

117 FERC ¶ 61,231
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

E.ON U.S., LLC

Docket Nos. ER06-1458-000,
ER06-1458-001, and
ER06-1458-002

ORDER ACCEPTING PROPOSED SERVICE
AGREEMENTS, SUBJECT TO CONDITIONS, AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued November 27, 2006)

1. On August 31, 2006, as amended on September 21 and 28, 2006, E.ON U.S., LLC, on behalf of its public utility subsidiaries, Louisville Gas and Electric Company (LG&E) and Kentucky Utilities Company (KU) (collectively, LG&E Companies), submitted, pursuant to section 205 of the Federal Power Act (FPA),¹ unexecuted agreements, consisting of: (i) a Network Integration Transmission Service Agreement (Network Service Agreement); and (ii) a Network Operating Agreement (collectively, Service Agreements). The parties to the Service Agreements are LG&E Companies, the transmission owners, acting by or through their Independent Transmission Organization, and East Kentucky Power Cooperative (East Kentucky), the transmission customer. For the reasons discussed below, we will accept the Service Agreements for filing, subject to refund and a nominal suspension, to become effective September 1, 2006, as requested. We will also establish hearing and settlement judge procedures.

Background

2. LG&E Companies state that under their proposed Service Agreements, they will be authorized to provide continued service to East Kentucky, whose prior transmission arrangements were terminated following LG&E Companies' withdrawal from the

¹ 16 U.S.C. § 824d (2000).

Midwest Independent Transmission System Operator, Inc. (Midwest ISO).² LG&E Companies state that in anticipation of their withdrawal, they entered into a settlement agreement with East Kentucky (Settlement) addressing rate issues relating to East Kentucky's use of LG&E Companies' transmission system, *i.e.*, addressing East Kentucky's service to that portion of its native load that is physically interconnected with LG&E Companies' transmission system.³ The settlement addresses these issues with respect to both pre-withdrawal and post-withdrawal transactions.

3. LG&E Companies state that the Settlement also refers to a rate depancaking proposal (a Rate Depancaking Maintenance Plan, or Depancaking Plan), which at the time that the Settlement was executed, was still pending before the Commission in conjunction with LG&E Companies' withdrawal proposal.⁴ LG&E Companies state that

² LG&E Companies' withdrawal became effective August 31, 2006. *See Louisville Gas and Electric Company*, 114 FERC ¶ 61,282 (2006); *E.ON U.S., LLC*, 116 FERC ¶ 61,019 (2006) (order on compliance). *See also Kentucky Utilities Co.*, Docket No. ER06-1124-000, letter order (July 21, 2006) (accepting for filing notice of cancellation of interconnection agreement); *Kentucky Utilities Co.*, Docket No. ER06-1425-000, letter order (September 11, 2006) (accepting for filing notice of cancellation of transmission agreement).

³ *See Louisville Gas and Electric Company*, Docket No. ER06-519-000, delegated letter order (March 17, 2006) (accepting for filing FERC Rate Schedule 400).

⁴ *See Settlement* at section 7(b):

The parties acknowledge that neither can predict conditions that FERC may impose on [LG&E Companies'] exit from the [Midwest ISO]. However, the parties acknowledge further that it is counter-intuitive that FERC would permit [LG&E Companies] to exit [the Midwest ISO] and create a new rate pancake. As such, LG&E commits that it will not seek to abandon the [Depancaking Plan] provisions of its OATT for as long FERC policy favors the elimination or mitigation of rate pancakes. If FERC policy subsequently favors the reinstatement of rate pancaking, LG&E reserves the right at that time to seek similar treatment consistent with then-articulated FERC policy. The parties recognize that this agreement may need to be renegotiated if the Commission fully rejects the [Depancaking Plan] structure. The intent of both parties is that any new agreement between the parties would maintain the benefit of each party's bargain as provided for in this agreement.

under the Depancaking Plan, they would have been required to provide depancaked transmission service for certain transactions between the Midwest ISO and LG&E Companies' transmission system. LG&E Companies note, however, that this aspect of their withdrawal proposal was accepted by the Commission, subject to conditions that have not been satisfied.⁵

4. LG&E Companies state that while the parties have not been able to negotiate rates for depancaked service, they propose here a post-withdrawal depancaked rate modeled on the pre-withdrawal crediting provisions in the Settlement.⁶ LG&E Companies state that their proposal will permit the parties to receive the benefit of their bargain under the Settlement. Specifically, LG&E Companies propose, at section 6.6 of the Network Service Agreement, a crediting provision based on the amount of point-to-point transmission service purchased by East Kentucky from the Midwest ISO for deliveries to East Kentucky's load on LG&E Companies' system. LG&E Companies propose to calculate this credit by multiplying the purchases at issue by a ratio of East Kentucky's load on LG&E Companies' system to East Kentucky's total load. In addition, LG&E Companies propose to cap the amount of eligible purchases that qualify for the credit at \$120,000. LG&E Companies request waiver of the Commission's 60-day advance notice requirement to permit an effective date of September 1, 2006.⁷

⁵ *Midwest ISO Withdrawal Order*, 114 FERC ¶ 61,282 at P 108 (accepting LG&E Companies' rate depancaking proposal subject to revision and the submission of a reciprocity agreement, or in lieu of a reciprocity agreement, a suitable alternative arrangement).

⁶ With respect to pre-withdrawal transactions, LG&E Companies state that under section 9 of the Settlement, LG&E Companies were obligated to provide a monthly transmission credit for Midwest ISO purchases (Monthly Credit) in order to de-pancake rates applicable to East Kentucky's loads. LG&E Companies state that this depancaking was achieved when they reduced their bill to East Kentucky by a credit equal to East Kentucky's Midwest ISO charges, as incurred by East Kentucky to serve the load at issue. LG&E Companies state that the Monthly Credit expired by the terms of the Settlement on the date it withdrew from the Midwest ISO, August 31, 2006.

⁷ *See* 18 C.F.R. § 35.3 (2006).

Notice of Filings and Responsive Pleadings

5. Notice of LG&E Companies' amended filing was published in the *Federal Register*,⁸ with interventions and protests due on or before October 19, 2006. A motion to intervene and protest was timely filed by East Kentucky.

6. East Kentucky asserts that LG&E Companies' load ratio crediting proposal is based on an unsupported premise, *i.e.*, that it is impossible to separate East Kentucky's Midwest ISO purchases used to serve East Kentucky load on LG&E Companies' system from those purchases used to serve East Kentucky load on East Kentucky's system. East Kentucky asserts that this proposal will limit the credits to which East Kentucky is entitled under the Settlement. It also challenges, as unsupported, LG&E Companies' proposed credit cap. East Kentucky further argues that the Network Service Agreement fails to incorporate two adjustments to LG&E Companies' transmission rates that are required under the Settlement. First, East Kentucky asserts that it is entitled to the rate adjustment set forth in section 7(a) of the Settlement.⁹ In addition, East Kentucky argues that LG&E Companies are required to reduce their rate by \$0.038/kW-month through

⁸ 71 Fed. Reg. 61,963 (2006).

⁹ Section 7(a) states as follows:

For rates scheduled to be effective June 1, 2006, June 1, 2007, June 1, 2008, June 1, 2009 and June 1, 2010, LG&E shall include within the revenue credits line item the higher of: (i) the amount of point to point and through and out revenue distributed to the company by [the Midwest ISO] and reported on the applicable line item on LG&E's 2005 Form 1, as provided for and consistent with LG&E Attachment O (which, based on current data, is expected to be reported on Form 1 at approximately \$8-10 million); or (ii) LG&E/KUs actual revenue credits for the applicable, calendar year preceding the June 1 rate-setting date, as reported on LG&E's FERC Form 1.

February 1, 2008 under section 7(d) of the Settlement.¹⁰ East Kentucky also proposes that section 6.1 of the Network Service Agreement be modified to provide that East Kentucky will pay the “Network rate under Schedule 9 of the OATT, subject to the Credits set forth in Paragraph 7 of the [Settlement].” Finally, East Kentucky asserts that the Network Operating Agreement and the Point-to-Point Agreements that will be required by Easy Kentucky must also incorporate its rights under the Settlement.

7. On October 29, 2006, LG&E Companies submitted an answer to East Kentucky’s protest, in which they restate their prior positions.

Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure,¹¹ the timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding. Rule 213(a) of the Commission’s Rules of Practice and Procedure prohibits an answer to a protest unless otherwise permitted by the decisional authority. We are not persuaded to accept LG&E Companies’ answer and will, therefore, reject it.

B. Analysis

9. We find that LG&E Companies’ proposed Service Agreements raise issues of material fact that cannot be resolved based on the record before us. We also find that

¹⁰ Section 7(d) states as follows:

Rate to [East Kentucky] under the LG&E Attachment O will not reflect LG&E’s Virginia facilities and thus will be reduced by \$0.038/kW-month from the rate otherwise calculated pursuant to the LG&E Attachment O. This section 7.d shall remain in effect until February 1, 2008. After that time, LG&E shall be free to include such amounts in LG&E’s transmission rates to [East Kentucky], and [East Kentucky] shall be free to file a complaint at FERC alleging that such amounts are not properly includable in LG&E’s transmission rates to [East Kentucky]. The foregoing amount is a negotiated “black box” settlement amount and shall not affect the calculation of refunds in Docket No. ER02-2560-000, *et al.*

¹¹ 18 C.F.R. § 385.214 (2006).

these issues can be more appropriately addressed and resolved through the parties' continued negotiations, or in lieu of a settlement, after a full evidentiary hearing, as established below.

10. We note, first, that the undisputed intent of the Settlement is to provide transmission service to East Kentucky's load on LG&E Companies' system at a depancaked rate. However, while the Settlement contemplates that these depancaked rates will be implemented under the Depancaking Plan after LG&E Companies' withdrawal from the Midwest ISO, the Depancaking Plan (for the reasons noted above) has not been implemented.¹² While the Settlement also anticipates that the Depancaking Plan might not take effect, it does not specify an alternative arrangement that could be adopted here. Rather, it requires the parties to negotiate alternative arrangements to "maintain the benefit of each party's bargain."¹³ It is clear, then, that continued negotiations offer the best avenue to the fulfillment of this commitment. We encourage the parties to make use of the settlement procedures established below.

11. Our preliminary analysis indicates that proposed 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 Service Agreements for filing, suspend them for a nominal period, and make them effective September 1, 2006, subject to refund, and set them for hearing and settlement judge procedures.

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 under Rule 603 of the Commission's Rules of Practice and Procedure.¹⁴ If the parties desire, they may, by mutual agreement, request a specific judge as a settlement judge in the proceeding;

¹² *See supra* P 3.

¹³ *See supra* note 4.

¹⁴ 18 C.F.R. § 385.603 (2006).

otherwise the Chief Judge will select a judge for this purpose.¹⁵ 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 the commencement of a hearing by assigning the case to a presiding judge.

13. Finally we note that the proposed Network Service Agreement refers to the Settlement. We remind the parties that section 35.1 of the Commission's regulations requires that all rates and charges be specified in the public utility's rate schedule. The Commission consistently has rejected proposals to define rates, term and conditions for service under one rate schedule solely by reference to a different agreement. Accordingly, the final agreements will need to include complete and stated provisions.

The Commission orders:

(A) We accept LG&E Companies' Service Agreements for filing, subject to a nominal suspension, to become effective September 1, 2006, subject to refund and the outcome of hearing and settlement judge procedures, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the 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 the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of LG&E Companies' proposed Service Agreements. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2006), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this

¹⁵ If the parties decide to request a specific judge, they must make their 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 listing of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

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order. Such settlement judge shall have all powers and duties enumerated in Rule 603 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 thirty (30) 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 sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) 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 this proceeding in a hearing room of the Commission, 888 First Street, N.E., Washington, D.C. 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.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.