211A is inapplicable because Edinburgh is and has been receiving transmission service for multiple years at the same blended rate paid by all IMPA members, which IMPA contends is a rate that achieves the lowest cost for the benefit of all its members.²¹ Moreover, IMPA asserts that, unlike section 206, even if the Commission found it proper to exercise authority in the context of the instant proceeding, section 211A does not obligate the Commission to “fix” the rates, but rather, merely, to remand them to the unregulated transmitting utility for review and revision.²²

11. IMPA also disputes Edinburgh’s section 211A and 206 claims that certain provisions of the Commission-jurisdictional Midwest ISO tariff, as well as the Midwest ISO Transmission Owners Agreement, govern the rates that apply to commerce downstream of Midwest ISO’s service to transmission owners.²³

12. IMPA contends that what Edinburgh describes as the “Template” or “ITP” rate does not reflect a legitimate transmission service rate but rather constitutes the revenue requirement that IMPA files with Midwest ISO pursuant to Attachment O of the Midwest ISO tariff for recovery of certain costs associated with the facilities that it owns within the Joint System. IMPA maintains that such facilities are incapable of providing transmission service without other transmission system components, and that these components justify incremental charges to IMPA’s customers.²⁴ IMPA asserts that numerous additional costs are justifiably included in determining the transmission component of bundled rates charged to members such as Edinburgh.²⁵ Moreover, IMPA asserts that Edinburgh, in alleging the unjustness and unreasonableness of calculations made by and cost data submitted to Midwest ISO by IMPA, is actually making an impermissible collateral attack on Commission approved tariffs and templates.²⁶

²⁰ Answer at 26.

²¹ *Id.* at 16.

²² *Id.* at 29 (citing 16 U.S.C. § 824e(b)).

²³ *Id.* at 41-49.

²⁴ *Id.* at 38.

²⁵ *Id.* at 38-40, 75-77.

²⁶ *Id.* at 52-76.

Additionally, IMPA states that it is a political subdivision of a state, and therefore clearly exempted from the Commission's rate-setting authority under section 206.

13. In Edinburgh's December 9, 2009 reply to IMPA's Answer (Edinburgh December 9 Reply), Edinburgh seeks to refute many of IMPA's assertions in the Answer. Edinburgh challenges IMPA's assertions that relevant statutory language and case law refutes the applicability of section 211A and any refund authority under that provision, under the present circumstances.²⁷ Edinburgh further disputes IMPA's assertions that Midwest ISO tariff provisions and applicable case law permit IMPA's rates, that IMPA's transmission rate is not excessive, and that Edinburgh errs in determining IMPA's "correct" rate for transmission service.²⁸ Edinburgh also challenges IMPA's defense of voltage-based rate distinctions for transmission service²⁹ and charging a blended rate based upon rates in different Midwest ISO and PJM zones.³⁰ Finally, Edinburgh also reiterates that it has satisfied its burden of proof for each element of its case and that the Commission is the proper forum for vindicating its rights.³¹

14. In IMPA's December 23, 2009 Answer to Edinburgh's December 9 Reply (IMPA December 23 Answer), IMPA largely restates earlier arguments opposing assertions in Edinburgh's Complaint. It adds a recently decided Commission decision it cites for the non-applicability of section 211A to Edinburgh's Complaint.³² It also contends that various factors under applicable case law support the right of the Commission to stay the proceeding pending a verdict in the state court case.³³

15. Edinburgh's January 7, 2010 Response to IMPA's December 23, 2009 Answer (Edinburgh January 7 Response), largely attacks case law used in the IMPA December 23

²⁷ Edinburgh December 9 Reply at 1-13, 35-36.

²⁸ *Id.* at 13-26.

²⁹ *Id.* at 26-29.

³⁰ *Id.* at 29-31.

³¹ *Id.* at 31-35.

³² IMPA December 23 Answer at 4 (citing *Midwest Indep. Transmission Sys. Op., Inc.*, 129 FERC ¶ 61,221, at P 40 (2009) (*MISO*)).

³³ *Id.* at 17-25.

Answer to support IMPA's section 211A applicability³⁴ and stay arguments.³⁵ It also alleges that IMPA made various erroneous claims in that Answer.³⁶

16. IMPA's January 12, 2010 Response to the Edinburgh January 7, 2010 Pleading (IMPA January 12 Response) briefly disputes Edinburgh's assertions regarding *MISO*, the applicability of section 211A, and the relationship of IMPA's revenue requirement filings and the Midwest ISO Zone 5 transmission service rate.

IV. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene serve to make the entities that filed them party to this proceeding.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the Edinburgh December 9 Reply, the IMPA December 23 Answer, the Edinburgh January 7 Response, and the IMPA January 12 Response because they assisted in our determination.

B. Edinburgh's Section 211A Claim

19. Section 211A of the FPA states that the:

Commission *may*, by rule or order, require an unregulated transmitting utility to provide transmission services: (1) at rates that are comparable to those that the unregulated transmitting utility charges itself; and (2) on terms and conditions (not relating to rates) that are comparable to those under which the unregulated utility provides transmission services to itself and that are not unduly discriminatory or preferential.³⁷

³⁴ Edinburgh January 7 Response at 2-4.

³⁵ *Id.* at 4-8.

³⁶ *Id.* at 8-11.

³⁷ 16 U.S.C. § 824j-1 (2006) (emphasis added).

20. Congress' use of the word "may" evinces Congress' intent that any exercise of section 211A authority by the Commission is discretionary. Here, we decline consideration of these matters under section 211A given the proceeding pending in Indiana state court.

21. The Commission expects that the ongoing state court proceeding, which has already produced voluminous discovery, is likely to resolve or at least clarify many of the disputes between the parties, including several contract-related disputes pertinent to the rate-amount and rate-setting issues raised in Edinburgh's complaint. Accordingly, the Commission finds it appropriate to decline to exercise section 211A jurisdiction in the present circumstances.³⁸ Therefore, we will dismiss this portion of Edinburgh's complaint.³⁹

C. Edinburgh's FPA Section 206 and Filed-Rate Claims

22. As political subdivisions of the State of Indiana, IMPA and Edinburgh are exempt from public utility status and thus not subject to Commission jurisdiction under

³⁸ The Commission has discretion to decide when and where it will resolve an issue. *See, e.g., Mobil Oil Exploration v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how to handle related, yet discrete, issues in terms of procedures . . . [such as] where a different proceeding would generate more appropriate information and where the agency was addressing the question.") (citations omitted). *See also Tennessee Gas Pipeline Co v. FERC*, 972 F.2d 376, 381 (D.C. Cir. 1992) ("The agency is entitled to make reasonable decisions about when and in what type of proceeding it will deal with an actual problem"); *Nadar v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) ("[T]his court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload.").

³⁹ Edinburgh's complaint briefly alleges violations of section 211 of the FPA. *See* Complaint at 18 ("IMPA's rate to Edinburgh is excessive, non-comparable to the rate IMPA charges itself for Zone 5 transmission service in violation of FPA [s]ection 211A and in violation of FPA filed rates. The rate may also violate Section 211"). However, the mere listing of an issue, without subsequent discussion, is not sufficient to adequately raise the issue. *See* 18 C.F.R. § 385.206 (2009) (a complaint must "[e]xplain how the action or inaction violates applicable statutory standards or regulatory requirements"); *see also Cal. Dep't of Water Res. v. FERC*, 341 F.3d 906, 911 (9th Cir. 2003) (inclusion of a single sentence without citation to the statutory language at issue is not sufficient to raise the issue). Accordingly, we need not address the section 211 claim.

section 201 of the FPA.⁴⁰ In contrast, Midwest ISO is a public utility directly subject to Commission jurisdiction under the same provision of the FPA.

23. Section 206 of the FPA grants the Commission the authority to consider “any rule, regulation, practice or contract” that affects the rates or charges of a public utility. Thus, the Commission may review the rates and charges of otherwise non-jurisdictional entities, but may do so only as a function of determining that the pass through of such rates or charges has not caused jurisdictional rates to become unjust, unreasonable, or unduly discriminatory or preferential.⁴¹ . .

24. Edinburgh fails to explicitly challenge the justness and reasonableness of Midwest ISO’s rates and therefore fails to direct its claim at the jurisdictional rates over which the Commission has remedial authority. Although unclear from its pleading, it appears that Edinburgh is arguing that IMPA charges Midwest ISO an improper rate for use of IMPA-owned facilities, and that this practice yields, in turn, an unjust and unreasonable Midwest ISO rate charged to IMPA that is ultimately passed through to Edinburgh.⁴²

25. In support of its claim, Edinburgh references *PG&E v. FERC*⁴³ and *TANC*, which it cites for the proposition that public bodies like IMPA are not beyond the reach of the Commission’s section 206 jurisdiction and that a public body, such as IMPA, can submit itself to that jurisdiction by dedicating its transmission facilities to public utility operation. Edinburgh further argues that, inasmuch as the public bodies in *PG&E* and *TANC* were prohibited from charging unjust and unreasonable rates that would be reflected in the rates charged to customers of the independent system operator, IMPA should be similarly precluded from charging Edinburgh allegedly unjust and unreasonable rates for transmission service provided by Midwest ISO.

⁴⁰ 16 U.S.C. § 824(e)-(f) (2006).

⁴¹ 16 U.S.C. § 824e(a) (2006). See *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator*, 561 F.3d 904, 918-19 (8th Cir. 2009); *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 673-74 (D.C. Cir. 2007) (*TANC*).

⁴² See Complaint at 22, 54.

⁴³ 306 F.3d 1112 (D.C. Cir 2002) (*PG&E*).

26. We disagree that *PG&E* and *TANC* support Edinburgh's position. In both of those cases, the Commission was addressing inputs of a non-jurisdictional entity into the calculation of a jurisdictional rate, the challenge was brought by ratepayers of a jurisdictional public utility, the independent system operator, and the relief sought was reformation of jurisdictional rates. In this case, Edinburgh's claims, as presented, seem to challenge and seek reformation of non-jurisdictional rates (i.e., those charged by IMPA to Edinburgh). Further, the complaint is directed solely at the actions of, and rates charged by, IMPA, a non-jurisdictional entity. Inasmuch as Edinburgh does not name the Midwest ISO, it fails to direct its complaint at an entity that might properly serve as a basis for the Commission to exercise its section 206 authority.⁴⁴ Accordingly, we will dismiss Edinburgh's section 206 claims. Moreover, even assuming *arguendo* that Edinburgh properly challenged the justness and reasonableness of IMPA's Midwest ISO template rate submissions, we find that Edinburgh has failed to satisfy its burden to produce the basic evidentiary support that would be required to make a *prima facie* case. Edinburgh's rate arguments largely amount to a proposal to adopt a different rate methodology, rather than showing, as it must, that the pre-existing rate is unjust and unreasonable.

27. Edinburgh also contends that it lacks sufficient information to analyze many elements of the IMPA revenue requirement submittal. However, Edinburgh does not deny that IMPA provided it with approximately 18,000 pages of documents, covering several years of rate studies, in the ongoing state proceeding that is addressing allegations similar to those before us here.⁴⁵ Thus, while we find dismissal of Edinburgh's section 206 claims is proper without reaching the merits, we note that Edinburgh has failed to demonstrate that the information it has been provided by IMPA, together with other publicly available information contained in Attachment O of the Midwest ISO tariff, is insufficient.

⁴⁴ With respect to Edinburgh's assertion of a filed-rate doctrine violation, it has not challenged a filed rate because the rates IMPA charges its members, including Edinburgh, are not rates filed with the Commission.

⁴⁵ Answer at 5; Edinburgh December 9 Reply at 25-26. *See also Interstate Power and Light Co. v. ITC Midwest, LLC*, 127 FERC ¶ 61,043, at P 45 (2009) (finding unsubstantiated allegations insufficient to warrant a hearing and denying a complaint, notwithstanding alleged denial of access to certain unspecified information).

The Commission orders:

Edinburgh's complaint is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.