

137 FERC ¶ 61,148  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Wabash Valley Power Association, Inc.

Docket No. EL11-26-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued November 21, 2011)

1. On March 3, 2011, Wabash Valley Power Association, Inc. (Wabash) filed a petition for declaratory order (Petition) seeking Commission confirmation that: (1) the Commission has exclusive jurisdiction over the Commission-approved Formula Rate Tariff, Wabash Valley Electric Tariff Volume No. 1 (Tariff), and its related March 21, 1977 Wholesale Power Supply Contract between Wabash and Northeastern Rural Electric Membership Corporation (NREMC) filed as Wabash's FERC Rate Schedule No. 27 (NREMC Rate Schedule); (2) changes to the rates paid by NREMC under the Tariff and NREMC Rate Schedule are subject to approval of the applicable regulatory authorities; and (3) the Commission is the applicable regulatory authority with jurisdiction over the rates NREMC pays under the Tariff and the NREMC Rate Schedule and any objections to those rates. In this order, we grant the Petition, as discussed below.

**I. Background**

2. Wabash is a non-profit generation and transmission cooperative that supplies all-requirements wholesale power and energy to its member distribution cooperatives.<sup>1</sup> Since 1977, Wabash has supplied and NREMC has purchased all of its power and energy requirements from Wabash under the NREMC Rate Schedule.<sup>2</sup> In 2004, Wabash repaid its debt to the Rural Utilities Service (RUS), thus becoming a public utility subject to regulation by the Commission.<sup>3</sup> Wabash filed the Tariff and its contracts, including the

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<sup>1</sup> Petition at 1.

<sup>2</sup> *Id.* at 1-2.

<sup>3</sup> *Id.* at 2, 7.

NREMC Rate Schedule, with the Commission.<sup>4</sup> The Commission issued an order accepting for filing Wabash's Tariff and related Wabash contracts including the NREMC Rate Schedule and exercising exclusive jurisdiction over the rates, terms and conditions of wholesale electric service and transmission in interstate commerce provided by Wabash.<sup>5</sup>

## II. Petition

3. Wabash asks the Commission to issue a declaratory order stating that (1) the Commission has exclusive jurisdiction over the Commission-approved Tariff and the related NREMC Rate Schedule; (2) changes to the rates paid by NREMC under the Tariff and NREMC Rate Schedule are subject to approval of the applicable regulatory authorities; and (3) the Commission is the applicable regulatory authority with jurisdiction over the rates NREMC pays under the Tariff and the NREMC Rate Schedule and any objections to those rates. Wabash states that the relief sought in the Petition goes to the heart of the Commission's jurisdiction and the integrity and efficacy of the jurisdiction that the Commission has asserted and exercised since 2004 over the long-term wholesale power supply contract between Wabash and its twenty-eight distribution cooperative members, including the NREMC Rate Schedule.<sup>6</sup> Wabash states that NREMC is seeking either to terminate the NREMC Rate Schedule or to subject that wholesale service to Public Service Commission of Indiana (Indiana Commission) jurisdiction, each inconsistent with the Commission's exclusive jurisdiction and the filed-rate doctrine.<sup>7</sup>

4. Further, Wabash argues that the Commission held in *Wabash* that the Commission is the "applicable regulatory authority" under the Tariff and related rate schedules and

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<sup>4</sup> On April 30, 2004, Wabash filed with the Commission: (a) in Docket No. ER04-789, its FERC Electric Tariff, Original Volume No. 1; and (b) in Docket No. ER04-802 various existing contracts as Commission-jurisdictional rate schedules including (i) the NREMC Rate Schedule as Wabash Valley Rate Schedule FERC No. 27, and (ii) as Wabash Valley Rate Schedule FERC No. 4, the December 12, 2001 Special Agreement for Transmission and Electric Service Between and Among NREMC, Wabash, and Steel Dynamics, Inc. (a large industrial customer located in NREMC's service area). See Petition at 7.

<sup>5</sup> See *Wabash Valley Power Assoc., Inc.*, 107 FERC ¶ 61,327, at P 12, 14 (2004) (*Wabash*).

<sup>6</sup> Petition at 3.

<sup>7</sup> *Id.*

“will exercise exclusive jurisdiction over the rates, terms and conditions of wholesale electric service and transmission” provided by Wabash to its members.<sup>8</sup> Wabash argues that the Commission should reaffirm this ruling with respect to NREMC to end this controversy.<sup>9</sup>

5. The NREMC Rate Schedule, section 4, states in relevant part:

4. RATE. Subject to the approval of the [Indiana Commission]:

(a) the Members shall pay [Wabash] . . . at rates and on terms and conditions set forth in the applicable rate schedule;

(b) . . . The Member agrees that the rate, from time to time, established by the Board of Directors of [Wabash] shall be deemed to be substituted for the rate herein provided and agrees to pay for electric power and energy furnished by [Wabash] to it hereunder after the effective date of any such revision at such revised rates; provided, however, that no such revision shall be effective unless approved by applicable regulatory authorities . . . .

6. Wabash states that on December 27, 2010, NREMC sent a letter (NREMC Demand Letter) to Wabash alleging that (1) Wabash breached the NREMC Rate Schedule when, in 2004, Wabash became subject to Commission jurisdiction; (2) rates under the NREMC Rate Schedule must be regulated by the Indiana Commission; (3) if Wabash does not become Indiana Commission rate regulated NREMC will seek rescission; and (4) the formula rate accepted by the Commission and applicable to service under the NREMC Rate Schedule has produced excessive charges to NREMC for which it intends to seek at least \$3 million in damages.<sup>10</sup>

7. Wabash argues that in 2004, when the Commission accepted Wabash’s Tariff and twenty-eight full-requirements contracts for filing, one of Wabash’s members, Midwest Energy Cooperative (Midwest), protested Wabash’s initial tariff filing and, in doing so, specifically challenged Commission jurisdiction with regard to the all-requirements power that Wabash provides pursuant to Wabash’s FERC Rate Schedule Nos. 7 and 32.<sup>11</sup>

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<sup>8</sup> *Id.* at 21-22 (citing *Wabash*, 107 FERC ¶ 61,327).

<sup>9</sup> *Id.* at 22.

<sup>10</sup> *Id.* at 2 (citing Ex. WV-1 at P 18 and Ex. WV-20).

<sup>11</sup> *Id.* at 22.

With respect to the wholesale power supply agreement between Wabash and Fruit Belt Electric Cooperative identified as Rate Schedule No. 7 (Midwest Rate Schedule), Midwest asserted that under section 4, the applicable regulatory authority was initially the Indiana Commission and after June 26, 1986, the Michigan Public Service Commission (Michigan Commission).<sup>12</sup> Wabash states that Midwest argued that the Michigan Commission and not the Commission was the applicable regulatory authority.<sup>13</sup> Wabash states that Midwest further contended that because Wabash had not received approval from the Michigan Commission for its Formula Rate Tariff, the Tariff rates should not apply under the Midwest Rate Schedule.<sup>14</sup> Wabash notes that section 4 of the Midwest Rate Schedule that Midwest argued required Michigan Commission approval is the same as section 4 of the NREMC Rate Schedule quoted above.

8. Wabash argues that the jurisdictional controversy that Midwest raised in its protest in the 2004 Wabash initial tariff proceeding is precisely the same jurisdictional challenge that NREMC raises in its Demand Letter six-plus years later.<sup>15</sup> Wabash states that the NREMC Rate Schedule submitted to the Commission in the same 2004 Wabash initial tariff filing includes the same language Midwest unsuccessfully challenged.<sup>16</sup> Wabash notes that NREMC received all of Wabash's 2004 Filings with the Commission (and Wabash argues that NREMC is in privity with Midwest and bound by its failed jurisdictional attacks), but NREMC has not intervened in any of the numerous Wabash filings at the Commission nor objected to the exclusive jurisdiction that the Commission explicitly recognized in *Wabash*. On that basis, Wabash requests that the Commission reaffirm and confirm that its findings in *Wabash* are applicable to the NREMC Rate Schedule. Specifically, Wabash cites to the Commission's statement in *Wabash*:

The language of the 1977 Contract, that rate changes not take effect unless approved by the applicable regulatory authorities, similarly does not preclude application of the proposed Formula Rate Tariff to Midwest under that contract. As of July 1, 2004, the proposed effective date, this Commission will exercise exclusive jurisdiction over the

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 23 (citing Midwest June 14, 2004 Protest at 6-9, Docket Nos. ER04-789-000 and ER04-802-000).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 24.

<sup>16</sup> *Id.*

rates, terms and conditions of wholesale electric service and transmission in interstate commerce provided by [Wabash], not the Michigan Commission (i.e., this Commission will be the applicable regulatory authority under the contract, not the Michigan Commission).<sup>17</sup>

### **III. Notice of Filing and Responsive Pleadings**

9. Notice of the Petition was published in the *Federal Register*, 76 Fed. Reg. 13,178 (2011), with interventions and protests due no later than April 4, 2011.

10. A timely motion to intervene, protest and request for dismissal was filed by NREMC. Wabash filed an answer to NREMC's protest and request for dismissal, and NREMC filed a reply to Wabash's answer. NREMC also filed a motion for summary disposition and Wabash filed an answer to NREMC's motion.

#### **A. NREMC Protest and Request for Dismissal**

11. NREMC argues that the Petition should be dismissed as premature because no on-going judicial action exists and the parties are still in negotiations.<sup>18</sup> NREMC states that no issue exists regarding Commission jurisdiction, as the Commission accepted exclusive jurisdiction over the Tariff and the NREMC Rate Schedule in 2004.<sup>19</sup>

12. NREMC states that the only dispute is, as stated in the NREMC Demand Letter, that Wabash must "cure its material breach of the [NREMC Rate Schedule], by restoring [Indiana Commission] rate regulation of its power sales to NREMC if [Wabash] can legally do so."<sup>20</sup> As further stated in the NREMC Demand Letter, "[i]f [Wabash] cannot, or alternatively is unwilling to cure its breach, NREMC is entitled to rescind its obligation to continue purchasing power from [Wabash] based upon [Wabash's] repudiation and material breach of its contract obligations to NREMC."<sup>21</sup> NREMC notes

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<sup>17</sup> *Id.* (citing *Wabash*, 107 FERC ¶ 61,327 at P 12).

<sup>18</sup> NREMC April 4, 2011 Protest at 2-6.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 8 (citing NREMC Demand Letter at 2).

<sup>21</sup> *Id.*

that Wabash did not respond to the NREMC Demand Letter before Wabash filed the Petition, and Wabash only offered NREMC a settlement after filing the Petition.<sup>22</sup>

13. NREMC asserts that the dispute does not implicate Commission jurisdiction, and that resolving the dispute does not require Commission expertise.<sup>23</sup> NREMC argues that this is a matter of contract interpretation and a matter of determining the parties' intent at the time of contract formation.<sup>24</sup> NREMC states that the core issue is whether Wabash, by filing for Commission jurisdiction over the Tariff and NREMC Rate Schedule in 2004, breached the NREMC Rate Schedule provision stating that the rate is subject to the approval of the Indiana Commission.<sup>25</sup>

14. NREMC states that it expressed its belief that Wabash breached the NREMC Rate Schedule in letters NREMC sent to Wabash in January 2004 and March 2004, prior to Wabash filing for Commission jurisdiction, and NREMC states that it has maintained its position continuously since then.<sup>26</sup>

15. NREMC asserts that a public utility such as Wabash may not make a filing with the Commission that is inconsistent with the utility's contractual obligations.<sup>27</sup> NREMC claims that under *Richmond*, Wabash's 2004 Rate Filing with the Commission is invalid because it conflicts with the NREMC Rate Schedule's Indiana Commission approval provision.<sup>28</sup>

16. NREMC also distinguishes the Commission's holding in *Wabash*. NREMC argues that, in *Wabash*, "Midwest contended that the filed Commission rate should not be

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 15 (citing *Arkansas-Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175 (1979) (*Arkla*)).

<sup>24</sup> *Id.* at 15.

<sup>25</sup> *Id.* at 3-4.

<sup>26</sup> *Id.* at 6-8.

<sup>27</sup> *Id.* at 19-21 (citing *Richmond Power & Light v. FPC*, 481 F.2d 490 (D.C. Cir. 1973) (*Richmond*) (finding that a wholesale contract provided for rates to be in parity with rates charged to retail industrial customers, and that a wholesale rate increase filed with the Commission inconsistent with the contract term is void pursuant to *Mobile-Sierra*)).

<sup>28</sup> *Id.* at 5.

applied to Midwest under the contract.”<sup>29</sup> In contrast, NREMC states that it does not question Commission jurisdiction over Wabash’s wholesale electric service and transmission in interstate commerce, or of the rates to be charged under the NREMC Rate Schedule.<sup>30</sup> Rather, NREMC states that it has challenged Wabash’s right under the NREMC Rate Schedule to unilaterally submit to Commission jurisdiction, and has asserted NREMC’s right to seek rescission of the NREMC Rate Schedule due to Wabash’s “unilateral” switch to Commission jurisdiction in violation of the NREMC Rate Schedule’s provision stating that rates are subject to approval of the Indiana Commission.<sup>31</sup>

### **B. NREMC Motion for Summary Disposition**

17. NREMC argues in its motion for summary disposition that the Petition presents no jurisdictional controversy or uncertainty regarding the NREMC Rate Schedule and therefore the matter is ripe for dismissal. NREMC argues that the dispute between the parties is a straightforward breach of contract dispute appropriate for determination by a court of competent jurisdiction. NREMC argues that the only dispute between the parties, which NREMC argues does not implicate Commission jurisdictional responsibilities, is whether Wabash breached the NREMC Rate Schedule when Wabash transferred jurisdiction over it from the Indiana Commission to the Commission. NREMC states that it makes its motion based on NREMC’s recent discovery of two judicial proceedings where, according to NREMC, the courts held that removing Indiana Commission regulation over Wabash’s supply contracts with its members, including the NREMC Rate Schedule, would materially breach the contracts and free Wabash’s members to purchase power elsewhere.<sup>32</sup>

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<sup>29</sup> *Id.* at 22.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 3-5.

<sup>32</sup> NREMC Motion at 2 (citing *In the Matter of Wabash Valley Power Ass’n, Inc.*, 72 F.3d 1305 (7th Cir. 1995) (affirming Wabash’s bankruptcy reorganization plan over objections from Rural Electrification Administration, predecessor to the RUS); *In re: Wabash Valley Power Ass’n, Inc.*, No. IP 91-928-C (S.D. Ind. 1994) (bankruptcy court finding that Rural Electrification Administration’s reorganization plan for Wabash violated 11 U.S.C. § 365 because it provided for the partial assumption of Wabash’s supply contracts without giving effect to their express provision recognizing rate regulation by the Indiana Commission and without honoring their implied provision requiring member control of the Wabash board of directors).

### **C. Wabash Answer to NREMC Motion**

18. Wabash argues that the Commission should reject NREMC's motion because the cases cited by NREMC are distinguishable from the present facts, and in any event, do not alter NREMC's attack on the Commission's jurisdiction and NREMC's attempt to subvert the filed-rate doctrine. Wabash argues that the cases cited by NREMC were based on a situation where the Rural Electrification Administration sought to involuntarily seize control of Wabash from its members, replace the member-controlled board, and arbitrarily impose rate increases to generate sufficient revenues to repay the Rural Electrification Administration debt, with no review by any regulatory authority. Wabash argues that those facts are distinguishable from Wabash's 2004 shift to exclusive Commission jurisdiction, which Wabash argues was voluntary and preserved the key attributes of member control and cost-based rates as determined by the Wabash board. Further, Wabash argues that neither of the cases addressed "long-established judicial and [Commission] precedent that Commission rate regulation can replace state rate regulation without affecting the validity or enforceability of underlying power supply contracts."<sup>33</sup> Wabash argues that, by granting the requested declaratory relief, the Commission will preserve and protect the jurisdiction it has exercised since July 1, 2004 and prevent NREMC from asserting the litigation claims threatened in the NREMC Demand Letter that Wabash argues will collaterally attack the Commission-approved filed rate reflected in the Tariff and NREMC Rate Schedule.

### **IV. Discussion**

#### **A. Procedural Matters**

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), its timely, unopposed motion to intervene serves to make NREMC a party to this proceeding.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Wabash's answer to the NREMC protest and NREMC's reply, and will therefore, reject them. Wabash's answer to NREMC's motion for summary disposition is permissible pursuant to Rule 213(a)(3) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(3) (2011).

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<sup>33</sup> Wabash Answer to NREMC Motion at 2 (citing *Richmond*, 481 F.2d 490, 499 (D.C. Cir. 1973); *The Detroit Edison Co.*, 47 FPC 130, 131 (1972); *Pub. Serv. Co. of Indiana*, 47 FPC 696, 697 (1972), *order on reh'g*, 47 FPC 1382, 1383 (1972)).

## **B. Substantive Matters**

21. Although NREMC acknowledges the Commission's jurisdiction over the Tariff and NREMC Rate Schedule and argues that there is no controversy or uncertainty,<sup>34</sup> we find it is appropriate under the circumstances to grant Wabash's Petition.<sup>35</sup> We will therefore deny NREMC's motion for summary disposition. Accordingly, we grant the Petition and find that, since 2004, the Commission has had exclusive jurisdiction over the Tariff and NREMC Rate Schedule.<sup>36</sup> Any changes to the rates paid by NREMC under the Tariff and NREMC Rate Schedule are subject to approval of the applicable regulatory authorities, and the Commission is the "applicable regulatory authority," with jurisdiction over the rates NREMC pays under the Tariff and the NREMC Rate Schedule and any objections to those rates.<sup>37</sup>

22. Wabash's Petition seeks only a jurisdictional declaration over its Tariff and NREMC Rate Schedule, consistent with the Commission's previous finding in *Wabash*. Therefore, we reject NREMC's breach claims as beyond the scope of this proceeding.

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<sup>34</sup> NREMC April 4, 2011 Protest at 2-5.

<sup>35</sup> See *California Dept. of Water Resources*, 124 FERC ¶ 61,216, at P 12 (2008) (citing *Entergy Nuclear Operations, Inc. v. Consol. Edison Co. of New York, Inc.*, 112 FERC ¶ 61,117, at P 23 & n.27 (2005) ("We have in the first instance the authority to determine the scope of our jurisdiction and to determine, specifically, whether any jurisdictional activities are occurring." (footnote omitted)), *appeal denied, Consol. Edison Co. of New York, Inc. v. FERC*, No. 05-1372 (D.C. Cir. 2008) available at <http://www.ferc.gov/legal/court-cases/opinions/2008/05-1372.pdf>; *New York Power Auth. v. Consol. Edison Co. of New York, Inc.*, 116 FERC ¶ 61,240, at P 26 & n.33 (2006) ("Further, the Supreme Court has affirmed that it is the Commission . . . that must make the factual and legal determinations to define the scope of its own jurisdiction . . . ." (footnote omitted)); *El Paso Natural Gas Co.*, 59 FPC 1209, 1212 (1977) ("The Commission has the authority to determine the reach of its own jurisdiction as a primary responsibility.")).

<sup>36</sup> *Wabash*, 107 FERC ¶ 61,327 at P 12.

<sup>37</sup> *Id.* ("As of July 1, 2004, the proposed effective date, this Commission will exercise exclusive jurisdiction over the rates, terms and conditions of wholesale electric service and transmission in interstate commerce provided by [Wabash], not the Michigan Commission.").

The Commission orders:

(A) The Petition is hereby granted, as discussed in the body of this order.

(B) NREMC's motion for summary disposition is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.