166 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Louisville Gas and Electric Company Kentucky Utilities Company	Docket Nos. EC98-2-001 ER18-2162-000

ORDER CONDITIONALLY GRANTING REQUEST TO REMOVE MITIGATION AND REJECTING SECTION 205 FILING WITHOUT PREJUDICE

(Issued March 21, 2019)

1. On August 3, 2018, Louisville Gas and Electric Company (LG&E) and Kentucky Utilities Company (KU) (together, LG&E/KU) filed, pursuant to sections 203(b) and 205 of the Federal Power Act (FPA)[1] and parts 33 and 35 of the Commission's regulations,[2] a request to remove a market power mitigation measure[3] imposed to resolve horizontal market power concerns originating from LG&E and KU's merger in 1998 (Merger)[4] and from LG&E/KU's subsequent withdrawal from the Midcontinent Independent System Operator, Inc. (MISO) in 2006.[5]

---

[1] 16 U.S.C. §§ 824b(b), 824d (2012).

[2] 18 C.F.R. pts. 33, 35 (2018).

[3] Joint Application of Louisville Gas and Electric Co. and Kentucky Utilities Co., Docket Nos. EC98-2-001 and ER18-2162-000 (filed Aug. 3, 2018) (LG&E/KU Filing).

[4] *Louisville Gas and Elec. Co.*, 82 FERC ¶ 61,308 (1998) (Merger Order). An LG&E affiliate, LG&E Electric Marketing Inc., was also a party to the merger.

[5] *Louisville Gas and Elec. Co.*, 114 FERC ¶ 61,282 (2006) (MISO Withdrawal Order); *see also E.ON U.S. LLC*, 116 FERC ¶ 61,019 (conditionally accepting LG&E/KU's compliance filing submitted in response to the MISO Withdrawal Order), *order on reh'g*, 116 FERC ¶ 61,020 (2006) (denying requests for rehearing and granting certain requests for clarification of the MISO Withdrawal Order).

2. For the reasons discussed below, we conditionally grant the request in LG&E/KU's Filing pursuant to FPA section 203(b) to remove the market power mitigation, subject to implementation of a transition mechanism for certain power supply arrangements, and we reject without prejudice LG&E/KU's Filing submitted pursuant to section 205.

I. Background

A. Description of LG&E/KU

3. LG&E/KU states that both LG&E and KU are transmission-owning utilities operating in the Commonwealth of Kentucky and wholly owned subsidiaries of PPL Corporation. Both utilities provide retail electric service and open access transmission service pursuant to a joint Open Access Transmission Tariff (Tariff) on file with the Commission.[6]

B. The Merger

4. The Commission approved the Merger subject to several conditions. At the time, LG&E/KU's analysis indicated that the Merger would increase market concentration beyond the thresholds specified in the Merger Policy Statement.[7] The increase in market concentration was due to customers in the KU destination market (KU Destination Market)[8] losing LG&E as a viable competitor to KU as a result of the Merger. To address this concern, LG&E/KU committed to mitigate the potential for increased

---

[6] LG&E/KU notes that it has delegated certain tariff administration responsibilities for its Tariff to an Independent Transmission Organization (currently TranServ International, Inc.) and reliability requirements to a Reliability Coordinator (currently Tennessee Valley Authority (TVA)). LG&E/KU Filing at 5.

[7] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, at 30,129 (1996) (cross-referenced at 77 FERC ¶ 61,263) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997).

[8] At the time of the Merger, the KU Destination Market was comprised of a group of twelve customers that had requirements contracts with KU (KU Requirements Customers). The KU Requirements Customers included the Cities of Barbourville, Bardstown, Bardwell, Benham, Corbin, Falmouth, Madisonville, Nicholasville, Paris, Providence; Frankfort Electric and Water Plant Board (Frankfort); and Berea College (Berea). Merger Order, 82 FERC at 62,215 n.7.

horizontal market power in the KU Destination Market through several mitigation measures and ratepayer protection mechanisms.[9]

5. The Commission concluded that LG&E/KU's proposed measures, in conjunction with its participation in the then-newly formed MISO, would ensure that the Merger would not adversely affect competition.[10] The Commission explained that independent system operators like MISO could improve market competition by ensuring the expansion of geographic markets by eliminating pancaked transmission rates in regions. The Commission found that, through the availability of transmission service at a single rate, the number of suppliers able to reach markets, such as the KU Destination Market, would increase, thereby lowering market concentration.[11] The Commission noted, however, that it would evaluate any subsequent request by LG&E/KU to withdraw from MISO in relation to its effect on competition in the KU Destination Market, and that it would use its authority under FPA section 203(b) to address any additional concerns that such a request would raise. The Commission stated:

> Our approval of the merger is based on [LG&E/KU's] continued participation in [MISO]. If [LG&E/KU] seek[s] permission to withdraw from [MISO] proceedings or the ISO once it is operating, we will evaluate that request in light of its impact on competition in the [KU Destination Market], use our authority under Section 203(b) of the FPA to address any concerns, and order further procedures as appropriate. We find that the combination of [LG&E/KU's] commitments and [its] continued participation in [MISO] satisfies our concerns

---

[9] Specifically, LG&E/KU proposed its joint membership in MISO together with selling energy through a trust intended to prevent them from withholding supply to drive prices above competitive levels in the KU Destination Market until 2005 and reducing the base rates of the KU Requirements Customers. *Id.* at 62,222. In addition, LG&E/KU filed for approval to transfer operational control over its transmission facilities to MISO, which was known as the Midwest Independent System Operator, Inc. at the time.

[10] *Id.* at 62,214. The Commission also found that, with additional commitments not relevant here, the Merger would not affect vertical competition, rates, or regulation. *Id.* at 62,224-25.

[11] *Id.* at 62,222.

> regarding the merger's impact on competition. Thus, we believe there is no reason to investigate competitive issues further.[12]

C. LG&E/KU's Withdrawal from MISO

6. In 2005, after consummating the Merger and joining MISO, LG&E/KU filed a proposal to withdraw its transmission facilities from MISO. In evaluating the proposal, the Commission noted that several legal standards applied, including that the proposal must satisfy the concerns underlying the conditions established by the Commission in connection with the Merger, "particularly those relating to independence and rate de-pancaking."[13]

7. As part of its proposal to withdraw from MISO, LG&E/KU proposed to maintain de-pancaked transmission rates in its stand-alone Tariff. Specifically, LG&E/KU proposed that transmission rates for new service into and through its system from MISO would remain de-pancaked, subject to certain exceptions and reciprocal treatment from MISO.[14] LG&E/KU claimed that maintaining de-pancaked rates would address the horizontal market power issues identified by the Commission in the Merger Order.

8. The Commission agreed with LG&E/KU, finding that, with some revisions, and submission of the anticipated reciprocity arrangement with MISO, LG&E/KU's de-pancaking proposal would maintain de-pancaked rates between its system and MISO, thereby establishing mitigation comparable to that provided by membership in MISO.[15] The Commission clarified, however, that, in the event LG&E/KU was unable to secure a commitment from MISO, it must have in place an alternative proposal to address the

---

[12] *Id.* at 62,222-23.

[13] MISO Withdrawal Order, 114 FERC ¶ 61,282 at P 3. The conditions regarding independence referred to vertical market power concerns the Commission identified in the Merger Order. The Commission also noted that LG&E/KU's proposal to withdraw from MISO must satisfy the terms of the MISO Transmission Owners' Agreement and its associated hold harmless obligation to de-pancake rates related to then-existing transmission service. *Id.* PP 3-4. The vertical market power concerns and LG&E/KU's hold harmless obligation are not relevant here.

[14] *Id.* PP 99-100. LG&E/KU also proposed to maintain de-pancaked rates for new service into and through its system from PJM Interconnection L.L.C. (PJM), subject to reciprocal treatment from PJM.

[15] *Id.* PP 108-110.

horizontal market power concerns. Therefore, the Commission stated that "we condition our section 203 approval of [LG&E/KU's] withdrawal on [LG&E/KU's] willingness and ability to shield its [KU Requirements Customers] from any re-pancaking of rates for transmission service between [LG&E/KU's] transmission system and the remaining members of [MISO]."[16] The Commission suggested that one way LG&E/KU could mitigate the re-pancaking of rates for KU Requirements Customers was to "reimburse[KU Requirements Customers] for all additional costs incurred by such customers that are due to re-pancaking of transmission and ancillary service rates and that occur as a result of [LG&E/KU's] withdrawal."[17] The Commission clarified that "[LG&E/KU] could set up a mechanism under [the Tariff] that grants a credit to [KU Requirements Customers] for any re-pancaked charges those customers pay to [MISO]."[18]

D. <u>The Merger Mitigation De-pancaking Mechanism</u>

9. The Commission ultimately accepted an LG&E/KU transmission rate de-pancaking mechanism, which is memorialized in and implemented through LG&E/KU First Revised Rate Schedule No. 402 (Rate Schedule No. 402).[19] Specifically, Rate Schedule No. 402 establishes the Merger Mitigation De-pancaking mechanism (De-pancaking Mitigation) to shield the "MMD Parties," which are the KU Municipals,[20] the

---

[16] *Id.* 112.

[17] *Id.* P 113.

[18] *Id.* at n.70.

[19] *E.ON U.S., LLC*, Docket No. ER06-1279-001 (Nov. 9, 2006) (delegated order). The transmission rate de-pancaking mechanism went through several iterations before it was finalized in Rate Schedule No. 402 and accepted. LG&E/KU includes in its filing a full description and procedural history of the rate de-pancaking mechanism. *See* LG&E/KU Filing at 11-16.

[20] Rate Schedule No. 402 defines "KU Municipals" as Frankfort Electric and Water Plant Board (Frankfort), Owensboro Municipal Utilities (Owensboro), and the Cities of Barbourville, Bardstown, Bardwell, Benham, Berea, Corbin, Falmouth, Madisonville, Nicholasville, Paris, and Providence. Except for Owensboro, these same entities are also KU Requirements Customers.

TVA Distributor Group,[21] and any future Requirements Customers[22] (together, Rate Schedule No. 402 Customers) "from any re-pancaking of rates for transmission service between [LG&E/KU's] transmission system and the remaining members of [MISO]."[23]

10. Section 1 of Rate Schedule No. 402 specifies that, for De-pancaking Mitigation transactions where a Rate Schedule No. 402 Customer purchases electricity from a source in MISO for delivery to such customer's load interconnected with the LG&E/KU transmission system: (1) LG&E/KU will credit that Rate Schedule No. 402 Customer's transmission and ancillary service charges by an amount equal to the MISO transmission and ancillary service charges that Rate Schedule No. 402 Customer incurs to deliver such purchased electricity to the MISO-LG&E/KU interface;[24] and (2) the Rate Schedule No. 402 Customer shall continue to be responsible for the LG&E/KU transmission and ancillary service charges incurred to deliver such electricity to its loads on the LG&E/KU system.[25] For De-pancaking Mitigation transactions in which a Rate Schedule No. 402 Customer sells electricity generated with a source in LG&E/KU's control area and a sink in MISO: (1) LG&E/KU shall waive the LG&E/KU transmission and ancillary service charges that a Rate Schedule No. 402 Customer would have incurred to transmit the electricity to the MISO-LG&E/KU interface; and (2) the Rate Schedule No. 402 Customer shall continue to be responsible for all MISO transmission and ancillary service

---

[21] Rate Schedule No. 402 defines "TVA Distributor Group" as the Electric Plant Board of the City of Paducah, Kentucky (Paducah), Princeton Electric Plant Board (Princeton), Glasgow Electric Plant Board, and Hopkinsville Electric Plant Board, all of which are located in Kentucky. Also included in the "TVA Distributor Group" is the Duck River Electric Membership Corporation of Shelbyville, Tennessee (Duck River). None of these entities are KU Requirements Customers.

[22] Rate Schedule No. 402 defines "Requirements Customer" as "transmission customers in the KU destination market (as that term is used and defined in certain Commission orders, 82 FERC ¶ 61,308, 114 FERC ¶ 61,282, and 116 FERC ¶ 61,019) who purchase requirements electric service from LG&E/KU."

[23] Rate Schedule No. 402 at 1 (quoting MISO Withdrawal Order, 114 FERC ¶ 61,282 at P 112).

[24] However, no credit shall be applied for any MISO charge for service that is not provided and charged by LG&E/KU, i.e., where there would be no pancaked charge. Rate Schedule No. 402, § 1.a.i.

[25] *Id.*

charges to deliver such electricity to any point within the MISO system beyond the MISO-LG&E-KU interface.[26] Rate Schedule No. 402 also provides that:

> The [De-pancaking Mitigation] . . . is intended to implement the Section 203 mitigation requirements ordered by the Commission in *Louisville Gas and Electric Co.*, 82 FERC ¶ 61,308 (1998), as modified by *Louisville Gas and Electric Co.*, 114 FERC ¶ 61,282, and *E.ON U.S., LLC*, 116 FERC ¶ 61,019 (2006). Any proposed changes to these requirements are governed by Section 203 of the FPA.[27]

E. The LG&E/KU Filing

11. LG&E/KU requests that the Commission find under FPA section 203 that LG&E/KU can remove the De-pancaking Mitigation provisions from Rate Schedule No. 402.[28] LG&E/KU argues that 20 years of market development and the addition of new sources of supply illustrate that the De-pancaking Mitigation is no longer necessary to mitigate the horizontal market power concerns raised by the Merger. LG&E/KU proffers evidence that over 100 suppliers can now reach the KU Destination Market and provides a Delivered Price Test to demonstrate the effect of removing the De-pancaking Mitigation on market size and market concentration levels. LG&E/KU further asserts that, without the need for mitigation, the De-pancaking Mitigation results in an unjust and unreasonable transmission rate that is unduly preferential to Rate Schedule No. 402 Customers.

II. Notice of Filing and Responsive Pleadings

12. Notice of the LG&E/KU Filing was published in the *Federal Register*, 83 Fed. Reg. 40,035 (2018), with interventions and protests due on or before August 24, 2018. The comment date was subsequently extended to October 2, 2018.[29]

---

[26] *Id.* § 1.a.ii.

[27] *Id.* § 1.a.v.

[28] LG&E/KU Filing at 21.

[29] Errata Notice Extending Comment Period, Docket No. EC98-2-001 (Aug. 8, 2018).

13. The Kentucky Public Service Commission filed a notice of intervention and comments.

14. Kentucky Municipals[30] filed a motion to intervene and a protest, request for summary disposition, and conditional request for hearing.[31] KMPA filed a supplement to the Kentucky Municipals Protest.

15. St. Joseph II, LLC (St. Joseph II) filed a motion to intervene, protest, and comments. Big Rivers Electric Corporation (Big Rivers), American Municipal Power, Inc. (American Municipal Power), Coalition of Midwest Power Producers, Inc. (Midwest Power Producers) also filed motions to intervene and protests.

16. Kentucky Industrial Utility Customers, Inc. (Kentucky Industrials) and East Kentucky Power Cooperative, Inc. (East Kentucky Power) filed motions to intervene and comments.

17. LG&E/KU filed an answer to Kentucky Municipals' motion for summary disposition. KMPA and American Municipal Power filed answers to the protests and comments.

18. LG&E/KU filed an answer to the protests and comments.[32] St. Joseph II and Kentucky Municipals filed answers to the LG&E/KU Answer. LG&E/KU filed responses to the answers. KMPA filed a subsequent answer, as did Kentucky Municipals.

---

[30] Kentucky Municipals are the Kentucky Municipal Energy Agency and each of its members; the Kentucky Municipal Power Agency and its two members, Paducah and Princeton (together, KMPA); and Duck River. The intervening municipal utility members of the Kentucky Municipal Energy Agency are Frankfort; the Cities of Barbourville, Bardwell, Benham, Berea, Corbin, Falmouth, Madisonville, Paris, and Providence, Kentucky; and Owensboro. Motion to Intervene on Behalf of Kentucky Municipals, Docket Nos. EC98-2-001 and ER18-2162-000, at 1 (filed Sep. 12, 2018).

[31] Kentucky Municipals, Protest, Request for Summary Disposition, and Conditional Request for Hearing of Kentucky Municipals, Docket Nos. EC98-2-001 and ER18-2162-000 (filed Oct. 2, 2018) (Kentucky Municipals Protest).

[32] Louisville Gas and Electric Company and Kentucky Utilities Company, Motion for Leave to Answer and Answer, Docket Nos. EC98-2-001 and ER18-2162-000 (filed Oct. 26, 2018) (LG&E/KU Answer).

19. On January 30, 2019, the Commission issued an order tolling time for action on the LG&E/KU Filing for an additional 180 days.[33]

III. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

22. Kentucky Municipals move for summary disposition, arguing that summary denial of LG&E/KU's request to remove the De-pancaking Mitigation is warranted based on Kentucky Municipals' protest, including the accompanying affidavits and exhibits.[34] In the alternative, Kentucky Municipals request that the Commission set the matter for hearing. LG&E/KU opposes the motion for summary disposition, arguing that Kentucky Municipals have not submitted a proper motion for summary disposition and have mischaracterized the legal questions before the Commission.[35] We dismiss as moot the motion for summary disposition and request for hearing given our order in this proceeding.

[33] *Louisville Gas and Elec. Co.*, 166 FERC ¶ 61,068 (2019).

[34] Kentucky Municipals Protest at 66-67.

[35] Louisville Gas and Electric Co. and Kentucky Utilities Co., Answer to Motion for Summary Disposition, Docket Nos. EC98-2-001 and ER18-2162-000, at 3-7 (filed Oct. 17, 2018).

B. Substantive Matters

1. Analysis of Section 203(b) Issues

a. Applicable Standard of Review

i. LG&E/KU Filing

23. According to LG&E/KU, under FPA section 203(b), the Commission "looks to see if the Commission can still find the underlying transaction in the public interest after the [merger] commitment is lifted."[36] LG&E/KU points out that "the Commission's section 203 analysis is limited to merger-related changes in market concentration."[37] LG&E/KU claims that, when analyzing the changed facts that warrant removal of the De-pancaking Mitigation under FPA section 203, the relevant 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.[38] LG&E/KU states that this "changed facts and circumstances" review is consistent with the approach taken by other antitrust agencies. LG&E/KU maintains that the underlying Merger commitment (i.e., membership in MISO) that gave rise to the De-pancaking Mitigation was not mandated by the Commission. LG&E/KU states that, in other words, the Commission merely found membership in MISO – and later the De-pancaking Mitigation – to be sufficient to satisfy concerns at the time each was offered.[39]

24. In addition, LG&E/KU argues that the KU Requirements Customers have no right to indefinite mitigation because Commission policy supports time-limited mitigation. LG&E/KU asserts, for example, that, in addressing time limitations on hold harmless commitments, the Commission decided to retain a five-year commitment and explained that it is difficult to administer such commitments over extended periods of time. LG&E/KU contends that this same rationale should also apply to evaluating the duration of other merger conditions.[40] In addition, LG&E/KU posits that behavioral remedies that are imposed or accepted by other antitrust agencies (i.e., the U.S. Department of Justice

[36] LG&E/KU Filing at 22.

[37] *Id.* at 23 (emphasis omitted).

[38] *Id.*

[39] *Id.* at 23-24.

[40] *Id.* at 24-25.

and the Federal Trade Commission) are typically time-limited, usually between five to 10 years, or much shorter, depending on the circumstances.[41]

ii. Comments and Protests

25. Protestors disagree with LG&E/KU's analysis and conclusion regarding the applicable standard of review under FPA section 203(b). Kentucky Municipals, for example, assert that LG&E/KU must show that removal of the De-pancaking Mitigation is consistent with the public interest. They assert that the relevant question is whether re-pancaking has an adverse effect on competition, rates, or regulation.[42] According to Kentucky Municipals, this analysis should be forward-looking, comparing the effect of the "transaction" (i.e., removal of the De-pancaking Mitigation) to the situation that will apply in the future if the proposed transaction does not occur. Kentucky Municipals contend that the "transaction" is not LG&E's merger with KU, but rather the removal of the De-pancaking Mitigation.[43]

26. Kentucky Municipals assert that LG&E/KU avoids this question and, instead, focuses on whether the Commission would require it to join MISO or de-pancake rates if the Merger took place today.[44] However, Kentucky Municipals contend that the section 203 comparison here should be whether allowing pancaked rates is consistent with the forward-looking public interest. According to Kentucky Municipals, this is shown through LG&E/KU's 2006 commitments to the Illinois Municipal Energy Agency and the Indiana Municipal Power Agency to de-pancake rates, and if LG&E/KU's commitments were limited to the consequences of the Merger, LG&E/KU would not have extended de-pancaking to the Illinois Municipal Energy Agency and the Indiana Municipal Power Agency because both of these loads are outside of the KU Destination Market.[45]

27. Kentucky Municipals argue that a forward-looking section 203 analysis is consistent with both the Federal Trade Commission precedent cited by LG&E/KU as well as the provisions of Rate Schedule No. 402. Kentucky Municipals state that, "[a]s written in 2006, [Rate Schedule No. 402] was not intended merely 'to implement the

[41] *Id.* at 25-26.

[42] Kentucky Municipals Protest at 24-26.

[43] *Id.* at 26-27.

[44] *Id.* at 27 (citing LG&E/KU Filing at 21, 28, and 54).

[45] *Id.* at 27-28.

[1998] Section 203 mitigation requirements;' rather, it was intended to implement those requirements 'as modified by *Louisville Gas & Electric Co., et al.*, 114 FERC ¶ 61,282 (2006), and *E.ON U.S., LLC*, 116 FERC ¶ 61,019 (2006).'"[46] Kentucky Municipals assert that, consequently, Rate Schedule No. 402 is broader in scope, establishing new obligations that LG&E/KU accepted to ensure that post-2006 transactions between MISO and the LG&E/KU balancing authority area would be no more pancaked than if LG&E/KU had remained in MISO.[47]

28. According to Kentucky Municipals, by erroneously framing the question, LG&E/KU ignores broader Commission policy against pancaked rates, which is relevant here. Kentucky Municipals argue that, because the Commission seeks to prevent harm to transmission-dependent third parties that results when a transmission owner withdraws from a regional transmission organization (RTO), de-pancaking rates was a necessary component of the mitigation that LG&E/KU agreed to in order to withdraw from MISO. Further, Kentucky Municipals assert that the De-pancaking Mitigation was broader in scope to prevent competition from deteriorating in 2006, illustrated by the definition of "MMD Parties" in Rate Schedule No. 402 that encompasses entities that enjoyed de-pancaking as a result of LG&E/KU's participation in MISO. Kentucky Municipals contend that the Commission decided to allow withdrawal only if it avoided making markets, which had improved from 1998 to 2006, more uncompetitive as of 2006. Kentucky Municipals argue, similarly, that the Commission should consider it a given that markets are overall more competitive in 2018 than they were in 2006, and instead evaluate whether a change to the De-pancaking Mitigation, as of 2018, retains that competition.[48]

29. The Midwest Power Producers also argue that the De-pancaking Mitigation reflected in Rate Schedule No. 402 was not meant to be time-limited in duration, so LG&E/KU's focus on the historical framework simply serves to complicate the proceeding. As a result, the Midwest Power Producers explain that the Commission should evaluate whether removal of the De-pancaking Mitigation would prospectively be in the public interest, which is the standard contemplated by Rate Schedule No. 402.[49]

---

[46] *Id.* at 28-29 (emphasis in original).

[47] *Id.* at 29-30.

[48] *Id.* at 30-33.

[49] Coalition of Midwest Power Producers, Motion to Intervene and Protest, Docket Nos. EC98-2-001 and ER18-2162-000, at 8-9 (filed Oct. 2, 2018) (Midwest Power Producers Protest).

30. American Municipal Power argues that the appropriate standard to apply is whether the Merger continues to be consistent with the public interest if the mitigation measures previously required are removed.[50] American Municipal Power argues that, when considering the removal of mitigation under section 203(b), the Commission looks to whether removal of the mitigation would render the result consistent with the public interest, or, in other words, "an examination of the impact on competition of unmitigated market power."[51] American Municipal Power argues that the Commission should not limit its review to the Merger alone but also to LG&E/KU's withdrawal from MISO.[52]

31. St. Joseph II argues that removing the De-pancaking Mitigation is subject to the requirements of FPA sections 203, 205, and 206, or, in other words, subject to a finding that removing the De-pancaking Mitigation is consistent with the public interest, permitted under Rate Schedule No. 402's terms, will not harm competition, and is otherwise just and reasonable and not unduly preferential or discriminatory.[53]

iii. Answers and Replies

32. LG&E/KU contends that protestors misstate the legal standard by arguing that the De-pancaking Mitigation arose solely out of LG&E/KU's 2006 withdrawal from MISO. LG&E/KU asserts that, contrary to protestors' arguments, the Commission, in the Withdrawal Order, continued to link mitigation for the KU Requirements Customers to the conditions that arose in the Merger and that Rate Schedule No. 402 did not create any new obligations or conditions on LG&E/KU.[54] Further, LG&E/KU states that, because the Commission lacks authority to review a transmission owner's withdrawal from an RTO under section 203(a), review of LG&E/KU's withdrawal from MISO could only relate to conditions imposed in the Merger.[55]

---

[50] American Municipal Power, Inc., Motion to Intervene and Protest, Docket Nos. EC98-2-001 and ER18-2162-000, at 5-6 (filed Oct. 2, 2018) (American Municipal Power Protest).

[51] *Id.* at 7.

[52] *Id.* at 7-8.

[53] St. Joseph II, LLC, Motion to Intervene, Protest, and Comments, Docket Nos. EC98-2-001 and ER18-2162-000, at 3-5 (filed Oct. 2, 2018) (St. Joseph II Protest).

[54] LG&E/KU Answer at 9-15.

[55] *Id.* at 15-17.

33. LG&E/KU also posits that Kentucky Municipals misrepresent the Commission's policy on de-pancaked transmission rates because, among other reasons, there is no general policy against pancaked transmission rates. LG&E/KU claims, in a similar vein, that contrary to Kentucky Municipals' arguments, the De-pancaking Mitigation only applies to Owensboro and the TVA Distributors Group because they were already parties, along with the KU Requirements Customers, to the original Rate Schedule No. 402. LG&E/KU points out that its arrangements with the Illinois Municipal Energy Agency and the Indiana Municipal Power Agency were unique and unrelated to pancaking between LG&E/KU and MISO.[56]

34. LG&E/KU contends that Kentucky Municipals, KMPA, and other protestors argue that LG&E/KU must recreate RTO conditions for customers in perpetuity. However, LG&E/KU argues that there is no right to perpetual RTO membership because (1) Order No. 2000 and the MISO Withdrawal Order indicate that RTO membership is voluntary and (2) the express terms of Rate Schedule No. 402 allow LG&E/KU to seek changes to the De-pancaking Mitigation under section 203. LG&E/KU suggests that Rate Schedule No. 402 Customers may join an RTO if they so choose because most of the Rate Schedule No. 402 Customers who are currently or will soon be using De-pancaking Mitigation are only a few miles away from transmission-owning utilities that are part of either PJM or MISO.[57]

35. In their reply, Kentucky Municipals reiterate that the standard of review in this proceeding is whether removing the De-pancaking Mitigation satisfies the Commission's forward-looking section 203 public interest analysis. Kentucky Municipals argue that the terms of Rate Schedule No. 402 contemplate this standard, which LG&E/KU agreed to, regardless of whether the Commission lacks the authority under section 203 to evaluate withdrawal from an RTO.[58] Kentucky Municipals additionally assert that the original mitigation—MISO membership—was intended to be structural, and when LG&E/KU sought to withdraw from MISO, it provided the De-pancaking Mitigation as a way to replicate that structural remedy, similar to a public utility seeking to reacquire assets that it was previously required to divest as structural mitigation. Kentucky Municipals agree that there is no perpetual right to the De-pancaking Mitigation and another mitigation

[56] *Id.* at 17-22.

[57] *Id.* at 22-25.

[58] Kentucky Municipals, Motion for Leave to Reply and Reply, Docket Nos. EC98-2-001 and ER18-2162-000, at 2-4 (filed Dec. 6, 2018) (Kentucky Municipals Reply).

measure can replace the original structural mitigation.[59] Kentucky Municipals assert that the analysis here, under the forward-looking test, is a comparison of the presently authorized, non-pancaked future to the proposed, pancaked future, and this comparison implicates the Commission's policy against pancaked rates.[60] In addition, Kentucky Municipals suggest that LG&E/KU's standard of review contradicts the basis on which the Commission required de-pancaked rates in 2006—to "maintain the expanded geographic scope of the [KU Destination Market]."[61]

36. LG&E/KU, in its response, asserts that the correct standard of review is whether the competitive circumstances that gave rise to the horizontal market power mitigation (i.e., membership in MISO) have changed, such that it is no longer necessary to continue that mitigation in its current form (i.e., de-pancaked rates under Rate Schedule No. 402). LG&E/KU argues that Kentucky Municipals are incorrect that removing the De-pancaking Mitigation should be considered a new transaction under FPA section 203 because there is no basis to conclude that the parties to Rate Schedule No. 402 agreed to treat changes to the De-pancaking Mitigation as related to anything other than the Merger. LG&E/KU points out that the purpose of articulating section 203 as the standard of review in Rate Schedule No. 402 was simply to memorialize an understanding that another standard besides FPA sections 205 and 206 would apply and that the reasonable interpretation of this provision is that review of changes to the De-pancaking Mitigation relates back to the Merger.[62]

37. In addition, LG&E/KU argues that there is no justification for Kentucky Municipals' argument that LG&E/KU's membership in MISO was intended to be structural mitigation. LG&E/KU asserts that the hypothetical involving a utility seeking to reacquire generation that it previously divested does not apply here because that utility would be engaging in a new transaction; LG&E/KU reiterates that there is no new transaction here. In addition, LG&E/KU argues that, if there were a larger prohibition against pancaked rates, as Kentucky Municipals suggest, the Commission would have required LG&E/KU to provide de-pancaked rates between the LG&E/KU balancing authority area and MISO for all current and future transmission customers, which it did not do; the Commission required de-pancaked rates only for the KU Requirements

[59] *Id.* at 5-6.

[60] *Id.* at 6-9.

[61] *Id.* at 9.

[62] Louisville Gas and Electric Co. and Kentucky Utilities Co., Motion for Leave to Respond and Response, Docket Nos. EC98-2-001 and ER18-2162-000, at 4-8 (filed Dec. 21, 2018) (LG&E/KU Response).

Customers. Lastly, LG&E/KU points out that, contrary to Kentucky Municipals' arguments, the Commission did not evaluate whether mitigation was necessary in 2006; instead, the Commission's authority to establish mitigation arose from the Merger.[63]

iv. Commission Determination

38. LG&E/KU's request that the Commission remove the De-pancaking Mitigation from Rate Schedule No. 402 was submitted pursuant to FPA section 203(b), which states:

> The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination of the public interest of facilities subject to the jurisdiction of the Commission. *The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.*[64]

39. We note at the outset that, by their very nature, each request made pursuant to FPA section 203(b) that the Commission terminate or amend previously ordered market power mitigation conditions is unique, and as such, the Commission has applied a fact-specific evaluation to these requests.[65] LG&E/KU's request here likewise is unique both in terms of the mitigation previously imposed and subsequently revised by the Commission.

40. In *Westar*, the Commission held that the FPA section 203 public interest standard should apply to section 203(b) requests to terminate or amend a condition as follows:

> Under section 203 of the FPA, the Commission is required to ensure that a proposed transaction is consistent with the public interest, which includes finding that the transaction does not adversely impact competition. Accordingly, for

---

[63] *Id.* at 13-16.

[64] 16 U.S.C. § 824b(b) (emphasis added).

[65] *See, e.g.*, *Westar Energy, Inc.*, 164 FERC ¶ 61,060 (2018) (*Westar*); *PPL Corp.*, 153 FERC ¶ 61,257 (2015) (*PPL*); *Louisville Gas and Elec. Co.*, 137 FERC ¶ 61,195 (2011); *Pub. Serv. Co. of New Mexico*, 135 FERC ¶ 61,230 (2011) (*PSNM*); *MidAmerican Energy Holdings, Co.*, 131 FERC ¶ 61,004 (2010) (*MidAmerican*).

> purposes of section 203(b), the appropriate standard to apply here is *whether to continue to find that Westar's acquisition of the Facility is consistent with the public interest if the mitigation measures and reporting requirements previously required are removed.*[66]

The Commission's prior FPA section 203(b) cases describe the section 203 public interest standard in comparable terms.[67]

41. As explained above, the De-pancaking Mitigation exists because the Merger was originally conditioned on LG&E/KU's membership in MISO in order to mitigate the Merger's effect on horizontal competition in the KU Destination Market. The Commission found that participation in MISO would eliminate pancaked rates, which in turn would increase the number of suppliers able to reach the KU Destination Market, thereby expanding the geographic scope of the market and adequately lowering market concentration.[68] Later, when the Commission addressed LG&E/KU's withdrawal from MISO, the Commission found that the De-pancaking Mitigation would maintain rate de-pancaking between the LG&E/KU market and the footprint of the remaining MISO membership, thereby providing mitigation comparable to that achieved by its prior membership in MISO.[69]

---

[66] *Westar*, 164 FERC ¶ 61,060 at P 15 (emphasis added) (citations omitted).

[67] *See, e.g., PPL*, 153 FERC ¶ 61,257 at P 33 ("[T]he proposed modification will continue to ensure that the transaction has no adverse effect on horizontal market power and is consistent with the public interest."); *Louisville Gas and Elec. Co.*, 137 FERC ¶ 61,195 at P 39 ("Applicants' proposal continues to satisfy the Commission's concerns with regard to horizontal competition."); *PSNM*, 135 FERC ¶ 61,230 (accepting PSNM's contention that "circumstances have changed since the 2005 Authorization Order that demonstrate that the Market Monitor and the Semi-Annual Planning Reports are no longer necessary."); *MidAmerican*, 131 FERC ¶ 61,004 at P 16 ("[T]he question is whether the Commission can continue to find that MidAmerican Holdings' acquisition of PacifiCorp is consistent with the public interest if the independent market monitor is terminated.").

[68] Merger Order, 82 FERC at 62,222-23; *see also* MISO Withdrawal Order, 114 FERC ¶ 61,282 at P 109.

[69] MISO Withdrawal Order, 114 FERC ¶ 61,282 at P 110. This finding was based on the Commission's determination that de-pancaking transmission rates between MISO and the LG&E/KU market would be an adequate substitute for the mitigation provided by MISO membership, and no Delivered Price Test of the LG&E/KU market was

42. Accordingly, consistent with the Commission's prior findings, the Commission may find that the Merger continues to be consistent with the public interest without the De-pancaking Mitigation if LG&E/KU has demonstrated that loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers after the mitigation is removed. We address this issue in the following section.

43. In addition, we reject arguments made by LG&E/KU, on the one hand, that there must be a time limitation on the De-pancaking Mitigation and by certain intervenors, on the other hand, that the De-pancaking Mitigation was intended to replace structural mitigation and therefore must be kept in place permanently. While we acknowledge that the antitrust agencies may have policies regarding the length of behavioral and structural mitigation, the Commission operates under different statutory authority than these agencies, and FPA section 203 requires the Commission to ensure that mergers are consistent with the public interest. Therefore, absent a specific finding in an original FPA section 203 order that establishes time limits on mitigation, we will apply no specific timing requirements in our consideration of such mitigation.

44. Because the De-pancaking Mitigation was implemented to remedy a horizontal market power concern, in evaluating the LG&E/KU Filing, we will solely consider the effect of terminating the De-pancaking Mitigation on horizontal competition, and we will not consider the effects of termination on the other public interest issues that the Commission also considers in evaluating an application for the approval of a transaction pursuant to FPA section 203(a), i.e., vertical competition, rates and regulation, and whether doing so would result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.[70] This approach is consistent with the Merger Order, where the Commission conditioned its approval on LG&E/KU's membership in MISO, explaining that participation would ameliorate the adverse effects of the transaction on horizontal competition in the KU

---

conducted. Further, MISO membership was intended to address vertical competition concerns with the Merger, and in the MISO Withdrawal Order, the Commission imposed separate conditions intended to preserve mitigation of LG&E/KU's vertical market power. *Id.* P 80. Those conditions related to vertical market power are not at issue here.

[70] *See, e.g.*, *Westar*, 164 FERC ¶ 61,060 at PP 15-16 (limiting analysis of FPA section 203(b) request to effect on competition prong where mitigation was established to address adverse effects on competition); *PPL*, 153 FERC ¶ 61,257 at PP 28-33 (same); *MidAmerican*, 131 FERC ¶ 61,004 at PP 15-18 (same); *but see Louisville Gas and Elec. Co.*, 137 FERC ¶ 61,195 at PP 39-40 (considering competition, rates, and regulation prongs of public interest standard where mitigation was established to address adverse effects on competition).

Destination Market and that, if LG&E/KU withdrew from MISO, the Commission would evaluate such a request in light of its impact on competition in that market.[71]

b. Effect on Competition

45. As discussed below, we find that the Merger continues to be consistent with the public interest without the De-pancaking Mitigation because the record shows that loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers after the mitigation is removed. However, to ensure that certain customers that have already provided notice and acted in reliance on the De-pancaking Mitigation retain access to alternative competitive supply arrangements entered into while the mitigation was in effect, we require LG&E/KU provide a transition mechanism for these customers.

i. LG&E/KU's Analysis

46. According to LG&E/KU, the circumstances that gave rise to the horizontal market power mitigation required in the Merger proceeding and modified to be the De-pancaking Mitigation no longer exist because wholesale markets have fundamentally changed in the past 20 years, which has resulted in more options for competitive supply today than the KU Requirements Customers had in 1998. Specifically, LG&E/KU argues that the Commission's policies, such as those in Order Nos. 888, 2000, 2003, 890, and 1000, have promoted the development of competitive wholesale markets. As a result, LG&E/KU explains that markets first-tier to the LG&E/KU balancing authority area have greatly expanded since 1998, when there were only eight adjacent utilities that had service territories either in Kentucky or in states bordering Kentucky, making up a small geographic area. LG&E/KU states that opportunities for competitive supply in the first-tier markets today, which include MISO, PJM, and TVA, have improved, and that capacity from these markets can compete with LG&E/KU to serve the KU Requirements Customers. LG&E/KU states that, because the LG&E/KU balancing authority area consists of non-contiguous service territories scattered throughout the state and engulfed by MISO, PJM, and TVA, Rate Schedule No. 402 Customers are now geographically situated to access supply in these first-tier markets. LG&E/KU contends that many of these transmission-dependent utilities are in rural areas where building transmission lines is much easier than in densely populated areas, and because loads are small in these rural areas, building 138 kV and 69 kV transmission lines would also be sufficient to provide service to these areas. LG&E/KU explains that the amount of third-party supply in first-

---

[71] Merger Order, 82 FERC at 62,222-23; *see also* MISO Withdrawal Order, 114 FERC ¶ 61,282 at P 5 (finding that LG&E/KU's proposal satisfied the Commission's concerns relating to horizontal market power provided that LG&E/KU ensured that loads located in the KU Destination Market do not pay pancaked transmission rates).

tier markets has also grown since 1998, from approximately 76,000 MW then to approximately 400,000 MW in 2017.[72]

47. LG&E/KU argues that the KU Requirements Customers' access to this available first-tier capacity is shown by their contracting patterns after LG&E/KU's withdrawal from MISO. LG&E/KU notes that, after their requirements contracts with LG&E/KU were terminated in 2015 and 2017, respectively, two KU Requirements Customers, the Cities of Benham and Paris, have already found competing supply from Paris's diesel-fired generation and from resources in MISO.

48. In addition, LG&E/KU asserts that a larger group of KU Requirements Customers, which joined together to form the Kentucky Municipal Energy Agency to issue several Requests for Proposals, have recently procured supply that they will use beginning in 2019.[73] LG&E/KU states that the Kentucky Municipal Energy Agency has held four Request for Proposal cycles. The first two Request for Proposal cycles, one for coal-based, natural gas combined cycle, and other peaking or reserve resources, and the other for peaking proposals only, resulted in 34 different proposals from 13 separate suppliers.[74] LG&E/KU explains that the Kentucky Municipal Energy Agency chose 35-40 percent of their Designated Network Resources to be located in MISO, whereas 60-65 percent are located elsewhere, suggesting that, for the majority of their resources, transmission charges will be unaffected by the removal of the De-pancaking Mitigation.[75]

49. According to LG&E/KU, the third and fourth Request for Proposal cycles, which were for renewable resources and natural gas combined cycle resources, yielded 210 proposals from 38 different entities and 8 proposals, respectively.[76] LG&E/KU notes that one response to a Request for Proposal cycle even proposed to construct a new combined-cycle power plant in Kentucky to serve Kentucky Municipal Energy Agency load, which illustrates sufficient time has passed to plan for and engage in new construction. Further, according to LG&E/KU, the Requests for Proposals responses show that sellers in organized markets are able to sell into the LG&E/KU balancing authority area, regardless of the incentives that result from RTO market rules and the fact

---

[72] LG&E/KU Filing at 28-36.

[73] *Id.* at 36-37.

[74] *Id.* at 36-38.

[75] *Id.* at 20.

[76] *Id.* at 19-20.

that Electric Quarterly Report data does not show significant prior sales in the LG&E/KU balancing authority area.[77]

50. LG&E/KU contends that its Delivered Price Test corroborates these results. As a threshold matter, LG&E/KU asserts that "the [Delivered Price Test] analysis is not required by the Commission's regulations for filings such as this" and that, as a result, "it is more appropriate to use the [Delivered Price Test] to corroborate real-world data instead of the reverse."[78] LG&E/KU's Delivered Price Test indicates that there is at least 2,818 MW of delivered Available Economic Capacity[79] across all ten season/load periods, which LG&E/KU argues is sufficient to meet the 706 MW of the Rate Schedule No. 402 Customers' peak load, regardless of the De-pancaking Mitigation.[80] LG&E/KU also explains that the Delivered Price Test shows that more than 100 entities, largely utilities and merchant generators, have Available Economic Capacity that is deliverable into the LG&E/KU balancing authority area. LG&E/KU notes that, although the Delivered Price Test may overstate the number of suppliers willing to sell into the LG&E/KU balancing authority area due to wholesale customers' preferences for long-term supply arrangements, the Delivered Price Test corroborates that the large suppliers revealed in the Delivered Price Test model are the same ones that responded to the Request for Proposal cycles.[81]

51. LG&E/KU's Delivered Price Test[82] shows that, without the De-pancaking Mitigation, the LG&E/KU balancing authority area is highly concentrated in three of

[77] *Id.* at 38-40.

[78] *Id.* at 41.

[79] "Available Economic Capacity" is each supplier's amount of capacity that could compete in the relevant geographic market given market prices, running costs, and transmission availability, and subtracts the supplier's native load obligation from its capacity and adjusts transmission availability accordingly.

[80] LG&E/KU Filing at 41-42.

[81] *Id.* at 43.

[82] The Delivered Price Test determines the pre- and post-transaction market shares from which the change in market concentration, or the change in the Herfindahl-Hirschman Index (HHI), due to a proposed transaction can be derived. The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered

10 season/load periods and moderately concentrated in seven of 10 season/load periods. Without the De-pancaking Mitigation, using base prices, LG&E/KU's market share ranges from 15.2 percent to 31.3 percent in off-peak periods and from 25.3 percent to 47 percent in peak periods. Removal of the De-pancaking Mitigation results in three screen failures in the Winter Peak, Winter Off-Peak, and Shoulder Off-Peak season/load periods, during which the LG&E/KU market is moderately and highly concentrated.[83] Despite these results, LG&E/KU contends that there is substantial supply that is economic and deliverable to the LG&E/KU balancing authority area.[84]

52. Lastly, LG&E/KU also suggests that the Commission consider other mitigating factors: (1) LG&E/KU has not sought market-based rate authority in the LG&E/KU balancing authority area; (2) LG&E/KU credits 75 percent of its off-system sales margins to native load customers; (3) the KU Requirements Customers already have long-term third-party supply; and (4) LG&E/KU has delegated transmission-related activities to third parties in compliance with the MISO Withdrawal Order.[85]

---

to be unconcentrated; markets in which the HHI is greater than or equal to 1,000, but less than 1,800 points, are considered to be moderately concentrated; markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In the Merger Policy Statement, the Commission adopted the 1992 Federal Trade Commission/Department of Justice Horizontal Merger Guidelines, which state that in a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails its screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; s*ee also Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

[83] LG&E/KU Filing, Ex. LG&E/KU-2.4 at 1. The results of LG&E/KU's Delivered Price Test also are sensitive to price changes. If prices increase by 10 percent, removal of the De-pancaking Mitigation results in no screen failures, whereas if prices decrease by 10 percent, removal of the De-pancaking Mitigation results in five screen failures in the Winter Peak, Shoulder Peak, Summer Off-Peak, Winter Off-Peak, and Shoulder Off-Peak season/load periods, during which the LG&E/KU market is moderately concentrated. *Id.*, Ex. LG&E/KU-2.4 at 2.

[84] *Id.* at 44-46.

[85] *Id.* at 46-48.

ii. Protests and Comments

53. Kentucky Industrials support the LG&E/KU Filing and argue that, because Rate Schedule No. 402 Customers have access to at least 172 suppliers in PJM and MISO and because LG&E/KU does not have enough meaningful independent capacity to serve as an alternative supplier to Rate Schedule No. 402 Customers, the De-pancaking Mitigation is no longer necessary to mitigate horizontal market power concerns.[86]

54. Kentucky Municipals disagree, arguing that re-pancaking rates harms competition. Kentucky Municipals point out that the results of LG&E/KU's Delivered Price Test show that removing the De-pancaking Mitigation causes screen failures in the Winter Peak period when the market is highly concentrated (i.e., an HHI of 2,090) and in the Winter Off-Peak and Shoulder Off-Peak periods when the market is moderately concentrated (i.e., HHIs of 1,174 and 1,135, respectively). According to Kentucky Municipals, LG&E/KU attempts to downplay these screen failures by arguing that LG&E/KU's market share does not increase if the De-pancaking Mitigation is removed and that only other suppliers benefit from the increase in overall market concentration. Kentucky Municipals assert that, contrary to these arguments, the Commission's test focuses on whether there is an overall harm to competition and that, in at least three season/load periods, removing the De-pancaking Mitigation raises competitive concerns.[87]

55. Kentucky Municipals provide a Delivered Price Test that they contend corrects for certain errors in LG&E/KU's Delivered Price Test that understate the adverse effect of re-pancaking on competition. Specifically, Kentucky Municipals argue that LG&E/KU's Delivered Price Test: (1) incorrectly assumed that each MISO or PJM seller had a self-dispatch plan that did not involve selling uncommitted capacity into the MISO or PJM market (in other words, the "opportunity costs" of each MISO and PJM seller); (2) was based on a historical study period instead of the forward-looking analysis required by the Commission and did not include upcoming retirements, such as that of the Elmer Smith generation station (Elmer Smith Unit 1 or Elmer Smith Facility); and (3) found that 1,000 MW of power from TVA was economically available when TVA is statutorily prohibited from selling power to any Kentucky Municipal in Kentucky. After correcting for these alleged errors, Kentucky Municipals explain that, because re-pancaking would add as much as $12.41/MW of wheeling charges to the delivered price of supply in MISO, thousands of megawatts of MISO supply becomes uneconomic after re-pancaking. Kentucky Municipals argue that, as a result, their Delivered Price Test shows that re-pancaking significantly increases market concentration, causing five screen

[86] Kentucky Industrial Utility Customers, Inc., Motion to Intervene and Comments, Docket Nos. EC98-2-001 and ER18-2162-000, at 7-8 (filed Oct. 2, 2018).

[87] Kentucky Municipals Protest at 37-39.

failures for the Summer Peak, Summer Off-Peak, Winter Peak, Winter Off-Peak, and Shoulder Peak periods that involve HHI increases exceeding 3,000 points.[88]

56. Kentucky Municipals also assert that actual market interactions confirm that re-pancaking harms competition. Kentucky Municipals state that they retained a consultant to survey their power supply options, including the possibility of continuing to purchase their power from KU. Kentucky Municipals assert that the consultant concluded that, had there been no De-pancaking Mitigation, his firm would have been unable to advise the KU Requirements Customers that there were sufficient viable alternative power supply options to justify terminating their requirements contracts with KU. Further, Kentucky Municipals state that the consultant explained that, if transmission rates are re-pancaked, it would reduce the likelihood that he could recommend that the two KU Requirements Customers who have not terminated their KU contracts (Bardstown and Nicholasville) could reasonably expect to reduce their total power supply cost by switching suppliers. Kentucky Municipals also explain that the Kentucky Municipal Energy Agency Request for Proposal process to develop its power supply portfolio would not be possible without the De-pancaking Mitigation making supply from MISO economic.[89] Kentucky Municipals argue that FPA section 203 contains no statute of limitations on the public interest, so if the De-pancaking Mitigation continues to serve the public interest, it should remain in effect regardless of time.[90]

57. Kentucky Municipals conclude that nothing of legal relevance has changed since the De-pancaking Mitigation took effect in 2006. Kentucky Municipals assert that the development of MISO and PJM already allowed for a number of first-tier suppliers to reach Kentucky Municipals in 2006, but the Commission nevertheless conditioned LG&E/KU's withdrawal from MISO on continuing to de-pancake rates. Kentucky Municipals argue that re-pancaking led the Commission to condition LG&E/KU's withdrawal to preserve the geographic scope of suppliers in MISO, and these conditions must still be met because LG&E/KU has not chosen to rejoin MISO or any other RTO.[91]

58. The Midwest Power Producers similarly argue that LG&E/KU has failed to meet its burden with respect to the effect of removing the De-pancaking Mitigation on competition. The Midwest Power Producers argue that, in contrast to what LG&E/KU argues regarding why its Delivered Price Test is not required, the relevant question is

---

[88] *Id.* at 39-41.

[89] *Id.* at 41-43.

[90] *Id.* at 43.

[91] *Id.* at 45-48.

whether the Commission would approve a merger between LG&E/KU today in the absence of the behavioral mitigation provided by the De-pancaking Mitigation.[92] The Midwest Power Producers believe that the Kentucky Municipal Energy Agency Request for Proposal cycles demonstrate the need to preserve de-pancaking and access to resources in MISO because certain categories of competitive resources are not available within the LG&E/KU balancing authority area. The Midwest Power Producers argue that eliminating the De-pancaking Mitigation would have a substantial impact on the cost of existing contractual arrangements and would limit Kentucky Municipals' access to resources in MISO. The Midwest Power Producers note that LG&E/KU even concedes that re-pancaking would increase what Kentucky Municipals would pay for wheeling transactions.[93]

59. American Municipal Power argues that removing the De-pancaking Mitigation would result in insufficient competition in the LG&E/KU balancing authority area and would be inconsistent with the public interest. American Municipal Power asserts that, while there may be more competitive suppliers willing to provide service to LG&E/KU customers at rates lower than KU's cost-based rates, mitigation is still required because most options available to LG&E/KU customers require firm transmission to be purchased, which is the reason for the De-pancaking Mitigation credits for MISO transmission service. According to American Municipal Power, competitive supply is already limited by Available Transmission Capability, and the amount of competitive supply would be greatly reduced if the De-pancaking Mitigation is removed. American Municipal Power contends that re-pancaking rates would signal to wholesale customers to not participate in other markets because any attempt to avoid above-market charges from the incumbent provider would result in duplicative transmission charges.[94]

60. Big Rivers argues that LG&E/KU has failed to meet its burden to show good cause exists under FPA section 203(b) to remove the mitigation by focusing on changes to market and transmission access between 1998 and today. Big Rivers contends that LG&E/KU failed to analyze the changes in the market and supply options between when the De-pancaking Mitigation was imposed in 2006 and today. Big Rivers claims that, had the changes in the market between 1998 and 2006 been sufficient, the Commission would not have required the De-pancaking Mitigation.[95]

---

[92] Midwest Power Producers Protest at 10.

[93] *Id.*

[94] American Municipal Power Protest at 8-10.

[95] Big Rivers Electric Corp., Motion to Intervene and Protest, Docket Nos. EC98-2-001 and ER18-2162-000, at 5-6 (filed Oct. 2, 2018) (Big Rivers Protest).

61. St. Joseph II argues that the relevant frame of reference is not whether markets have changed from 1998 to today, but from when markets were mitigated under Rate Schedule No. 402 as of 2006, which in part protects the transmission access rights of entities that were not even LG&E/KU customers in 1998. St. Joseph II asserts that, because Rate Schedule No. 402 did not exist in its current form, any comparison to markets in 1998 is meaningless and that the correct frame of reference for Rate Schedule No. 402 is the market during and after 2006. St. Joseph II contends that, even if LG&E/KU used the correct frame of reference, LG&E/KU would not be able to show an increase in first-tier supply because such supply has barely increased since 2006.[96] In addition, St. Joseph II argues that the 203(b) Filing fails to address the limitations on competitive access that generators will face if the De-pancaking Mitigation is removed, which is likely to allow LG&E/KU to seek to monopolistically capture wholesale load and harm wholesale customers in its service territory.[97]

iii. <u>Answers and Replies</u>

62. LG&E/KU disagrees with Kentucky Municipals that removing the De-pancaking Mitigation is anticompetitive. Specifically, LG&E/KU explains that Kentucky Municipals' argument is that paying MISO's transmission rate in addition to LG&E/KU's transmission charges could change the relative economics of their various third-party supply options, but LG&E/KU argues that this is not the same as whether Kentucky Municipals cannot reach third-party suppliers or whether they would have to turn to LG&E/KU for supply. LG&E/KU reiterates that, even with full transmission charges restored, competitive supply available to Kentucky Municipals is still price competitive and will be 7.8 percent lower than the cost-based KU rate. LG&E/KU also points out that it is unable to sell at above market prices in its home balancing authority area because it sells at cost-based rates. In addition, LG&E/KU asserts that Kentucky Municipals admit that the De-pancaking Mitigation inhibited the responses to the Kentucky Municipal Energy Agency's Request for Proposal responses from resources in PJM, which indicates that competition would be enhanced by removing the De-pancaking Mitigation. According to LG&E/KU's expert, the Kentucky Municipal Energy Agency's Request for Proposal cycles prove that long-term markets are competitive because the Kentucky Municipal Energy Agency was not forced to turn to LG&E/KU and that removing the De-pancaking Mitigation simply changes which Kentucky Municipals' supply options are most economic.[98]

---

[96] St. Joseph II Protest at 6-9.

[97] *Id.* at 9.

[98] LG&E/KU Answer at 31-38, 40-41.

63. As to Kentucky Municipals' criticisms of LG&E/KU's Delivered Price Test, LG&E/KU argues that they are without merit. LG&E/KU reiterates that, because removing the De-pancaking Mitigation is not a section 203(a) transaction, it is more appropriate to use the Delivered Price Test to corroborate real-world data, instead of the reverse. LG&E/KU also restates that the supply options available to Rate Schedule No. 402 Customers total over four times their combined peak load. LG&E/KU accepts the change regarding how Elmer Smith Unit 1 is modeled and whether TVA can sell up to 1,000 MW to Kentucky Municipals. However, LG&E/KU disagrees with Kentucky Municipals' critique that LG&E/KU's Delivered Price Test did not appropriately model units in PJM and MISO because "opportunity costs" are not usually considered or accepted by the Commission and, at best, remain part of an "alternative" analysis. With respect to Kentucky Municipals' Delivered Price Test, LG&E/KU argues that its results are unreliable because it shows a number of suppliers with zero Available Economic Capacity even though those sellers submitted bids in response to the Kentucky Municipal Energy Agency Request for Proposal cycles. LG&E/KU points out that the issue here is about the availability of long-term supply, whereas the Delivered Price Test focuses solely on short-term markets.[99]

64. LG&E/KU argues that Kentucky Municipals should not rely on how removing the De-pancaking Mitigation will affect Bardstown and Nicholasville because Kentucky Municipals do not represent them and they have not intervened in this proceeding.[100] LG&E/KU also asserts that Kentucky Municipals' arguments that removing the De-pancaking Mitigation is an attempt to hamper retail competition are unfounded allegations.[101]

65. In their reply, Kentucky Municipals reiterate that removing the De-pancaking Mitigation will harm competition in short-term energy markets, arguing that LG&E/KU's focus on the availability of long-term supply is misplaced and that such a view would render the Delivered Price Test irrelevant. They assert that, regardless of the specific Delivered Price Test, removing the De-pancaking Mitigation fails the Commission's screens; however, they suggest that their Delivered Price Test is more accurate because it takes into consideration the opportunity costs of generators in MISO and PJM and the likelihood of whether they sell into the LG&E/KU balancing authority area.[102] They also contend that removing the De-pancaking Mitigation will harm the competition in long-

[99] *Id.* at 41-43.

[100] *Id.* at 43-44.

[101] *Id.* at 44-45.

[102] Kentucky Municipals Reply at 11-13.

term energy and capacity markets because the cost to deliver power from MISO will increase and make MISO supply uneconomic compared to LG&E/KU's supply.[103] Kentucky Municipals argue that barriers to entry exist in the LG&E/KU balancing authority area, which prevent new market participants from becoming alternative supply. Lastly, Kentucky Municipals assert that the fact that LG&E/KU is under cost-based regulation does not mean that removing the De-pancaking Mitigation will not be anticompetitive.[104]

66. In its response, with respect to evidence submitted by Kentucky Municipals, LG&E/KU repeats that, even though Rate Schedule No. 402 Customers will pay more if the De-pancaking Mitigation is removed, these costs appropriately reflect their full transmission charges. Further, LG&E/KU argues that Kentucky Municipals face only a modest increase in the supply costs and this is still within the realm of what the Commission considers to be economic. LG&E/KU also points out other alleged errors and inconsistencies in Kentucky Municipals' analysis.[105]

iv. Commission Determination

(a) Need for Mitigation

67. As explained above, we are evaluating the LG&E/KU Filing by considering whether LG&E/KU has demonstrated that loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers after the mitigation is removed. As an initial matter, LG&E/KU's Delivered Price Test, as modified to correct for TVA imports and the retirement of Elmer Smith Unit 1, shows that removing the De-pancaking Mitigation results in screen failures in the Winter Peak, Winter Off-Peak, and Shoulder Off-Peak periods under the base case when the market is moderately and highly concentrated. These screen failures indicate that terminating the De-pancaking Mitigation will reduce the number of competitive suppliers in the LG&E/KU market. However, the Commission explained in Order No. 642 that screen failures alone are not determinative on the question of competitive effects: "[f]ailing the initial screen does not necessarily mean the Commission will reject the merger. Rather, it means only that the Commission must take a closer look at the competitive impacts of the proposed merger."[106] In addition, the Commission has stated that it "may consider

---

[103] *Id.* at 13-15.

[104] *Id.* at 16-19.

[105] LG&E/KU Response at 8-13.

[106] *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111, at 31,879 (2000) (cross-referenced at

arguments that a proposed transaction raises competitive concerns that have not been captured by the Competitive Analysis Screen," and that it "will also consider any alternative methods or factors, if adequately supported."[107] Because the De-pancaking Mitigation is a unique solution tailored to the specific circumstances of the Merger and LG&E/KU's subsequent withdrawal from MISO, screen failures associated with the termination of the De-pancaking Mitigation cannot be looked at in isolation and require additional context and analysis. Accordingly, we will consider the alternative factors proposed by LG&E/KU as support for its contention that the De-pancaking Mitigation no longer is necessary.

68. In considering these alternative factors we find that, because loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers after the De-pancaking Mitigation is removed, the Merger continues to be consistent with the public interest. First, we agree with LG&E/KU that the record shows there is actual competition among suppliers to make sales in the LG&E/KU market, which was not the case at the time of the Merger. Specifically, the Kentucky Municipal Energy Agency has held four Requests for Proposal for power to supply its members after they terminate their LG&E/KU requirements service. The first two requests resulted in 34 different proposals from 13 separate suppliers.[108] The third and fourth requests yielded 210 proposals from 38 different entities for renewable resources and eight proposals for natural gas combined cycle resources, respectively.[109] After accounting for the possibility that some suppliers may have participated in more than one Request for Proposal cycle, the record evidence therefore shows that there are

93 FERC ¶ 61,164), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001); *see also Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 at P 38; Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,112 ("For mergers that do not pass the market power screen, we will engage in a more detailed analysis."); *Transactions Subject to FPA Section 203*, Order No. 669, 113 FERC ¶ 61,315, at P 65 (2005) ("If the screen is failed, then . . . the Commission examines the factors that could affect competition in the relevant market."), *order on reh'g*, Order No. 669-A, 115 FERC ¶ 61,097, *order on reh'g*, Order No. 669-B, 116 FERC ¶ 61,076 (2006).

[107] *Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 at P 38.

[108] LG&E/KU Filing at 37-38.

[109] *Id.* at 38.

between 38 and 59 separate suppliers who actually have competed to make sales in the LG&E/KU market in the recent past.

69. LG&E/KU's analysis estimates that, even without the De-pancaking Mitigation, suppliers located in MISO that offered into the Requests for Proposals could deliver to Kentucky Municipals at a cost that is, on average, 7.8 percent less than the cost-based requirements service currently provided by LG&E/KU to Kentucky Municipals.[110] Kentucky Municipals contested this estimate, asserting numerous defects in the LG&E/KU assumptions. However, although they have access to the exact offers submitted in the Requests for Proposals,[111] Kentucky Municipals did not provide an analysis of the competiveness of those offers without the De-pancaking Mitigation. Instead, Kentucky Municipals submitted a revised version of LG&E/KU's estimate, using different assumptions, that shows that supplies located in MISO would on average cost 2.5 percent more than the LG&E/KU requirements service if the De-pancaking Mitigation were terminated.[112] This revised estimate was, in turn, criticized by LG&E/KU.[113]

70. We find that these variations in estimates do not affect our evaluation of the competitive effects of removing the De-pancaking Mitigation. The Commission considers supply that can be delivered into a market at a price that is no more than five percent above the price in the market to be competitive in that market.[114] Therefore, even accepting Kentucky Municipals' estimate that removing the De-pancaking Mitigation would cause supply originating from MISO to be, on average, 2.5 percent higher than LG&E/KU's requirements service,[115] competing supply would be available

---

[110] *Id.*, Ex. LG&E/KU-9 at 22.

[111] According to Kentucky Municipals' expert, the Kentucky Municipal Energy Agency ran and evaluated the four Requests for Proposals. *See* Kentucky Municipals Protest, Ex. KM-1 at 33.

[112] Kentucky Municipals Reply, Ex. KM-3 at 12-17 and Table C.

[113] LG&E/KU Response at 10.

[114] *See* 18 C.F.R. § 33.3(c)(4) (2018).

[115] It appears that this estimate may be overstated. For example, Kentucky Municipals reduced the LG&E/KU requirements service rate to account for the recent reduction in the federal income tax rate, but they did not make a corresponding reduction in the cost-based transmission rates charged by MISO or LG&E/KU. LG&E/KU Response at 10.

should the market price increase by five percent and, thus, would remain economic in our analysis.[116]

71. Further, LG&E/KU points to the Kentucky Municipal Energy Agency's transmission reservations, which indicate that 65 percent of the capacity selected to serve their members' load is located outside of MISO.[117] Kentucky Municipals, who know the location of the selected resources, did not contest this conclusion. Because the De-pancaking Mitigation applies only to transmission from resources located in MISO and its termination would have no effect on whether suppliers located in other markets remain competitive, the record shows that a majority of resources selected through the Kentucky Municipal Energy Agency's Requests for Proposals did not depend on the De-pancaking Mitigation to offer competitively into the LG&E/KU market.

72. Further evidence that a sufficient number of suppliers would be able to compete to make sales in the LG&E/KU market if the De-pancaking Mitigation were to be terminated comes from the results of the LG&E/KU Delivered Price Test, which show that, even after termination of De-pancaking Mitigation, there would remain at least 100 entities with Available Economic Capacity able to supply the LG&E/KU market in each period analyzed.[118] Many of these are relatively large suppliers and the total amount

[116] We note that Kentucky Municipals also presented a 10-year forecast of the effect of terminating the De-pancaking Mitigation on the competitiveness of suppliers located in MISO, Kentucky Municipals Reply, Ex. KM-3 at 17-22 and Table D, but this analysis is too speculative for the purposes of evaluating effects on competition. *Cf. NextEra Energy, Inc.*, 165 FERC ¶ 61,199, at P 31 (2018) ("The Commission usually reviews transactions based upon market conditions at the time of the transaction, under the assumption that determining future market conditions is speculative and uncertain."); *Westar Energy, Inc.*, 115 FERC ¶ 61,228, at P 79 ("Given the uncertainty regarding market conditions ten years from now, we will not require mitigation at this time."), *order on reh'g*, 117 FERC ¶ 61,011 (2006), *order on reh'g*, 118 FERC ¶ 61,237 (2007).

[117] Kentucky Municipals' network designations showed 100 MW of resources in EEI, 33 MW in TVA, 101 MW in LG&E/KU, and 125 MW in MISO. LG&E/KU Filing, Ex. LG&E/KU-3 at 50.

[118] *See id.*, Ex. LG&E/KU-3 at 11. Our findings are based on the Delivered Price Test submitted by LG&E/KU rather than the alternative analysis presented by Kentucky Municipals. We note that, after LG&E/KU corrected its Delivered Price Test to account for two errors identified by Kentucky Municipals, the only material difference between the two analyses is that Kentucky Municipals' Delivered Price Test purported to account for opportunity costs, whereas LG&E/KU's Delivered Price Test did not. *See* LG&E/KU Answer, Ex. LG&E/KU-8 at 4-7. The Commission does not require that Delivered Price Tests account for opportunity costs. *See Analysis of Horizontal Market Power under the*

of supply was several times larger than the total load of all LG&E/KU customers.[119] This is in contrast to the number of suppliers that existed at the time of the Merger, when only four to seven potential suppliers could be identified.[120]

73. Finally, we note that competitive conditions have changed significantly since the time of the Merger in 1998. At that time, the Delivered Price Test indicated that there were only a handful (four to seven) of potential suppliers to the wholesale customers located in the KU destination market, and elimination of LG&E as a potential supplier to those customers represented a significant competitive concern. Today, given the formation of large RTOs and the entrance of a large number of independent owners of generation capacity into the market, there are numerous potential suppliers located in markets bordering the LG&E/KU destination market. This includes not only MISO, but also PJM and other markets. Based on the changes in competitive conditions in the region since 1998 and the evidence regarding potential competitive suppliers described above, we find that loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers after the De-pancaking Mitigation is removed and, thus, that the Merger continues to be consistent with the public interest without the mitigation. Because we are able to base our finding on the evidence described above, we will not address any of the other arguments advanced by LG&E/KU in support of its request to terminate the De-pancaking Mitigation for purposes of market power mitigation.

(b) <u>Need for Transition Mechanism</u>

74. Although we find that the Merger continues to be consistent with the public interest without the De-pancaking Mitigation, we note that certain customers in the LG&E/KU market acted in reliance on the De-pancaking Mitigation prior to the submission of the LG&E/KU Filing. As explained below, we find that the public interest requires that our granting of LG&E/KU's request to remove the De-pancaking Mitigation

---

Federal Power Act, 138 FERC ¶ 61,109 at P 44. Although the Commission has stated that it would consider alternative analyses based on opportunity costs, we decline to do so here in light of flaws identified in Kentucky Municipals' Delivered Price Test. For example, Kentucky Municipals' Delivered Price Test shows that certain suppliers had no Available Economic Capacity even when those suppliers submitted bids to make long-term sales in response to the Kentucky Municipal Energy Agency's Requests for Proposals. *See* LG&E/KU Answer, Ex. LG&E/KU-8 at 13-22.

[119] *See* LG&E/KU Filing, Ex. LG&E/KU-2 at 23; LG&E/KU Answer, Ex. LG&E/KU-8 at 12, Table 2.

[120] *See* LG&E/KU Filing at 6-7, Ex. LG&E/KU-3 at 11.

under FPA section 203(b) be conditioned on the inclusion of a transition mechanism for these customers.

75. At the time the Commission accepted the De-pancaking Mitigation, all of the KU Requirements Customers were taking requirements service from LG&E/KU under long-term contracts. Therefore, in order for the KU Requirements Customers to be able to exercise their rights under the De-pancaking Mitigation, they first were required to terminate their requirements contracts with LG&E/KU. Pursuant to the terms of their requirements contracts, some of the KU Requirements Customers were required to provide notice of termination five years in advance. Nine of the KU Requirements Customers took this first step towards obtaining de-pancaked rates by providing the required notice in April 2014, four years before LG&E/KU submitted the instant filing in August 2018. The requirements contract of a tenth requirements customer, the City of Benham, was terminated by LG&E/KU in 2015.[121]

76. Since 2014, these customers initiated procurement processes to secure new supply and made long-term and financial commitments in reliance on the De-pancaking Mitigation. The City of Benham entered into requirements power contracts from American Municipal Power sourced with resources located in MISO. The City of Berea contracted to begin purchasing from American Municipal Power when its KU requirements contract ends on May 1, 2019, with supply resources that are sourced in MISO. The remaining KU Requirements Customers that had submitted notices of termination contracted to purchase their power from the Kentucky Municipal Energy Agency which, as described above, initiated four Request for Proposals cycles and, based on the results, entered into a number of purchase contracts from resources located in a number of locations.[122]

77. Owensboro, which is not a KU Requirements Customer but is located in the LG&E/KU market, also relied on the De-Pancaking Mitigation. Owensboro made the decision to retire the Elmer Smith Facility and conducted a Request for Proposal to replace the capacity of the Elmer Smith Facility. Based on the responses to that Request for Proposal, Owensboro entered into a long-term power supply contract with Big Rivers to cover most of its needs for capacity and energy after the retirement of the Elmer Smith Facility. Big Rivers' resources are located in MISO.[123]

[121] Kentucky Municipals Protest at 18-20.

[122] *Id.* at 19-20.

[123] *Id.* at 20-22.

78. LG&E/KU argues that, because the De-pancaking Mitigation could be modified at any time and LG&E/KU reminded Kentucky Municipals (which include the KU Requirements Customers) of that fact in 2015, Kentucky Municipals received adequate notice and terminated their requirements service contracts in reliance on the existence of the De-pancaking Mitigation at their own risk.[124] However, at the time LG&E/KU sent its reminder, LG&E/KU had not requested authorization from the Commission to terminate the De-pancaking Mitigation, much less received such authorization. Further, after making this reminder in 2015, LG&E/KU did not take any action to attempt to terminate the De-pancaking Mitigation for four years. In this circumstance, Kentucky Municipals reasonably relied on the De-pancaking Mitigation when exercising their rights to de-pancaked transmission.

79. Under these circumstances, we find that it would not be consistent with the public interest to remove the De-pancaking Mitigation without a transition mechanism accounting for Kentucky Municipals' reliance on that mitigation. Although we have determined that there would continue to be a sufficient number of competitive suppliers to the LG&E/KU market if the De-pancaking Mitigation is terminated, termination will affect the relative economics of competing suppliers in different markets by making the cost of purchases from resources located in MISO more expensive. Consequently, if Kentucky Municipals had known earlier that the De-pancaking Mitigation would be terminated, they may have made different resource selections, or possibly negotiated different terms for purchases from resources located in MISO. We note that the KU Requirements Customers submitted their notices of termination of their requirements contracts in 2014, but LG&E/KU waited until 2018 to propose to terminate the De-pancaking Mitigation, after the KU Requirements Customers had made alternate supply arrangements and Owensboro similarly had made arrangements to retire and replace the Elmer Smith Facility.

80. As a result, we condition our approval of the termination of the De-pancaking Mitigation on LG&E/KU providing a transition mechanism for those customers located in the LG&E/KU market that reasonably relied on such mitigation. Specifically, the transition mechanism should apply to 10 of the 12 KU Requirements Customers (i.e., Barbourville, Bardwell, Benham, Corbin, Falmouth, Frankfort, Madisonville, Paris, Providence, and Berea) and Owensboro. These entities (the Transition Customers) have made business decisions in reliance on the De-pancaking Mitigation.

81. The transition mechanism does not apply to the Cities of Bardstown and Nicholasville because there is no evidence in the record that they acted in reliance on the De-pancaking Mitigation (e.g., they have not provided notice to terminate their existing contracts) and thus remain KU Requirements Customers. Nor is the Commission

[124] LG&E/KU Filing at 53, 62.

requiring at this time that the transition mechanism apply to Rate Schedule No. 402 Customers located outside of the LG&E/KU market.[125] We find that it would not have been reasonable for customers outside the LG&E/KU market to have relied on the continuation of a tariff provision that was intended to preserve horizontal competition within the LG&E/KU market.

82. We find that the De-pancaking Mitigation must continue for a transition period equal to the initial term[126] of each power purchase agreement entered into by a Transition Customer that relies on transmission service on the MISO transmission system and that a Transition customer entered into in reliance on the De-pancaking Mitigation prior to the issuance of this order. This includes: (1) contracts entered into by the Kentucky Municipal Energy Agency to supply KU Requirements Customers that go into effect on May 1, 2019; (2) the requirements contract between the City of Benham and American Municipal Power that currently is in effect; (3) the requirements contract between the City of Berea and American Municipal Power that will go into effect on May 1, 2019; and (4) the contract between Owensboro and Big Rivers. As the initial term of each such power purchase agreement terminates, or if such power purchase agreement is terminated prior to the end of its initial term, the De-pancaking Mitigation will terminate with respect to the transmission service associated with that agreement.

2. <u>LG&E/KU's Section 205 Filing</u>

83. As explained above, we conditionally grant under FPA section 203(b) LG&E/KU's request to remove the De-pancaking Mitigation, subject to a transition mechanism for the Transition Customers. Consequently, we reject LG&E/KU's Filing pursuant to FPA section 205 to remove the De-pancaking Mitigation from Rate Schedule No. 402 because that filing does not include the transition mechanism required in this order. However, our rejection is without prejudice to LG&E/KU, if it chooses, resubmitting its filing pursuant to FPA section 205 to include the transition mechanism provisions.

84. Notwithstanding our rejection, we provide guidance below regarding the relevant FPA section 205 arguments raised in this proceeding that also would be applicable to such a filing.

---

[125] According to Rate Schedule No. 402, these customers are the TVA Distributor Group. *See* Rate Schedule No. 402 at 1, 2.

[126] By "initial term," we mean the term specified in the power purchase agreement before any extensions pursuant to an evergreen provision or other provision in the contract extending that term.

a. Standard of Review

85. Rate Schedule No. 402 provides that any request to remove the De-pancaking Mitigation provisions shall be reviewed pursuant to FPA section 203.[127] Our finding in this order that the De-pancaking Mitigation can be terminated, subject to a transition mechanism, satisfies this threshold requirement. However, if LG&E/KU elects to resubmit its filing of Rate Schedule No. 402 to include the required transition mechanism provisions, it must go beyond this threshold showing and demonstrate that its filing satisfies the FPA section 205 standard that rates must be just and reasonable and not unduly discriminatory.

b. Undue Discrimination

i. LG&E/KU's Position

86. LG&E/KU argues that the requirement that rates not be unduly discriminatory does not mean that all rates must be the same for all customers. Instead, utilities have the flexibility to treat different customers differently, based on differences in facts between the customers.[128] LG&E/KU asserts that here, however, its transmission customers all use the same transmission facilities and receive the same quality of service. LG&E/KU thus argues that removing the De-pancaking Mitigation "ensure[s] that the [Rate

---

[127] Rate Schedule No. 402 at § 1.a.v ("The [De-pancaking Mitigation] described under this Section 1 is intended to implement the Section 203 mitigation requirements ordered by the Commission . . . . Any proposed changes to these requirements are governed by Section 203 of the FPA.").

[128] LG&E/KU Filing at 54 (citing *Complex Consol. Edison Co. of N.Y., Inc. v. FERC*, 165 F.3d 992, 1012 (D.C. Cir. 1999) ("[D]ifferences in the rates paid by two sets of customers are not always unduly discriminatory. Rather, to show undue discrimination, the petitioner must demonstrate that the two classes of customers are similarly situated for purposes of the rate."); *Cities of Newark, New Castle and Seaford, Del. v. FERC*, 763 F.2d 533, 546 (3d Cir. 1985) ("It is well settled . . . that differences in rates are justified where they are predicated upon factual differences between customers and that these differences may arise from differing costs of service or otherwise."); *City of Frankfort, Ind. v. FERC*, 678 F.2d 699, 706 (7th Cir. 1982) ("[T]he standard of due and reasonable differences is met . . . when there are [other] differences in facts – cost of service or otherwise – that justify the rate disparity."); *W. Grid Development, LLC*, 133 FERC ¶ 61,029, at P 17 (2010) ("[R]ate differences may be justified and rendered lawful based on the specific factual differences between the entities at issue."); *Cal. Indep. Sys. Operator Corp.*, 124 FERC ¶ 61,271, at P 209 (2008) ("Differences in rates are justified where they are predicated upon differences in facts.")).

Schedule No.] 402 Customers bear the same costs for their transmission service as LG&E/KU's other transmission customers."[129]

ii. Protests and Comments

87. KMPA argues that the 203(b) Filing would result in undue discrimination, as it would re-pancake rates for some, but not all, of LG&E/KU's customers. KMPA explains that, at the time of LG&E/KU's withdrawal from MISO, LG&E/KU entered into agreements with the Illinois Municipal Electric Agency and the Indiana Municipal Power Agency that provided for de-pancaking, similar to Rate Schedule No. 402. KMPA notes, however, that LG&E/KU is not seeking to modify those agreements in the LG&E/KU Filing. KMPA concludes that, if the Commission removes the De-pancaking Mitigation, it will result in disparate treatment for similarly situated customers, that is, KMPA vis-à-vis the Illinois Municipal Energy Agency and the Indiana Municipal Power Agency, which also have rate de-pancaking agreements with LG&E/KU.[130] KMPA argues further that its members (Paducah and Princeton) are not similarly situated to other Rate Schedule No. 402 customers in at least two respects: (1) KMPA and its members have relied on de-pancaked rates in committing to invest in long-term resources in MISO (i.e., the Prairie State Energy Campus and American Municipal Power hydro resources); and (2) KMPA does not have available alternatives should re-pancaking be approved.[131]

88. Kentucky Municipals also disagree with LG&E/KU, arguing that removing the De-pancaking Mitigation would disrupt their investor-backed expectations, without justification. According to Kentucky Municipals, they have made "major investments and commitments" based on the existence of de-pancaked transmission rates within MISO, when LG&E/KU was in MISO, and between MISO and the LG&E/KU balancing authority area. Kentucky Municipals note that power supply resource planning is a long, complex process, and they argue that the process is being clouded and delayed by the uncertainty created by LG&E/KU's proposal to remove the De-pancaking Mitigation, just as Kentucky Municipals were on the verge of benefitting from it.[132] Kentucky

---

[129] *Id.* at 55.

[130] Kentucky Municipal Power Agency, Paducah Power System and Princeton Electric Plant Board, Supplemental Protest, Docket Nos. EC98-2-001 and ER18-2162-000, at 16-18 (filed Jan. 9, 2019) (KMPA Protest).

[131] *See* KMPA Protest at 12-16; Kentucky Municipal Power Agency, Paducah Power System and Princeton Electric Plant Board, Motion for Leave to Answer and Answer, Docket Nos. EC98-2-001 and ER18-2162-000, at 8-10 (filed Oct. 17, 2018).

[132] Kentucky Municipals Protest at 48.

Municipals point to KMPA's investment in the Prairie State generation project, the Kentucky Municipal Energy Agency's All Requirements Project, and Owensboro's long-term power purchase agreement with Big Rivers as examples of investments that will be threatened by eliminating the De-pancaking Mitigation.[133]

89. Big Rivers also suggests that the timing of the LG&E/KU Filing is suspect in that it was submitted shortly after customers had taken affirmative steps to diversify their power supply and that, if the De-pancaking Mitigation is removed, supply options from LG&E/KU to Kentucky Municipals become comparatively less expensive. Big Rivers argues that LG&E/KU's decision to remove the De-pancaking Mitigation appears designed to punish customers and to introduce rate uncertainty, which is what the De-pancaking Mitigation was intended to prevent.[134]

90. KMPA also argues that, if the Commission does not reject the LG&E/KU Filing, the Commission should adopt measures to protect Rate Schedule No. 402 Customers that have relied on continued de-pancaking. KMPA requests that the Commission grandfather de-pancaked rates for these customers at least through the longest term of any other existing de-pancaking agreement, which KMPA understands to be 2027, with extensions of the term to the extent any other de-pancaking agreement is extended.[135]

iii. Answers and Replies

91. In response to claims that removing the De-pancaking Mitigation would be unduly discriminatory, LG&E/KU argues that the terms and conditions of the De-pancaking Mitigation are distinguishable from LG&E's agreements with the Illinois Municipal Electric Agency and the Indiana Municipal Power Agency. LG&E/KU notes that its agreements with those customers contain *Mobile-Sierra* provisions,[136] provide for de-pancaked transmission in one direction, and that the de-pancaking obligations continue only until their pre-existing transmission service reservations terminate.[137]

---

[133] *Id.* at 48-53.

[134] Big Rivers Protest at 6-8.

[135] KMPA Protest at 23-24.

[136] *United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

[137] LG&E/KU Answer at 28-29.

92. LG&E/KU also argues that KMPA and the Kentucky Municipal Energy Agency's reliance on the continuation of de-pancaked rates, via the De-pancaking Mitigation, is not reasonable. First, LG&E/KU asserts that KMPA ignored opportunities to mitigate its risks and instead chose to expose itself to the potential for higher transmission costs. LG&E/KU notes, for example, that in February 2005, KMPA moved forward with its investments in MISO supply resources even though LG&E/KU had tendered its notice of withdrawal to leave MISO in December 2004. LG&E/KU asserts that the Kentucky Municipal Energy Agency's reliance arguments support its position only if it was reasonable for the Kentucky Municipal Energy Agency to assume that De-pancaking Mitigation would continue into perpetuity. LG&E/KU notes that the terms of Rate Schedule No. 402 allow it to seek changes to the De-pancaking Mitigation under section 203 at any time, and that it reminded the Kentucky Municipal Energy Agency of its ability to do so as the agency began searching for new supply options in 2015.[138]

c. Commission Precedent on De-pancaking

i. Protests and Comments

93. Kentucky Municipals argue that pancaked rates distort and balkanize markets, and that the Commission has, in prior orders, explained the benefits of de-pancaking that accrue not just to customers whose rates are de-pancaked, but to all loads throughout a region. Kentucky Municipals note, for example, that in its orders examining the seams between MISO and PJM, the Commission explained that eliminating rate pancaking would result in more remote generation becoming economic for import, which would put downward pressure on market prices where load is located, resulting in lower costs for purchases from local generation as well as imports.[139] Kentucky Municipals observe that LG&E/KU argues that the de-pancaking mechanism has become unnecessary because there now exists a robust power market, and because MISO's internally de-pancaked rates allow generators located anywhere in MISO to reach the MISO-LG&E/KU border by paying a single transmission charge. Kentucky Municipals assert, however, that this claim is akin to saying that because region-wide de-pancaking has succeeded in creating a region-wide market, de-pancaking is no longer appropriate.[140]

[138] *Id.* at 30-31.

[139] Kentucky Municipals Protest at 58 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 105 FERC ¶ 61,212, at P 45 (2003)).

[140] *Id.* at 61.

94. American Municipal Power agrees that re-pancaked rates are unjust and unreasonable. It argues that the Commission, in Order No. 2000, specified that pancaked rates are unjust and unreasonable and that, without the De-pancaking Mitigation, LG&E/KU customers would have to pay these pancaked rates for any MISO transactions, which were nonexistent when LG&E/KU was in MISO and are contrary to Commission precedent. American Municipal Power adds that re-pancaked rates here are discriminatory because similarly situated customers in MISO's footprint are not required to pay LG&E/KU's pancaked rates.[141]

ii. Answers and Replies

95. In response, LG&E/KU asserts that "the Commission does not have a general policy against pancaked transmission rates."[142] LG&E/KU recognizes that while the Commission requires de-pancaking of rates within RTOs and ISOs, it has declined to require de-pancaked transmission rates on a generic basis for inter-RTO, or RTO to non-RTO, transactions. According to LG&E/KU, outside of an RTO, the Commission has required de-pancaking only in extraordinary circumstances, such as in addressing operational issues arising from changes in RTO seams. LG&E/KU claims that the De-pancaking Mitigation falls outside the scope of the Commission's traditional application of de-pancaked transmission rates and can also be distinguished from such arrangements. LG&E/KU notes, for example, that the De-pancaking Mitigation is the only de-pancaking arrangement in which there is no reciprocity and that benefits only one targeted group of customers, rather than all customers in an affected RTO.[143] Further, LG&E/KU argues that there are examples of other utilities located at the borders of RTOs whose customers must pay a pancaked rate in order to access supplies located in the RTO.[144]

---

[141] American Municipal Power Protest at 12-13.

[142] LG&E/KU Answer at 18.

[143] LG&E/KU Filing at 63-64.

[144] LG&E/KU Answer at 18-19. St. Joseph II argues that LG&E/KU's filing is deficient because it failed to comply with part 35 of the Commission's regulations governing the information required for section 205 filings. St. Joseph II Protest at 4; see also St. Joseph II, LLC, Motion for Permission to Answer and Answer, Docket Nos. EC98-2-001 and ER18-2162-000, at 3 (filed Nov. 13, 2018). LG&E/KU argues that compliance with certain requirements in part 35 is unnecessary but that, nevertheless, it requested waiver of the Commission's filing requirements. LG&E/KU Answer at 52 n.143; see also Louisville Gas and Electric Co. and Kentucky Utilities Co., Motion for Leave to Reply and Reply, Docket Nos. EC98-2-001 and ER18-2162-000, at 4-5 (filed Nov. 30, 2018).

d. <u>Commission Determination</u>

96. As stated earlier, we reject LG&E/KU's Filing pursuant to FPA section 205 to remove the De-pancaking Mitigation from Rate Schedule No. 402 because that filing does not include the transition mechanism required in this order. However, our rejection is without prejudice to LG&E/KU, if it chooses, resubmitting its filing pursuant to FPA section 205 to include the transition mechanism provisions.

97. As to claims about re-pancaked rates being unduly discriminatory absent a transition mechanism, we note that no party disputes that, without De-pancaking Mitigation, all transmission customers other than the Illinois Municipal Energy Agency and the Indiana Municipal Power Agency will pay the same rate for the same service. As to the Illinois Municipal Energy Agency and the Indiana Municipal Power Agency, they have entered into settlement agreements regarding de-pancaked rates and these separate agreements can justify disparate rate treatment. As the D.C. Circuit held in rejecting a similar discrimination claim based on lower rates paid by settling customers, "this court has upon several occasions noted that settlement agreements can justify a rate differential," provided that "the agreements must have been negotiated in good faith and must not unduly burden any group of customers."[145] Here, we have no evidence that the Illinois Municipal Energy Agency and Indiana Municipal Power Agency settlements were not negotiated in good faith or that these agreements unduly burden LG&E/KU's other transmission customers. Consequently, we find that, based on the record in this proceeding, the rates paid by the Illinois Municipal Energy Agency and the Indiana Municipal Power Agency as compared to those customers taking service under a re-pancaked Rate Schedule No. 402 are not unduly discriminatory.[146]

---

[145] *La. Ass'n of Independent Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1118 (D.C. Cir. 1992) (citing *United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 212 (D.C. Cir. 1984); *Cities of Bethany, Bushnell, Cairo v. FERC*, 727 F.2d 1131, 1139 (D.C. Cir. 1984); *Boroughs of Chambersburg and Mont Alto Pa. v. FERC*, 580 F.2d 573, 577 (D.C. Cir. 1978)).

[146] We note, however, that if LG&E/KU resubmits Rate Schedule No. 402 with the transition mechanism required as a condition of the termination of De-pancaking Mitigation, LG&E/KU will be charging different rates to the Rate Schedule No. 402 Customers entitled under this order to a transition mechanism and Rate Schedule No. 402 Customers not so entitled. Any Rate Schedule No. 402 Customer that is paying pancaked rates and believes that it is similarly situated to Rate Schedule No. 402 Customers benefitting from De-pancaking Mitigation under the transition mechanism may raise a claim of undue discrimination in the FPA section 205 proceeding initiated by LG&E/KU's filing.

98. We also reject the argument that removal of the De-pancaking Mitigation would violate a general Commission policy favoring de-pancaking. The Commission has required de-pancaking within RTOs,[147] in the context of mergers involving multi-company utility holding companies,[148] and in other unique contexts,[149] but except for these specific contexts, the Commission does not have a policy requiring de-pancaked rates between different transmission providers. We emphasize that, even in the MISO Withdrawal Order, the Commission did not generally prohibit rate pancaking, but only prohibited rate pancaking to the extent necessary to meet the Merger conditions and the hold harmless obligation associated with the MISO Transmission Owners' Agreement.[150]

The Commission orders:

(A) LG&E/KU's Filing is hereby conditionally granted pursuant to FPA section 203(b), subject to implementation of a transition mechanism for certain power supply arrangements, as discussed in the body of this order.

---

[147] Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 31,174-75 (1999) (cross-referenced at 89 FERC ¶ 61,285), order on reh'g, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) (cross-referenced at 90 FERC ¶ 61,201), aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC, 272 F.3d 607 (D.C. Cir. 2001); see also Regional Transmission Organizations, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,541, at 33,754 (1999) (cross-referenced at 87 FERC ¶ 61,173) (explaining that pancaked rates raise the cost of transmission, thereby reducing the size of geographic power markets and increasing balkanization of such markets); Cal. Indep. Sys. Operator, Inc., 147 FERC ¶ 61,231, at P 156 (2014) (finding that elimination of pancaked transmission rates would have several benefits, including promoting efficient and competitive markets and increasing access to energy supplies).

[148] *See, e.g.*, *UtiliCorp United Inc.*, 92 FERC ¶ 61,067, at 61,235 (2000); *CP&L Holdings, Inc.*, 92 FERC ¶ 61,023, at 61,051, 61,060 (2000).

[149] See, e.g., Midwest Independent Transmission System Operator, Inc., LLC, 104 FERC ¶ 61,105, at P 35 (2003) (addressing issues related to the seams between PJM and MISO).

[150] *See supra* n.13; *see also* MISO Withdrawal Order, 114 FERC ¶ 61,282 at PP 3-4, 43-45.

(B) LG&E/KU's Filing is hereby rejected pursuant to FPA section 205 without prejudice, as discussed in the body of this order.

By the Commission. Commissioner LaFleur is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Louisville Gas and Electric Co.	Docket Nos.	EC98-2-001
Kentucky Utilities Co.		ER18-2162-000

(Issued March 21, 2019)

LaFLEUR, Commissioner, *dissenting*:

1. In today's order the Commission conditionally grants Louisville Gas and Electric Company's and Kentucky Utilities Company's (together, LG&E/KU's) request, pursuant to Federal Power Act sections 203(b) and 205, to remove mitigation imposed to resolve horizontal market power concerns arising from LG&E/KU's 1998 merger and subsequent withdrawal from MISO in 2006. Specifically, today's order removes a rate de-pancaking mitigation designed to shield Kentucky Utility Municipals, Tennessee Valley Authority Distributor Group, and any future Requirements Customers (together, Rate Schedule No. 402 Customers) from any re-pancaking of rates for transmission service between LG&E/KU's transmission system and the remaining members of MISO.[1] On this record, I am not persuaded that removing this mitigation is consistent with the public interest, and, at a minimum, I believe the Commission should engage in further record development before making that determination.

2. The majority opinion acknowledges that LG&E/KU's modified Delivered Price Test shows that removing the rate de-pancaking mitigation results in screen failures in Winter Peak, Winter Off-Peak and Shoulder Off-Peak periods.[2] Notably, these screen failures occur during periods when the market is highly or moderately concentrated, which suggests that Rate Schedule No. 402 Customers have limited access to alternative generation suppliers during critical periods.

3. To consider whether screen failures are determinative, the Commission has stated that it may consider "any alternative methods or factors, if adequately supported."[3]

---

[1] *Louisville Gas and Elec. Co.*, 114 FERC ¶ 61,282, at P 112 (2006). The Commission accepted the de-pancaking mitigation, filed in Docket No. ER06-1279-000 on July 26, 2006, via delegated order. *E.ON U.S., LLC*, Docket No. ER06-1279-001 (Nov. 9, 2006) (delegated order).

[2] *Louisville Gas and Elec. Co.*, 166 FERC ¶ 61,206, at P 67 (2019).

[3] *Id*. We note, however, this consideration generally applies to an analysis of

However, I do not believe that LG&E/KU have provided sufficient support to justify removal of the rate de-pancaking mitigation. LG&E/KU refer to four requests for proposals held by the Kentucky Municipal Energy Agency that resulted in various proposals from suppliers.[4] However, the referenced requests for proposals benefited from the application of the rate de-pancaking mitigation, and the mere existence of suppliers with available economic capacity is not dispositive. Simply put, I do not think the results of solicitations that were conducted with rate de-pancaking mitigation in place are sufficient evidence of the adequacy of competitive options without mitigation. In my view, the record is incomplete in assessing the availability of a sufficient number of suppliers, and a sufficient amount of supply, to serve Rate Schedule No. 402 Customers at competitive prices without the rate de-pancaking mitigation. In addition, the results of the delivered price test that show how much prices would change without rate de-pancaking are necessarily based on little evidence and I do not find those estimates probative.

4. In order to better understand the potential impacts of the removal of the rate de-pancaking mitigation on competition in the KU Destination Market, I would have set this matter for hearing, which would provide the opportunity to explore what competitive alternatives are actually available to serve Rate Schedule No. 402 Customers. In the absence of further record development that adequately addresses the screen failures, I am concerned that the Commission is unjustly constraining the generation supply options available to Rate Schedule No. 402 Customers.

5. In conclusion, while people frequently talk about how the sausage gets made, this case shows how the pancakes get made. While a single pancake may be fine, I do not believe that LG&E/KU should be able to force feed a short stack of pancakes to Rate Schedule No. 402 Customers. Without better ingredients than are presented in this record, the conclusion that these customers have adequate menu alternatives is half-baked at best. While I expect the majority would rather that I hop to their decision, I am not waffling, and respectfully dissent.

____
Cheryl A. LaFleur
Commissioner

horizontal market power in an initial request for merger.

[4] Joint Application of Louisville Gas and Electric Co. and Kentucky Utilities Co., Docket Nos. EC98-2-001 and ER18-2162-000, at 37-38 (filed Aug. 3, 2018).

Document Content(s)