

101 FERC ¶ 61, 182
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Louisville Gas & Electric Company and
Kentucky Utilities Company

Docket No. ER02-2560-000

ORDER ACCEPTING AND SUSPENDING REVISED
INTERCONNECTION AND TRANSMISSION AGREEMENTS AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued November 15, 2002)

1. On September 18, 2002, Louisville Gas & Electric Company (LG&E) and Kentucky Utilities Company (KU) (collectively LG&E/KU), filed to modify the rates for transmission service provided to East Kentucky Power Cooperative (EKPC) under two contracts. In this order, we accept and suspend the proposed rates, to become effective on November 18, 2002, and set them for hearing. In addition, we initiate settlement judge procedures and hold the hearing in abeyance pending settlement negotiations. This action is in the public interest because it provides an opportunity for the parties to develop a more complete factual record upon which the Commission may evaluate the justness and reasonableness of the proposed rates and also provides an opportunity for the parties to avoid the expense of such litigation by informally resolving their differences.

I. Background and Description of the Filing

2. LG&E/KU currently provide transmission service to EKPC, for delivery to EKPC loads served from LG&E/KU's transmission system, pursuant to two agreements: an Interconnection Agreement (IA) dated May 11, 1995,¹ and a Transmission Agreement

¹The IA was accepted to become effective October 22, 1994, by letter order issued July 27, 1995, in Docket No. ER94-209-000, et al. See Kentucky Utilities Company, 72 FERC ¶ 61,097 (1995).

(TA) dated February 9, 1995 (collectively, Agreements).² LG&E/KU are transmission-owning members of Midwest Independent Transmission System Operator, Inc. (Midwest ISO), and each Agreement is a grandfathered agreement under the Midwest ISO open access transmission tariff (OATT).

3. In the instant proceeding, LG&E/KU propose to adjust the rates for certain transmission services provided to EKPC under the Agreements so that the charges reflect the corresponding charges that EKPC would pay if it were a transmission customer of Midwest ISO.³ LG&E/KU explain that the rates currently charged to EKPC under the Agreements are less than the applicable rates for delivery within the LG&E/KU licence plate pricing zone under the Midwest ISO OATT. As such, LG&E/KU state that, in amending their Agreements with EKPC, they seek to eliminate the under-recovery of their transmission revenue requirement, including Midwest ISO charges that they are assessed for service provided under the Agreements.⁴

II. Notices and Interventions

4. Notice of LG&E/KU's filing was published in the Federal Register, with comments, protests, and interventions due on or before October 10, 2002.⁵ On October 10, 2002, EKPC and the Gallatin Steel Company (Gallatin) filed timely motions to intervene and protests. On October 25, 2002, LG&E/KU filed an answer to these protests. On November 4, 2002, EKPC filed an answer in response to LG&E/KU's answer.

²The TA was accepted to become effective February 10, 1995, by unpublished letter order issued June 9, 1995, in Docket No. ER95-580-000.

³LG&E/KU explain that, pursuant to each agreement, LG&E/KU have the unilateral right to file changes to the rates for service to EKPC, with one exception. According to LG&E/KU, this exception involves the "base load" amount of service provided under the IA, the rates for which are fixed for the initial ten-year term of the agreement. Therefore, LG&E/KU state that they are not proposing to change the rates for base load amounts under the IA in this filing. Transmittal Letter at 2-3.

⁴Transmittal Letter at 2.

⁵67 Fed. Reg. 62,047 (2002).

III. Intervenors' Comments

5. EKPC urges the Commission to reject LG&E/KU's filing. EKPC argues that LG&E/KU: (1) have previously contracted away their right to unilaterally seek modification of the Agreements under Section 205 of the FPA; (2) have violated prior Commission orders by failing to safeguard existing grandfathered contracts; and (3) have failed to adequately support the proposed rates. Gallatin, in addition to adopting the arguments made by EKPC, states that LG&E/KU have shortened the initial term of the TA in this filing and argues that this modification of the contract should be rejected since LG&E/KU provide no explanation for this change.

6. With regard to section 205 filing rights, EKPC states that LG&E/KU agreed to surrender these rights in a December 5, 1997 settlement agreement with EKPC resolving issues concerning the then-pending merger between LG&E and KU (Merger Settlement). According to EKPC, the Merger Settlement established rates that would remain fixed for the duration of the Agreements, and the Agreements were subsequently amended to implement the Merger Settlement.⁶ EKPC states that under the terms of the Merger Settlement, EKPC expressly retained its right to make unilateral filings to this Commission to seek rate changes whereas nowhere in the Merger Settlement did LG&E/KU preserve their rights to unilaterally file rate changes. EKPC states that this was intentional, as it was the "quid pro quo" in exchange for EKPC's commitment to not oppose the proposed merger between LG&E and KU. In addition, EKPC argues that while other provisions in the Merger Settlement have explicitly-specified durations,⁷ the Merger Settlement does not establish a sunset date for the transmission rates established therein, short of the expiration of the Agreements. EKPC maintains that, had the parties intended a shorter duration for the transmission rates, they would have specified a sunset date for those rates. Therefore, EKPC argues, the Commission must reject LG&E/KU's rate filing, finding that LG&E/KU have contracted away their section 205 filing rights.

⁶The amendments to the IA and the TA were executed on June 26, 1998, and accepted by unpublished letter order issued August 4, 1998, in Docket Nos. ER98-3637-000 and ER98-3646-000.

⁷EKPC provides Section C.1 as an example of where the parties specifically provided for the duration of a provision that is shorter than the term of the Agreements.

7. EKPC and Gallatin argue that the filing also violates Opinion 453-A,⁸ in which, according to EKPC, the Commission: (1) stated that the rates, terms and conditions of grandfathered agreements will be honored throughout the transition period; (2) held that the Midwest ISO's Schedule 10 cost adder could not be passed through to grandfathered contract customers; and (3) found that any modifications to grandfathered contracts should first be a matter for negotiation between the parties to those contracts.⁹ According to EKPC, LG&E/KU's proposal to alter not only the existing rates, but also the entire rate structure of the Agreements, without first negotiating such changes with EKPC, violates the Commission's directive to honor grandfathered contracts while they are in effect and to renegotiate those contracts to phase in service under the Midwest ISO OATT.¹⁰

8. EKPC argues that LG&E/KU's filing should also be rejected for failure to provide any cost support for the proposed rates. EKPC argues that, in proposing to adopt the Midwest ISO OATT rates, LG&E/KU ignore the fact that the transmission services provided under the Agreements are different from the services provided under the Midwest ISO OATT.¹¹ In addition, EKPC objects to LG&E/KU's failure to consider that the transmission facilities of EKPC and LG&E/KU are highly integrated, and that EKPC may be entitled to a credit for customer-owned transmission facilities in accordance with Section 30.9 of the Midwest ISO OATT.¹² Gallatin argues that LG&E/KU's proposal to adopt the ancillary service rates under the Midwest ISO OATT is inappropriate given that the Agreements do not provide EKPC with the same opportunities to self-provide ancillary services that the Midwest ISO OATT provides.¹³

9. Gallatin argues that LG&E/KU propose, with no explanation, to shorten the initial term of the TA from June 1, 2005, to February 10, 2005. Gallatin explains that the TA is one of three agreements, that, taken together, provide for power service to Gallatin for a

⁸Midwest Independent Transmission System Operator, Inc., *et al.*, Opinion No. 453-A, 98 FERC ¶ 61,141 (2002).

⁹EKPC Protest at 11-12, Gallatin Protest at 4-7.

¹⁰EKPC Protest at 13.

¹¹EKPC Protest at 8.

¹²EKPC Protest at 8-9.

¹³Gallatin Protest at 7-8.

ten-year period ending June 1, 2005. According to Gallatin, the other two contracts, one between EKPC, Owen Electric Cooperative (Owen) (a member of EKPC) and Gallatin, providing for service to Gallatin, and one between EKPC and LG&E, whereby LG&E provides some of the power necessary to serve Gallatin, have ten-year terms ending June 1, 2005. Gallatin argues that, given the context of the development and execution of the TA, and its specific references to the EKPC/Owen/Gallatin contract, it is inconceivable that the parties would have so structured such an important element of their business arrangement as the TA to terminate four months earlier than the termination of the power supply agreements.

IV. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁴ the timely, unopposed motions to intervene serve to make the intervenors parties to this proceeding.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2002), generally prohibits answers to protests, unless otherwise ordered by the decisional authority. In this instance, we will accept the answer of LG&E/KU to the extent that it provides clarification concerning the termination date of the TA. We will reject EKPC's answer.

B. Filing Rights

12. With respect to the issue of whether LG&E/KU retain the authority under section 205 to file changes to the rates for service under the Agreements, we find that LG&E/KU have this right.

13. EKPC has cited no specific language in the Merger Settlement that would limit the filing rights of LG&E/KU. The fact that the Merger Settlement specifically preserved EKPC's filing rights under the Agreements is understandable given that the settlement otherwise foreclosed EKPC's rights to file in opposition to the pending merger. Therefore, we are not persuaded by EKPC's arguments on this point.

¹⁴18 C.F.R. § 385.214 (2002).

14. We also find that Section 15.02 of the IA and Section 14 of the TA contain language which expressly provides either party with the right to unilaterally file with the Commission to seek changes in the rates under the Agreements (with the exception of the rates associated with base load amounts of service under the IA, which LG&E/KU do not seek to change).¹⁵ The amendments to the Agreements to implement the Merger Settlement did not modify these sections or affect LG&E/KU's filing rights in any other

¹⁵Section 15.02 of the IA provides:

(b) Except as provided for in paragraph (c) to this Section 15.02, nothing contained in this Agreement, or in any amendment hereto, or in the Service Schedules or Exhibits attached hereto, shall be construed as affecting in any way the right of either Party from time to time to unilaterally make application to the FERC (or any successor regulatory agency or department having jurisdiction) for the modification of, or change in, the rates and charges contained in this Agreement, or in the Service Schedule or Exhibits attached hereto, under Section 205 of the Federal Power Act...

(c) The charges for area load service for base load amounts as defined in Section 8.03 and as subject to potential reduction in accordance with Section 8.04, are fixed for the initial ten year term of this Agreement. It is the intent of the Parties to this Agreement to eliminate during the ten year initial term, solely with respect to said charges for area load service for base load amounts, [LG&E/]KU's right to make changes in said rates by making unilateral filings with the FERC pursuant to Section 205 of the Federal Power Act and EKPC's right to seek modification of such rates pursuant to Section 206 of the Federal Power Act and the rules and regulations promulgated thereunder...

Section 14 of the TA provides:

Nothing contained in this Agreement shall be construed as affecting or limiting in any way the right of [LG&E/]KU to unilaterally file with the FERC for a change in any aspect of this Agreement including the rates for service hereunder under Section 205 or 206 of the Federal Power Act pursuant to the FERC's Rules and Regulations promulgated thereunder or otherwise prejudice the rights of [LG&E/]KU under the Federal Power Act. EKPC retains whatever rights it has with respect to filing a complaint before the FERC under Section 206 of the Federal Power Act.

way. Rather, language in the amendments makes clear that these sections of the Agreements are not changed and "shall continue to be effective."

15. Finally, while EKPC argues that the language in the amendments and the Merger Settlement permanently fixes the \$0.77kW-month rate for the entire term of the Agreements, there is not express language to this effect.¹⁶ Further, as evidenced by Section 15.02(c) of the IA, which limits the parties' filing rights with respect to base load amounts of service, it is clear that when the parties intended to fix a rate for the term of an agreement, they knew how to do so, and explicitly did so.

16. In sum, without more, we are not persuaded by the interveners' arguments and cannot find that LG&E/KU is prohibited from making section 205 filings.

C. Proposed Rates

17. By basing the proposed rates on the comprehensive transmission cost-of-service and rate formula in Attachment O of the Midwest ISO OATT, which the Commission has recently approved,¹⁷ we find that the filing substantially complies with the Commission's filing requirements and will not reject it for lack of support, as interveners request. However, while we find that the Midwest ISO rate formula provides an adequate starting point for establishing just and reasonable rates under the Agreements, we find that the proposed adoption of the Midwest ISO OATT rates, without adjustment,

¹⁶The relevant provision in Section B.6 of the Merger Settlement reads:

[LG&E/KU] also agree to modify the existing Interconnection Agreement between KU and EKPC to provide that, effective with the date of consummation of the Merger: (1) EKPC will pay LG&E/KU the lesser of \$1.28 per kW per month or a rate calculated using the network transmission service revenue requirement set forth in Attachment H to [LG&E/KU's] open access transmission service tariff that has been authorized by the FERC for transmission of power and energy to all existing EKPC area loads (base and incremental) served from KU transmission lines and the Gallatin Steel load...

¹⁷See Midwest Independent Transmission System Operator, Inc., et al., Opinion 453, 97 FERC ¶ 61,033 (2001), order on reh'g, Opinion No. 453-A, 98 FERC ¶ 61,141 (2002). On October 29, 2002, the Commission filed with the United States Court of Appeals for the District of Columbia Circuit, a voluntary request for remand of the pending appeals of the decisions in Opinion Nos. 453 and 453-A.

may not produce just and reasonable rates under the Agreements, due to some unique elements of the services provided under the Agreements. For instance, for service under the TA, LG&E/KU propose to adopt the Midwest ISO network service rate, which is designed for application to coincident-peak demands, whereas the approach under the TA, which approach appears to be designed to meet the unique power service needs of a single industrial load - Gallatin's steel plant, will continue to utilize a mixture of contract demand and non-coincident peak demand billing determinants. At the hearing established below, the parties should address what adjustments are necessary to address such issues.

18. In addition, interveners have raised issues of material fact concerning LG&E/KU's proposal that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing established below.

19. The Commission's preliminary analysis indicates that the proposed rates have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, the Commission will accept the proposed amendments for filing, suspend them for a nominal period to become effective November 18, 2002, subject to refund, and set them for hearing, as ordered below.

20. In order to provide the parties an opportunity to resolve these matters among themselves, we will hold the hearing in abeyance and direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁸ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁹ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the 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.

¹⁸18 C.F.R. § 385.603 (2002).

¹⁹If 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 this order. The Commission's website contains a list of Commission judges and a summary of their background and experience. (www.ferc.gov - click on Office of Administrative Law Judges).

D. Pass-Through of Midwest ISO Charges

21. Gallatin and EKPC both object to LG&E/KU's proposal to pass the Midwest ISO Schedule 10 cost adder, which is assessed to LG&E/KU for loads served under the Agreements, through to EKPC on the grounds that such pass through of the cost adder to grandfathered contract customers is prohibited by Opinion 453-A.

22. Gallatin and EKPC misread Opinion 453-A. In that order, the Commission was presented with, and rejected, a request by the Midwest ISO transmission owners to generically alter the rates, terms and conditions of grandfathered contracts to allow pass through of the Schedule 10 charges to grandfathered contract customers without an opportunity for case-by-case review to ensure that the rates under the contracts remained just and reasonable.²⁰ Rejection of that proposal to generically alter grandfathered contracts and the existing rates under those contracts, without case-by-case review, cannot be interpreted, as interveners argue, as a general policy that the Commission would categorically disallow recovery from grandfathered contract customers of all charges that Midwest ISO levies on transmission owners for service provided under grandfathered contracts, and we did not intend it as such.

23. In contrast to the generic alteration of grandfathered contracts at issue in Opinion 453-A, we are presented in the instant proceeding with a proposal to change the rates in particular individual contracts. In evaluating whether the proposed rates at issue here reflect the cost of providing service under the Agreements, the charges that Midwest ISO levies on transmission owners for service provided under these grandfathered contracts, including the Schedule 10 charges, may be considered.

E. Honoring Grandfathered Contracts

24. Gallatin and EKPC argue that the filing violates the Commission's finding in Opinion 453-A that the rates, terms, and conditions of grandfathered agreements will be honored throughout the initial six-year transition period under the Midwest ISO OATT and that LG&E/KU, by failing to negotiate a rate increase with EKPC before tendering their filing, have also violated the Commission's finding in that order that any modifications to grandfathered contracts should first be a matter for negotiation between the parties to those contracts.

²⁰See Opinion 453-A, 98 FERC at 61,413.

25. We disagree that LG&E/KU's filing is inconsistent with the Commission's prior decision to allow the rates, terms, and conditions of grandfathered agreements to remain in place during the transition period. As we find above, LG&E/KU possesses the right to unilaterally seek changes to the rates under the Agreements. Thus, we decline to reject the filing as requested.

26. We also will not reject the filing for LG&E/KU's failure to first negotiate a rate increase. In Opinion 453-A, we did not intend that negotiation be mandatory. To the extent that it seems to suggest that, we clarify here that, unless otherwise provided in the grandfathered agreement, we are not requiring negotiation prior to petitioning the Commission for change to the rates, terms or conditions of grandfathered agreements.

F. Initial Term of the TA

27. In their Answer, LG&E/KU state that, in response to Gallatin's concerns, LG&E/KU will agree to either withdraw their amendments to Section 9 of the TA or to specify therein a date of June 1, 2005 for the end of the initial term of that contract. We will accept the modification agreed to by LG&E/KU to specify a date of June 1, 2005 for the end of the initial term of the TA and will direct LG&E to file revised tariff sheets reflecting that commitment within 30 days of the date of this order.

The Commission orders:

(A) LG&E/KU's proposed tariff revisions are hereby accepted for filing and suspended for a nominal period, to become effective November 18, 2002, subject to refund.

(B) 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 the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter 1), a public hearing shall be held concerning the justness and reasonableness of LG&E/KU's proposed tariff revisions. As discussed in the body of this order, the hearing will be held in abeyance to give the parties time to conduct settlement judge negotiations.

(C) Pursuant to Rule 603 of the Commission's Rule of Practice and Procedure, 18 C.F.R. § 385.603 (2002), the Chief Administrative Law Judge is hereby authorized to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603

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and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If the 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 convene a conference in this proceeding to be held within approximately fifteen (15) days of the date the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426. Such 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.

(F) LG&E/KU are hereby directed to file a revision to the TA, as directed in the body of this order, within 30 days of the date of this order.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.