UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Louisville Gas and Electric Company	)	Docket Nos. ER18-2162-000
Kentucky Utilities Company	)	EC98-2-000

MOTION TO INTERVENE AND PROTEST OF AMERICAN MUNICIPAL POWER, INC.

On August 3, 2018, Louisville Gas and Electric Company ("LG&E") and Kentucky Utilities Company ("KU", collectively, "LG&E/KU"), pursuant to Section 203 and 205 of the Federal Power Act ("FPA")[1] and Parts 33 and 35 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure,[2] submitted a request ("LG&E/KU Filing") to remove certain obligations related to LG&E/KU's merger[3] and withdrawal[4] from the Midcontinent Independent System Operator, Inc. ("MISO"). Specifically, LG&E/KU requests that the Commission now remove its merger-related obligations and the resulting modifications to its FERC First Revised Rate Schedule No. 402 ("Rate Schedule 402") that "de-pancake" transmission rates as a horizontal market power mitigation measure for a portion of LG&E/KU's customers. LG&E/KU Filing at 1.

I. MOTION TO INTERVENE

A. Communications

Communications regarding this matter should be addressed to the following

[1] 16 U.S.C.§ 824b, 16 U.S.C. § 824d.

[2] 18 C.F.R. Part 33, 18 C.F.R. Part 35.

[3] *Louisville Gas & Elec. Co.*, 82 FERC ¶ 61,308 (1998). ("Merger Order").

[4] *Louisville Gas & Elec. Co.*, 114 FERC ¶ 61,282 (2006). ("Withdraw Order").

persons, who also should be designated for service on the Commission's official service list for this proceeding:

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B. Identity of AMP

American Municipal Power, Inc. ("AMP") is a nonprofit Ohio corporation organized in 1971. AMP's members are political subdivisions of their respective domicile states that own and operate municipal electric utility facilities (including generating stations and distribution facilities). AMP's members are located within the PJM Interconnection, L.L.C. ("PJM") and MISO footprints but also outside of regional transmission organization ("RTO") or independent system operator ("ISO") footprints (specifically, in the LG&E/KU service area).

AMP is a full or partial requirements wholesale power supplier for most of its 135 members. AMP's primary purpose is to assist its member communities in meeting their electric and energy needs. This purpose is served in a number of ways, including through the ownership of electric generation, the scheduling and dispatch of member-owned generation, and power supply and transmission arrangements that AMP makes with third parties at the request of and on behalf of its members.

C. AMP's Interest in this Proceeding

Several of AMP's members are located in Kentucky. These members purchase wholesale transmission service from LG&E/KU, giving them a direct interest in this proceeding. Accordingly, AMP and its members have direct and substantial interests in the outcome of this proceeding. Those interests cannot be adequately represented by any other party, and, for these reasons, intervention by AMP and its members clearly is justified and consistent with the public interest. For these reasons, AMP should be permitted to intervene in this proceeding.

II. INTRODUCTION AND BACKGROUND

In 1997, LG&E and KU filed a joint merger application[5] under FPA Section 203[6] requesting approval of the power supply system agreement, transmission coordination agreement and approval of their single-system open access transmission tariff. In its Order approving the proposed merger, the Commission analyzed the request under FPA Section 203(a), which requires the Commission to "approve a proposed merger if it finds that the merger 'will be consistent with the public interest.'"[7] To determine a proposed merger's consistency with the public interest, the Commission looked to the merger's effect on competition, rates and regulation.[8] Ultimately, after looking at these factors, the

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[5] *Application of Louisville Gas & Elec. Co., et al for Approval of Merger & Related Authorizations*, FERC Docket No. EC98-2-000 (October 9, 1997).

[6] 16 U.S.C. § 824b.

[7] 16 U.S.C. § 824b(a).

[8] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Statutes and Regulations P 31,044 (1996), order on reconsideration, Order 592-A, 79 FERC 61,321 (1997).

Commission approved the merger subject to the condition "that the Merger Applicant's proposed mitigation measure and ratepayer protection mechanism, in conjunction with LG&E's and KU's participation in the [MISO], will ensure that the proposed merger is consistent with the public interest."[9]

In 2005, LG&E/KU filed another proposal, under FPA Sections 203 and 205,[10] to withdraw their transmission facilities from the operational control of MISO. In its review of LG&E/KU's request to withdraw from MISO ("2006 Withdraw Order"),[11] the Commission noted that the 1998 Merger Order relied on LG&E/KU's participation in MISO to alleviate concerns of horizontal market power and particularly, the availability of transmission service at non-pancaked rates.[12] In order to address the Commission's concern that the withdrawal from MISO eliminated the protections against horizontal market power and pancaked rates, the Commission required LG&E/KU to either enter into a reciprocity agreement with MISO to avoid pancaked rates *or* to have an alternative proposal with its wholesale customers wishing to access MISO's markets ("KU requirements customers") (AMP Kentucky members). The Commission conditioned their approval of LG&E/KU's MISO withdrawal on their "willingness and ability to shield its KU requirements customers from any re-pancaking of rates for transmission service between [LG&E/KU's]

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[9] Merger Order pg.7.

[10] *Louisville Gas & Elec. Co., Filing to Changes its Method of Complying with Order Nos. 888 and 889 and Merger Conditions*, FERC Docket Nos. ER06-20-000 and EC06-4-000 (October 7, 2005).

[11] *Louisville Gas and Electric Co.,* 114 FERC ¶ 61,282 (2006) ("Withdraw Order"). *See also E. On U.S. LLC, et al.*, 116 FERC ¶ 61,019, FERC Docket No. ER06-20-002 (July 7, 2006) ("Withdraw Compliance Order").

[12] Withdraw Order P 109.

transmission system and the remaining members of the [MISO]."[13] Further, the Commission stated that if LG&E/KU could not form an agreement with MISO to address re-pancaking, LG&E/KU "must file a mechanism to hold the KU requirements customers harmless against any increased transmission costs resulting from rate re-pancaking"[14]

While MISO and LG&E/KU were unable to reach an agreement to address the Commission's re-pancaking concerns, LG&E/KU worked with its requirements customers to revise its Rate Schedule 402 to ensure that its customers were not subject to rate pancaking.[15] Under the revised Rate Schedule 402, LG&E/KU agreed to "shield [Merger Mitigation De-Pancaking] Parties from any pancaking of transmission and ancillary services charges for MMD Transactions."[16] In order to do so, LG&E/KU would provide credits to customers wishing to "drive-in" or "drive-out" of MISO.[17] These credits would ensure that customers would only be subject to charges that would have been incurred if LG&E/KU had remained in MISO rather than charging for both MISO and LG&E/KU transmission services. In this filing, LG&E/KU requests the authority to remove these customer protections upon which the Commission specifically conditioned the LG&E/KU merger as well as the withdrawal from MISO.

III. PROTEST

Under section 203 of the FPA, the Commission is required to ensure that a

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[13] Withdraw Order P 112.

[14] Withdraw Order P 113.

[15] *See E.On. U.S., LG&E and KU Revised Rate Schedule 402*, FERC Docket No. ER06-1279-001 (September 27, 2006) ("Rate Schedule 402").

[16] Rate Schedule 402 at 2.

[17] Rate Schedule 402 at 2-3.

proposed transaction is consistent with the public interest, which includes finding that the transaction does not adversely impact competition.[18] Accordingly, for purposes of section 203(b), the appropriate standard to apply is whether LG&E/KU's merger continues to be consistent with the public interest if the mitigation measures previously required are removed.[19] LG&E/KU has the burden of demonstrating that removal of Rate Schedule 402's Merger Mitigation De-Pancaking ("MMD") requirements is in the public interest and have not made such a demonstration. Rather, removal of the required mitigation measures would adversely impact competition and result in unjust, unreasonable and unduly discriminatory rates, terms and conditions of service. Moreover, LG&E/KU presents no reasoning or justification for the Commission to reverse this long-standing policy and precedent to re-pancake transmission charges.

A. LG&E/KU's proposal must be in the public interest and result in just and reasonable rates.

LG&E/KU argues that the Commission's section 203 analysis is limited to merger-related changes in market concentration: "When analyzing the changed facts that warrant removal of MMD under section 203, the relevant analytical question is whether the competitive effect of the merger of LG&E and KU has been adequately mitigated – i.e. whether losing LG&E as a competitor to KU is still relevant. The question is not whether

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[18] *See Merger Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, reconsideration denied, Order No. 592-A, 79 FERC ¶ 61,321; *see also* FPA Section 203 Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 (2007), order on clarification and reconsideration, 122 FERC ¶ 61,157 (2008). *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), order on reh'g, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), order on reh'g, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, order on reh'g, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

[19] *See PPL Corp.*, 153 FERC ¶ 61,257 (2015); *MidAmerican Energy Holdings Co.*, 131 FERC ¶ 61,004 (2010).

the LG&E/KU market would satisfy the section 205 market power standards for market-based rate authority." Transmittal Letter at 23. LG&E/KU's suggested review under section 203 as being limited to the merger alone however misses the mark.

When considering the removal of a mitigation measure under FPA Section 203(b), the Commission looks to whether the removal of the mitigation measure would render the result consistent with the public interest.[20] Much like the initial review of a merger request that resulted in the mitigation, the Commission's review of subsequent requests to remove mitigation involves an examination of the impact on competition of unmitigated market power, among other things.[21] To conduct a review of whether to maintain or remove the MMD as consistent with the public interest, the Commission should not limit its review to the merger alone but should also look to LG&E/KU's withdrawal from MISO. In both LG&E/KU's merger and its withdrawal from MISO, the Commission conditioned its approvals on LG&E/KU's obligation to maintain de-pancaked transmission rates in order to address horizontal market power concerns.[22] In approving the LG&E/KU merger, the Commission predicated its approval on LG&E/KU joining MISO to avoid pancaked transmission charges. Additionally, the Commission's concerns regarding pancaked transmission rates remained when it conditionally approved LG&E/KU's withdrawal from MISO and ultimately led to the development of Rate Schedule 402. Removing Rate Schedule 402's MMD provisions therefore cannot be addressed in isolation from

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[20] *See, for example, Westar Energy, Inc.*, 164 FERC ¶ 61,060 (2018); *PPL Corporation RJS Power Holdings LLC*, 153 FERC ¶ 61,257 (2015); *MidAmerican Energy Holdings Company Scottish Power PLC*, 131 FERC ¶ 61,004 (2010).

[21] *Id.*

[22] See Withdrawal Order at P 109, 112.

LG&E/KU's withdrawal from MISO.

The Commission must also ensure that the resulting rates from the LG&E/KU Filing are just and reasonable. Under FPA Section 205, the Commission is charged with ensuring that all rates used in connection with the transmission of electric energy are just and reasonable and not unduly discriminatory.[23] LG&E/KU filed its request to remove the MMD provisions under both FPA sections 203 and 205. Regardless, the Commission examines the transaction's impact on rates under FPA section 203 as well.[24] The Commission's review does not end with mitigating the effects of the merger alone but must include LG&E/KU's withdrawal from MISO and also ensure that the resulting rate is just and reasonable.

B. Under the appropriate legal standard, removal of MMD Protections in Rate Schedule 402 is against the public interest.

Despite LG&E/KU's assertions, removing the MMD protections from its Rate Schedule 402 would result in insufficient competition in the Balancing Authority Area and would run counter to the public interest. Rate Schedule 402, which contains the MMD provisions, dictates[25] that it is to be analyzed under FPA Section 203(b), which provides that the Commission may grant any application for an order under this section so long as the Commission finds the terms and conditions "necessary or appropriate to secure the maintenance of adequate service and the coordination *in the public interest* of facilities subject to the jurisdiction of the Commission."[26] (emphasis added). The Commission may

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[23] 16 U.S.C. 824d.

[24] *See New England Power Co., et. al.*, 82 FERC 61,179 (1998).

[25] *See E.On. U.S., LG&E and KU Revised Rate Schedule 402*, FERC Docket No. ER06-1279-001 (September 27, 2006).

[26] 16 U.S.C.§ 824b.

also, for good cause shown, make such orders supplemental to any order made under this section as it may find necessary or appropriate. *Id.*

LG&E/KU's argument that removal of the mitigation measures is warranted boils down to one proposition: "wholesale markets have changed fundamentally in 20 years, resulting in far more options for competitive supply than the KU Requirements Customers had in 1998." Transmittal Letter at 28. While there may be more competitive suppliers willing to provide service to LG&E/KU customers at rates that are significantly lower than KU's cost-based rates through 2029, that fact is irrelevant to the reasons that the mitigation measures are required. Transmittal Letter at 20.

As LG&E/KU notes, the purpose of the mitigation measures LG&E/KU seeks to remove is to eliminate duplicative transmission charges for transactions between LG&E/KU and MISO. Transmittal Letter at 28. However, if there is a lack of available transmission or the firm transmission charges make those offers uneconomic, then the number of potential capacity and energy suppliers willing to sell to LG&E/KU customers to relieve them from above market rates that are otherwise applicable is rendered completely meaningless. It is in fact the case that most options available for LG&E/KU customers to be served by competitive wholesale suppliers still require firm transmission to be purchased, which is the entire point of providing the credit on MISO transmission service.

Today, LG&E/KU has external connections to East Kentucky Power Cooperative, MISO, PJM, the Ohio Valley Electric Corporation ("OVEC") and Tennessee Valley Authority ("TVA"). From AMP's experience in attempting to arrange for capacity and energy to Kentucky Municipals, AMP is aware that monthly firm Available Transmission

Capability ("ATC") is available directly from PJM, as well as wheeled through OVEC, in most months. There is some availability to wheel across TVA from either MISO or Duke Energy. However, there is not always firm transmission available for each month of the year, and there is very limited or no capacity in some months. Moreover, some of these paths would also require the purchase of multiple wheels, making purchases uneconomic. Accordingly, while there is some opportunity for competitive suppliers to provide capacity and energy to LG&E/KU customers, it is limited by ATC and would become practically none if the mitigation measures are removed.

LG&E/KU's request is purely anticompetitive. LG&E/KU noted that although it has had the obligation to credit MISO transmission charges since its departure from MISO, its actual crediting obligation had been limited until recently, when its requirements customers began providing notice of termination of contracts. It was not until a majority of the Kentucky municipal customers provided such notice of termination that LG&E/KU sought to re-pancake the rates.

As LG&E/KU noted in the filing, the capacity and energy supply deals that the Kentucky municipal customers are being offered by competitive suppliers are significantly lower than KU's cost-based rates through 2029. Transmittal Letter at 20. Removing the MMD from Rate Schedule 402 would have an adverse effect on competition by removing the very protections that the Commission insisted upon in the 1998 Merger Order and in the 2006 Withdraw Order. Re-pancaking transmission charges would signal to wholesale customers to not participate in other markets and that even an attempt to avoid above-market charges from the incumbent provider will result in duplicative transmission charge – essentially stifling competition for wholesale customers within LG&E/KU. The fact that the de-pancaking measures have allowed for some varying competition thus far is not an indication that they are no longer needed. The Commission should deny LG&E/KU's request to stifle competition.

LG&E/KU's request also fails to justify a reversal of the Commission's policy against pancaked transmission charges. In Order 2000, the Commission sought to foster participation in Regional Transmission Organizations in order to "promote efficiency in wholesale electricity markets and to ensure that electricity consumers pay the lowest price possible for reliable service."[27] A central tenet of those goals was to de-pancake transmission charges along utility borders.[28] As the Commission stated in Order 2000, "the distances need not be great to be assessed two, three or more access charges for a single transaction. This duplication can severely restrict the area in which generation can economically be secured."[29] Further, the Commission found one of the many benefits of greater RTO participation would be the "*the elimination of rate pancaking,* […] All of these improvements to the efficiencies in the transmission grid will help improve power market performance, which will ultimately result in lower prices to the Nation's electricity consumers."[30] (emphasis added). LG&E/KU's Filing, however, essentially requests for the Commission to reverse its long-standing policy on de-pancaking to the detriment of wholesale customers within LG&E/KU's footprint. Granting LG&E/KU's filing would erect

[27] *Regional Transmission Organizations, Order No. 2000,* 89 FERC ¶ 61,285 (Final Rule) (December 20, 1999) ("Order 2000").

[28] Order 2000 at 516. "[T]he elimination of rate pancaking as a central goal of our RTO policy. … We affirm that the RTO tariff must not result in transmission customers paying multiple access charges to recover capital costs."

[29] Id.

[30] Order 2000 at 89.

costly barriers for wholesale customers wishing to further interact with markets outside of the LG&E/KU zone – the precise concerns that the Commission expressed in the 1998 Merger Order and the 2006 Withdraw Order and that were ultimately addressed in Rate Schedule 402. Removing de-pancaking measures simply does not comport with past Commission policy.

C. Removal of MMD Protections results in unjust and unreasonable rates.

Section 205 of the FPA requires the Commission to ensure that rates and charges for the transmission of electric energy must be just and reasonable.[31] However, LG&E/KU's requested removal of the de-pancaking provisions within Rate Schedule 402 would result in an unjust and unreasonable rate for LG&E/KU's transmission customers.

As the Commission stated in Order 2000, a single transaction can easily cross multiple transmission borders resulting in pancaked – and unjust and unreasonable – rates.[32] Removal of the Rate Schedule 402 protections would force LG&E/KU customers to pay more for the same transmission service than they would have prior to LG&E/KU leaving MISO. Currently under Rate Schedule 402, LG&E/KU customers purchasing from inside the MISO border pay the MISO charge and then receive a credit for those charges against LG&E/KU's transmission charges.[33] Without the mitigation measures, LG&E/KU customers would have to pay transmission fees not only from the MISO system to the LG&E/KU border *but also* across the LG&E/KU system to the delivery point, in addition to any other transmission system charges the transaction may pass through. While

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[31] 16 U.S.C. § 824a.

[32] Order 2000 at 89.

[33] LG&E/KU Filing at 15.

LG&E/KU was in MISO, these transmission charges were nonexistent and transmission rates were de-pancaked in that transmission customers paid only one charge across the MISO system to their delivery point. Without the current MMD provisions resulting from the merger *and* withdrawal orders, LG&E/KU customers must not only procure firm transmission (as discussed above) in order to reach into wholesale markets, but must also cross several transmission systems, incurring multiple transmission fees resulting in unjust and unreasonable rates. Such a result is contrary to the Commission's Order 2000 and results in unjust and unreasonable rates. It is also discriminatory since similarly situated customers in MISO's footprint are not required to pay the LG&E/KU pancaked charges.

IV. CONCLUSION

WHEREFORE, for the reasons stated herein, AMP respectfully requests that the Commission reject LG&E/KU's Filing and maintain the MMD de-pancaking requirements under Rate Schedule 402.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused a copy of the foregoing document to be served on each person included on the official service list maintained for this proceeding by the Commission's Secretary, by electronic mail or such other means as a party may have requested, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated this the 2nd day of October, 2018.

/s/ Kristin Rothey
Kristin Rothey

4845-3265-2404, v. 8