

133 FERC ¶ 61,004
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.

The Empire District Electric Company

Docket Nos. ER10-2099-000
ER10-2100-000
ER10-2101-000
ER10-2102-000
ER10-2103-000
ER10-2104-000
ER10-2105-000
ER10-2106-000
ER10-1358-000
ER10-877-000
ER10-877-001
ER10-877-002
(Consolidated)

ORDER ACCEPTING AND SUSPENDING UNEXECUTED SERVICE
AGREEMENTS, ESTABLISHING HEARING PROCEDURES, AND
CONSOLIDATING PROCEEDINGS

(Issued October 1, 2010)

1. On August 2, 2010, The Empire District Electric Company (Empire) filed unexecuted Full Requirements Electric Service Agreements (requirements service agreements) and unexecuted Wholesale Distribution Service Agreements (distribution service agreements) between itself and each of the cities of Monett, Mt. Vernon, and Lockwood, Missouri (Missouri Cities), and Chetopa, Kansas (collectively, Cities).¹ As

¹ Docket Nos. ER10-2099-000 and ER10-2100-000 contain the requirements and the distribution service agreements, respectively, with Chetopa, KS; Docket Nos. ER10-2101-000 and ER10-2102-000 contain the requirements and distribution service agreements, respectively, with Lockwood, MO; Docket Nos. ER10-2103-000 and ER10-2106-000 contain the distribution and requirements service agreements, respectively, with Monett, MO; and Docket Nos. ER10-2104-000 and ER10-2105-000 contain the distribution and requirements service agreements, respectively, with Mount Vernon, MO.

discussed below, the Commission accepts and suspends the proposed requirements and distribution service agreements for a nominal period to become effective August 1, 2010, subject to refund, establishes hearing procedures, and consolidates the agreements with the ongoing rate proceedings in Docket No. ER10-877-000, *et al.*

I. Background

2. Empire is a public utility providing electric service to approximately 167,000 customers in southwest Missouri, southeast Kansas, northeast Oklahoma, and northwest Arkansas. Empire is also a transmission-owning member of Southwest Power Pool, Inc. (SPP), and its transmission facilities, most of which operate at 69 kV and 161 kV, are under the functional control of SPP. All transmission service requests to use Empire's transmission system are made through SPP, and Empire takes transmission service over its facilities under the SPP tariff.

3. Prior to its participation in SPP, Empire provided bundled full requirements wholesale service within its balancing authority area to the Cities. After becoming an SPP member, Empire continued to serve the Cities under grandfathered agreements with stated rates under its cost-based Wholesale Electric Service Schedule W-1 (W-1 Tariff).²

4. On March 12, 2010 in Docket No. ER10-877-000, Empire filed a proposed Full Requirements Electric Service Tariff (GFR Tariff) with a standard form of Electric Service Agreement (*pro forma* service agreement) to implement a cost-based full requirements wholesale electric service rate schedule and generation formula rate. On May 28, 2010, the Commission issued an order conditionally accepting and suspending Empire's proposal, to be effective June 1, 2010, subject to refund, and established a hearing on Empire's proposal in Docket No. ER10-877-000.³ Also on May 28, 2010, in Docket No. ER10-1358-000, Empire filed notices of termination for the W-1 Tariff and the grandfathered service agreements with the Cities. Subsequently, the Commission issued an order in Docket No. ER10-1358-000 accepting and suspending Empire's proposal to terminate the W-1 Tariff and the grandfathered agreements effective July 31,

² Empire's FERC Electric Tariff, Second Revised Volume No. 1, Wholesale Electric Service Schedule W-1.

³ *Empire District Electric Company*, 131 FERC ¶ 61,182 (2010) (May 28 Order). Empire originally designated the GFR Tariff as a rate schedule but redesignated it as a tariff in a June 25, 2010 filing in accordance with the Commission's directive in the May 28 Order. Empire's filing redesignating the rate schedule to the GRF Tariff will be addressed in a separate order.

2010.⁴ The July 28 Order also consolidated the proceedings in ER10-1358-000 and ER10-877-000.⁵

II. Empire's Filings

5. Empire states that it is filing the unexecuted requirements and distribution service agreements with the Cities because the grandfathered agreements terminated on July 31, 2010. Empire explains that, although it offered the Cities service under Empire's GFR Tariff, the Cities have neither agreed to take unbundled full requirements and wholesale distribution service, nor have they informed Empire that they will take service from a third party beginning August 1, 2010. According to Empire, it commenced service under the unexecuted requirements and distribution service agreements under the GFR Tariff in order to avoid service disruptions to the Cities.

6. Empire states that the requirements and distribution service agreements, which are in the *pro forma* service agreement form, provide that although the Cities are responsible for arranging and paying all required transmission, ancillary and wholesale distribution services, Empire can arrange for such services on behalf of the Cities pursuant to Exhibit C of the *pro forma* service agreement. Empire asserts that because the Cities have not applied to SPP for network integration transmission service, Empire is making such arrangements to ensure continuity of service. Empire will bill the Cities for the resulting charges in accordance with Exhibit C of the requirements service agreements.

7. Empire requests waiver of the prior notice filing requirement pursuant to section 35.11 of the Commission's regulations⁶ to permit the requirements and distribution service agreements to become effective on August 1, 2010. Empire notes that the agreements are being filed under a tariff of general applicability within 30 days after service commenced. Empire also asserts that an August 1, 2010 effective date will prevent any disruption of service to the Cities, whose previous service terminated on July 31, 2010. Accordingly, Empire reasons that good cause exists for the Commission to grant the requested waiver.

⁴ *Empire District Electric Company*, 132 FERC ¶ 61,078 (2010) (July 28 Order).

⁵ *Id.* P 15.

⁶ 18 C.F.R § 35.11 (2010).

III. Notices of Filing and Responsive Pleadings

8. Notices of Empire's filings were published in the *Federal Register*, 75 Fed. Reg. 49,924 (2010), with comments due on or before August 23, 2010. Missouri Public Utility Alliance (MPUA)⁷ filed a timely motion to intervene, protest, and request for suspension and consolidation. Empire filed an answer to MPUA's protest on September 7, 2010, and MPUA filed an answer to Empire's answer on September 14, 2010.

IV. MPUA Protest

9. MPUA asserts that the Missouri Cities have concerns regarding the required minimum ten-year term of service for the requirements service agreements, particularly because the final rates and terms for Empire's new GFR Tariff have not been established. MPUA contends that Empire should be required to modify the requirements service agreements to remove the ten-year minimum term requirement. MPUA also argues that, if accepted, the agreements should be effective on an interim basis until the Missouri Cities decide whether to take service from Empire under the GFR Tariff once its final terms are known.

10. MPUA also takes issue with the distribution service agreements. Specifically, MPUA contends that Empire has not shown that it is entitled to the stranded-cost recovery provided for in paragraph 10 of the distribution service agreements. According to MPUA, this provision appears to allow Empire to retain distribution facilities when customers stop using them and to charge customers for the fully-depreciated values of the facilities plus a removal fee. MPUA asserts that this provision could have the anti-competitive effect of making use of alternative distribution facilities prohibitively expensive. MPUA also argues that the provision could provide a windfall to Empire, which would benefit from the ability to make alternative use of certain equipment that the Missouri Cities would have funded.

11. MPUA further argues that the requirements and the distribution service agreements incorporate the terms and conditions of the *pro forma* service agreement that the Commission suspended and set for hearing in Docket Nos. ER10-877-000, *et al.* Accordingly, MPUA requests that the Commission suspend the requirements service agreements filed in the instant proceedings and consolidate these proceedings with the proceedings in Docket No. ER10-877-000, *et al.*, to avoid duplicating efforts to resolve the issues.

⁷ MPUA's protest, which it filed on its own behalf and on the behalf of the Missouri Cities, is limited to the requirements and distribution service agreements with the Missouri Cities that Empire filed in Docket Nos. ER10-2101-000 through ER10-2106-000.

V. Empire's Answer

12. Empire states that it does not object to the Missouri Cities' request to consolidate Docket Nos. ER10-2101-000 through ER10-2106-000 with the already consolidated proceedings in Docket No. ER10-877-000, *et al.* However, Empire contends that the Commission should reject the Missouri Cities' request to suspend the effective date of the service agreements. Empire points out that the Commission unconditionally accepted and suspended the termination of the W-1 Tariff as well as termination of all bundled wholesale electric service agreements under the W-1 Tariff, including the Cities' agreements.⁸ Furthermore, Empire argues that the Commission conditionally accepted Empire's GFR Tariff, including the *pro forma* service agreement, effective June 1, 2010, subject to refund.⁹ Thus, Empire asserts that as of August 1, 2010, the only Commission-approved rate under which Empire could provide full-requirements service to the Cities is the GFR Tariff. Accordingly, Empire requests that the Commission reject the Missouri Cities' request to suspend the requirements and distribution service agreements and accept the agreements effective August 1, 2010, as requested.

VI. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motion to intervene serves to make the entities that filed it parties to the proceeding.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept Empire's answer, because it has provided information that assisted us in our decision-making process.

15. The Commission will grant the motion to consolidate the instant proceeding with Docket Nos. ER10-877-000, *et al.* The Commission's practice is to consolidate proceedings where the issues are closely intertwined with each other.¹⁰ Consolidation will allow the common issues regarding the terms and conditions of the GFR Tariff and the proposed requirements and distribution service agreements between Empire and the Cities to be heard together. Furthermore, no party has opposed consolidation. Having considered the responsive pleadings, we find there are disputed issues of fact regarding

⁸ Empire Answer at 2 (citing July 28 Order, 132 FERC ¶ 61,078).

⁹ *Id.* (citing May 28 Order, 131 FERC ¶ 61,182).

¹⁰ *Missouri River Energy Servs.*, 124 FERC ¶ 61,309, at P 39 (2008).

the rates and terms of the service agreements and the intent of the parties, which will benefit from examination as part of the ongoing hearing in Docket No. ER10-877-000, *et al.*

B. Determination

16. The rates, terms, and conditions of the proposed requirements service agreements and the distribution service agreements raise issues of material fact, including, but not limited to, whether Empire should be required to modify the requirements service agreements to remove the ten-year minimum requirement and whether the distribution agreements unreasonably provide for Empire to retain distribution facilities when customers stop using them and to charge customers for the full depreciated value of such facilities plus a removal fee. These issues are more appropriately addressed in the hearing procedures ordered below.

17. Our preliminary analysis indicates that Empire's proposed requirements service agreements and the distribution service agreements have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept the proposed requirements service agreements and the distribution service agreements and suspend them for a nominal period, to take effect August 1, 2010, subject to refund, and consolidate the instant proceedings with the ongoing proceedings in Docket Nos. ER10-877-000, *et al.* for hearing and settlement procedures.

18. We find it unnecessary to make the agreements effective on an interim basis as Missouri Cities' request. When Empire filed its GFR Tariff on March 12, 2010, in Docket No. ER10-877-000, it stated that it intended to file notices of cancellation of the existing W-1 Tariff upon Commission approval of its proposal in Docket No. ER10-877-000.¹¹ Empire filed to terminate the W-1 tariff and the grandfathered service agreements on May 28, 2010 in Docket No. ER10-1358-000. Missouri Cities knew as early as March 12, 2010 that the grandfathered agreements would be terminated,¹² and that they would have to decide whether to take service under the GFR Tariff or take service from a third party. However, in accepting and suspending the proposed terminations in the July 28 Order, the Commission found that it may not be reasonable to require Missouri Cities to commit to service agreements with 10-year terms, when those terms and rates have not yet been established or to lose service from Empire and seek to obtain service from an alternative supplier on short notice even though Empire has satisfactorily

¹¹ See May 28 Order, 131 FERC ¶ 61,182 at P 3.

¹² In its March 12, 2010 filing, Empire stated that it mailed a copy of its filing to those entities listed on the service list appended to the filing, which included the Cities. See Empire District Electric Co., March 12, 2010 filing in Docket No. ER10-877-000.

complied with the prior notice provision of section 35.15 of the Commission's regulations.¹³ These issues will be among those addressed in the hearing procedures ordered herein.

19. For good cause shown, we will grant Empire's request for waiver of the prior notice requirement.¹⁴ Accordingly, for the reasons stated above, the Commission accepts the proposed requirements service agreements and the distribution service agreements, suspends them for a nominal period, to take effect August 1, 2010, subject to refund, and consolidates the instant proceedings with the ongoing proceedings in Docket No. ER10-877-000, *et al.* for hearing.¹⁵

The Commission orders:

(A) The unexecuted full requirements electric service agreements filed in Docket Nos. ER10-2099-000, ER10-2101-000, ER10-2106-000, and ER10-2105-000, and the unexecuted wholesale distribution service agreements filed in Docket Nos. ER10-2100-000, ER10-2102-000, ER10-2103-000, and ER10-2104-000, are hereby accepted and suspended for a nominal period to be effective August 1, 2010, subject to refund and the outcome of a hearing.

(B) MPUA's motion to consolidate these proceedings with Docket No. ER10-877-000, *et al.* is granted

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹³ July 28 Order, 132 FERC ¶ 61,078, at P 17.

¹⁴ *Central Hudson Gas and Electric Corp.*, 60 FERC ¶ 61,106, *order on reh'g*, 61 FERC ¶ 61,089 (1992).

¹⁵ Although no interventions or protests were filed in the proceedings regarding the agreements for the City of Chetopa, Kansas, the issues are the same as in the Missouri Cities' agreements. Accordingly, we will treat these agreements the same as all of the other agreements in these dockets.