168 FERC ¶ 61,151
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisville Gas and Electric Company	Docket Nos. ER19-2396-000
Kentucky Utilities Company	ER19-2397-000

ORDER REJECTING PROPOSED AGREEMENT

(Issued September 10, 2019)

1. On July 12, 2019, pursuant to section 205 of the Federal Power Act (FPA)[1] and part 35 of the Commission's regulations,[2] Louisville Gas and Electric Company (LG&E) and Kentucky Utilities Company (KU) (together, LG&E/KU) filed an unexecuted transition mechanism agreement (Agreement)[3] based on the Commission's March 21, 2019 order in Docket Nos. EC98-2-001 and ER18-2162-000.[4] In the March Order, the Commission conditionally granted LG&E/KU's request to remove certain market power mitigation measures from Rate Schedule No. 402, subject to the implementation of a transition mechanism for customers in the LG&E/KU market that had relied on the mitigation. In this order, we reject the Agreement without prejudice, and provide guidance, as discussed below.

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[1] 16 U.S.C. § 824d (2012).

[2] 18 C.F.R. pt. 35 (2019).

[3] *See* Louisville Gas and Electric Company, Filing of Transition Mechanism Agreement, Docket No. ER19-2396-000 (filed July 12, 2019) (Transmittal); Kentucky Utilities Company, Certificate of Concurrence, Docket No. ER19-2397-000 (filed July 12, 2019) (concurring with the transmission mechanism agreement filed by LG&E in Docket No. ER19-2396-000). For purposes of discussing the Agreement, we refer to LG&E's Transmittal in Docket No. ER19-2396-000 but attribute the statements therein to both LG&E and KU.

[4] *Louisville Gas and Elec. Co.*, 166 FERC ¶ 61,206 (2019) (March Order).

I. **Background**

2. In August 2018, LG&E/KU requested that the Commission find under FPA section 203 that LG&E/KU may remove from Rate Schedule No. 402 the rate de-pancaking mitigation provisions (De-pancaking Mitigation) that were imposed to resolve horizontal market power concerns originating from LG&E/KU's merger in 1998 (Merger) and from LG&E/KU's subsequent withdrawal from the Midcontinent Independent System Operator, Inc. (MISO) in 2006.[5]

3. In the March Order, the Commission conditionally granted LG&E/KU's request to terminate the De-pancaking Mitigation. Among other things, the Commission concluded that the Merger continues to be consistent with the public interest without the De-pancaking Mitigation because the record showed 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.[6] 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 before the Commission granted LG&E/KU's request, the Commission required LG&E/KU to provide a transition mechanism for those customers (Transition Mechanism).[7] The Commission explained that, although it determined that there would continue to be a sufficient number of competitive suppliers in the LG&E/KU market if the De-pancaking Mitigation was 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.[8]

4. The Commission identified certain of the KU Requirements Customers[9] as having made business decisions in reliance on the De-pancaking Mitigation and considered these

[5] A comprehensive review of the origins of the De-pancaking Mitigation can be found in the March Order, 166 FERC ¶ 61,206 at PP 4-10.

[6] *Id.* PP 45, 67-73.

[7] *Id.* PP 45, 74-82.

[8] *Id.* P 79.

[9] At the time of the Merger, 12 customers had requirements contracts with KU (KU Requirements Customers). The original KU Requirements Customers included the Cities of Barbourville, Bardstown, Bardwell, Benham, Corbin, Falmouth, Madisonville, Nicholasville, Paris, Providence; the Frankfort Electric Water and Plant Board (Frankfort);

customers to be eligible for the Transition Mechanism (Transition Customers).[10] The Commission concluded that the Transition Mechanism would not apply to Rate Schedule No. 402 Customers located outside of the LG&E/KU market, specifically, the TVA Distributor Group, comprised in relevant part of the Electric Plant Board of the City of Paducah (Paducah) and the Princeton Electric Plant Board (Princeton).[11] The Commission found that it would not have been reasonable for customers outside of the LG&E/KU market to have relied on the continuation of a provision that was intended to preserve horizontal competition within the LG&E/KU market.[12]

5. For the Transition Mechanism, the Commission stated that the De-pancaking Mitigation must continue for a transition period equal to the initial term[13] of each power purchase agreement (PPA) 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 the March Order. The Commission noted that this included: (1) contracts entered into by the Kentucky Municipal Energy Agency to supply KU Requirements Customers that went into effect on May 1, 2019; (2) the requirements contract between the Benham and American Municipal Power (AMP) that was then in effect; (3) the requirements contract between the Berea and AMP that went into effect on May 1, 2019; and (4) the contract between Owensboro and Big Rivers Electric Cooperative. The Commission also explained that, as the initial term of each such power purchase agreement terminates, or if such power purchase agreement is terminated before the end of its initial term, the

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and Berea College (Berea). *Louisville Gas and Elec. Co.*, 82 FERC ¶ 61,308, at 62,215 n.7 (1998) (Merger Order).

[10] The Commission specified in the March Order that the Transition Customers included the Cities of Barbourville, Bardwell, Benham, Berea, Corbin, Falmouth, Frankfort, Madisonville, Paris, Providence, and Owensboro Municipal Utilities (Owensboro). March Order, 166 FERC ¶ 61,206 at P 80. The Commission concluded that the Transition Mechanism would not apply to Bardstown and Nicholasville, although they were KU Requirements Customers, because they had not acted in reliance on the De-pancaking Mitigation (e.g., they had not provided notice to terminate their existing contracts) and remained KU Requirements Customers. *Id.* P 81.

[11] *Id.* n.125.

[12] *Id.* P 81.

[13] The Commission explained that, by "initial term," it meant 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. *Id.* P 82 n.126.

De-pancaking Mitigation will terminate with respect to the transmission service associated with that agreement.[14]

6. Kentucky Municipals,[15] KMPA, and AMP requested rehearing and clarification of the March Order. Concurrently with this order, we are issuing an order denying rehearing but granting clarification as to certain issues.[16]

II. Agreement

7. To meet the Commission's goal of a limited transition mechanism, LG&E/KU explains that it proposes the Agreement as a new arrangement that supersedes and replaces Rate Schedule No. 402 in its entirety and clearly defines the customers and costs that will be covered. LG&E/KU states that the Agreement identifies the specific PPAs under the "Covered PPAs" term and their related MISO transmission service requests (TSR) under the "Covered TSRs" term and that, under the Agreement, LG&E/KU will provide reimbursement for these PPAs and TSRs during the "Covered Periods," which is equal to the initial term of each Covered PPA, the latest of which ends on May 31, 2029. LG&E/KU also explains that the Agreement provides a clear definition of "Applicable MISO Charges," which identifies the applicable pancaked MISO schedules for which reimbursement will be provided. LG&E/KU suggests that, because the Transition Mechanism could span almost ten years into the future, a new agreement setting forth clear provisions to effectuate the March Order is appropriate.

8. In addition, LG&E/KU states that, consistent with the March Order, the Agreement applies to those customers who made business decisions in reliance on the De-pancaking Mitigation, defined in the Agreement as "Transition Customers." LG&E/KU explains that Princeton and Paducah as well as KMPA are excluded from the Agreement because, unlike the Transition Customers identified in the March Order, KMPA had no such reliance on the De-pancaking Mitigation.

9. LG&E/KU argues that the Agreement is consistent with the March Order and represents a means of bringing LG&E/KU's de-pancaking obligation to a close.

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[14] *Id.* P 82.

[15] Kentucky Municipals include the Kentucky Municipal Energy Agency and each of its members; the Kentucky Municipal Power Agency and its two members, Paducah and Princeton (collectively, KMPA); and Duck River Electric Membership Corporation of Shelbyville, Tennessee. The Kentucky Municipal Energy Agency's members are Frankfort; Berea; the Cities of Barbourville, Bardwell, Benham, Corbin, Falmouth, Madisonville, Paris, and Providence, Kentucky; and Owensboro.

[16] *Louisville Gas and Elec. Co.*, 168 FERC ¶ 61,152 (2019) (Rehearing Order).

LG&E/KU thus requests that the Commission find that the Agreement is just and reasonable, and not unduly discriminatory, and accept the Agreement for filing.

III. Notice of Filing and Responsive Pleadings

10. Notice of the Agreement was published in the *Federal Register*, 84 Fed. Reg. 34,882 (2019), with interventions and protests due on or before August 2, 2019. AMP and Kentucky Municipals filed motions to intervene. Kentucky Municipals also filed a protest, request for five-month suspension, and request for hearing (Kentucky Municipals Protest). KMPA joined the Kentucky Municipals Protest and also filed a supplemental protest (KMPA Protest).

11. According to Kentucky Municipals, rather than resubmitting Rate Schedule No. 402 with the required Transition Mechanism, LG&E/KU instead proffered a new arrangement to replace Rate Schedule No. 402 that is "considerably, and unreasonably, narrower in scope and duration" than Rate Schedule No. 402's de-pancaking.[17] Kentucky Municipals argue that LG&E/KU's Agreement is inconsistent with the March Order in six ways—namely, LG&E/KU's Agreement would (1) redefine the De-pancaking Mitigation to exclude certain MISO schedules from reimbursement; (2) improperly define the customers that are parties to the Agreement; (3) exclude long-term firm point-to-point transmission reservations that were made in reliance on the De-pancaking Mitigation; (4) exclude certain power purchase agreements that rely on transmission service to MISO; (5) improperly limit the duration of the Transition Mechanism; and (6) exclude KMPA and its members from the Transition Mechanism.[18]

12. KMPA focuses its protest on why it and its members, Princeton and Paducah, should be entitled to the Transition Mechanism and why it would be unduly discriminatory to exclude them from continued de-pancaking benefits. KMPA also argues that an Agreement to supersede and replace Rate Schedule No. 402 in its entirety goes beyond what the Commission directed, as the proposed Agreement does not contain the same terms and conditions as those in Rate Schedule No. 402.[19]

13. On August 19, 2019, LG&E/KU filed a motion for leave to answer and answer to the protests. On August 26, 2019, Kentucky Municipals filed a motion for leave to answer and answer to LG&E/KU's answer. On August 30, 2019, KMPA also filed a

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[17] Kentucky Municipals Protest at 7.

[18] *Id.* at 2-3.

[19] KMPA Protest at 25.

motion for leave to answer and answer.[20] On September 3, 2019, LG&E/KU filed a motion for leave to respond and response to the answers.

IV. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed in this proceeding and, therefore, reject them.

B. Substantive Matters

16. LG&E/KU states that the purpose of the Agreement is to satisfy the Commission's condition in the March Order regarding termination of the De-pancaking Mitigation. In the March Order, the Commission conditioned its approval of terminating 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."[21] Under this Transition Mechanism, "the De-pancaking Mitigation must continue for a transition period equal to the initial term of each [PPA] entered into by a Transition Customer that relies on transmission service on the MISO transmission system."[22] Therefore, we evaluate the Agreement for compliance with the condition for termination of the De-pancaking Mitigation established in the March Order, i.e., LG&E/KU continuing to offer the De-pancaking Mitigation to the specified customers for the initial term of their PPAs. Also, we evaluate whether the Agreement is just, reasonable, and not unduly discriminatory or preferential, as required by FPA section 205.

17. As an initial matter, we note that instead of amending Rate Schedule No. 402, which includes the "Merger Mitigation De-pancaking mechanism" to comply with the March Order, LG&E/KU filed the proposed Agreement, and the proposed Agreement supersedes Rate Schedule No. 402 in its entirety. We acknowledge that much of Rate Schedule No. 402 has been mooted by the passage of time. As such, we find that it

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[20] On September 3, 2019, KMPA filed an errata to its earlier answer.

[21] March Order, 166 FERC ¶ 61,206 at P 80.

[22] *Id.* P 82.

would be appropriate to supersede that rate schedule in its entirety provided that the replacement Agreement gives the Transition Customers the same level of protection against transmission rate pancaking as the "Merger Mitigation De-pancaking mechanism" included in Rate Schedule No. 402.

18. As to the Agreement before us, however, we find that it is inconsistent with the Commission's condition regarding the Transition Mechanism set forth in the March Order. We therefore reject the Agreement without prejudice and provide guidance to assist LG&E/KU in developing a new proposal. Specifically, we provide guidance on which customers should be entitled to the Transition Mechanism, which PPAs should be considered Covered PPAs, how "Covered TSRs" should be defined, which MISO Schedules are eligible for reimbursement, which reimbursement adjustments can be made, how the De-pancaking Mitigation could be terminated, and whether exports are covered by the Transition Mechanism.

1. Customers Entitled to the Transition Mechanism

a. Transmittal

19. LG&E/KU explains that it defined Transition Customers to be the same set of customers as the Commission set forth in the March Order, except for Falmouth. LG&E/KU states that, as discussed in Docket No. EL18-176-000,[23] Falmouth is located on the East Kentucky Power Cooperative transmission system, which is part of PJM Interconnection, L.L.C. (PJM). LG&E/KU explains that the Agreement, as with the De-pancaking Mitigation, only addresses rate pancaking between MISO and LG&E/KU and that, because Falmouth is no longer designated a network load nor a network customer of the LG&E/KU transmission system, pancaked transmission charges between MISO and LG&E/KU are not an issue for Falmouth. LG&E/KU states that it is thus appropriate to exclude Falmouth from the Agreement as a Transition Customer.[24]

20. In addition, LG&E/KU states that the Commission excluded the TVA Distributors Group from the Transition Customers on the basis 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

[23] *City of Falmouth, Kentucky*, 165 FERC ¶ 61,250 (2018) (involving a petition for declaratory order requesting a finding that, when Falmouth changes energy suppliers, Falmouth could continue to obtain transmission service over the facilities of East Kentucky Power Cooperative, Inc. at the same rates, terms and conditions as Falmouth paid under an existing contract with KU).

[24] Transmittal at 6.

market.[25] LG&E/KU explains that this determination means that KMPA and its members, Princeton and Paducah, are not included as Transition Customers under the Agreement.[26]

21. LG&E/KU contends that, despite the Commission's decision to exclude KMPA and its members, KMPA continues to argue that it and its members have made business decisions in reliance on LG&E/KU's membership in MISO and in reliance on the De-pancaking Mitigation. According to LG&E/KU, KMPA could not have acted in reliance on the De-pancaking Mitigation and Rate Schedule No. 402 when it made its decision to invest in the Prairie State Energy Campus (Prairie State) in 2005 as a means of long-term supply because the De-pancaking Mitigation and Rate Schedule No. 402 did not yet exist.[27] LG&E/KU also argues that KMPA cannot claim it relied on LG&E/KU remaining in MISO because: (1) neither Princeton nor Paducah were LG&E/KU transmission customers when KMPA invested in the Prairie State project in 2005; and (2) LG&E/KU's MISO membership had been the subject of a Kentucky Public Service Commission investigation since 2003 and, by December 2004, LG&E/KU had submitted its notice of withdrawal to MISO. LG&E/KU asserts that, because KMPA could not have relied on the De-pancaking Mitigation when it made its decision to invest in the Prairie State project, KMPA is in the same position as most of LG&E/KU's other transmission customers and not the Transition Customers. LG&E/KU argues therefore that it is just and reasonable to exclude KMPA from the Agreement as a Transition Customer.[28]

b. <u>Protests</u>

22. Kentucky Municipals contend that the Kentucky Municipal Energy Agency should be included as a Transition Customer. Kentucky Municipals state that the Agreement includes the Kentucky Municipal Energy Agency's MISO TSRs as "Covered TSRs," but does not include the Kentucky Municipal Energy Agency as a party to the proposed Agreement. According to Kentucky Municipals, the March Order implicitly recognized the Kentucky Municipal Energy Agency's status as a Transition Customer by listing "[PPAs] entered into *by a Transition Customer*" and specifically including "contracts

[25] *Id.* (citing March Order, 166 FERC ¶ 61,206 at P 81).

[26] *Id.*

[27] *Id.* at 6-7.

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

entered into *by the Kentucky Municipal Energy Agency* to supply KU Requirements Customers."[29]

23. Kentucky Municipals argue that the Transition Mechanism required by the Commission's March Order must also apply to Paducah and Princeton.[30] According to Kentucky Municipals, the Transition Mechanism applies to systems now located in the LG&E/KU market and which made long-term financial commitments in the form of generation ownership commitments. Kentucky Municipals contend that this includes those by which KMPA, on behalf of Paducah and Princeton, committed to own an interest in Prairie State located in MISO. Kentucky Municipals state that Paducah and Princeton have reserved transmission from MISO to LG&E/KU for delivery of that resource.[31]

24. KMPA also argues that it and its members should be eligible for the Transition Mechanism. KMPA and its members claim to meet the definition of Transition Customer because (1) they are within the LG&E/KU market and (2) made economic decisions based on the continued existence of transmission service from LG&E/KU at non-pancaked rates. As to the first criterion, KMPA explains that Princeton and Paducah are directly interconnected with LG&E/KU and funded transmission and direct interconnection facilities to do so. KMPA states that it has also entered into other arrangements to facilitate the import from MISO or export to MISO of power under LG&E/KU's open access transmission tariff (Tariff), such as a Network Integration Transmission Service Agreement and Network Operating Agreement between KMPA and LG&E/KU, an Interim and Standard Large Generator Interconnection Agreement, and agreements for long-term, firm point-to-point transmission service reservations.[32]

25. In addition, KMPA disputes LG&E/KU's arguments and contends that it meets the second criterion. KMPA explains that, while Rate Schedule No. 402 was executed in July 2006, Original Rate Schedule No. 402, in which LG&E/KU committed to preserve de-pancaked rates, was filed by LG&E/KU in February 2006, providing assurance of de-pancaking to KMPA and its members at that time.[33] KMPA also argues that LG&E/KU

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[29] Kentucky Municipals Protest at 10 (citing March Order, 166 FERC ¶ 61,206 at P 82) (emphasis added by Kentucky Municipals).

[30] *Id.* at 10.

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

[32] KMPA Protest at 15-17.

[33] *Id.* at 17-18.

is wrong regarding the timing of KMPA's investment in Prairie State because KMPA's execution of the Project Development Agreement in February 2005 did not constitute a binding decision to invest. KMPA explains that it executed the Amended & Restated Project Development Agreement, which provided for KMPA's full commitment to Prairie State, in June 2007, nearly a year after Rate Schedule No. 402 was executed. KMPA explains that, since then, it has issued $526 million in debt to develop and construct the Prairie State plant and purchase its entitlement share of the Prairie State assets.[34]

26. Besides investing in Prairie State, KMPA states that it and its members have made a number of other business decisions relying on the De-pancaking Mitigation, including: (1) executing power sales agreements in September 2007 with its members for their respective entitlement percentages of KMPA's share of the electric power and energy from Prairie State; (2) paying for facilities to be constructed to interconnect with the LG&E/KU transmission system; (3) terminating wholesale power sales contracts with TVA in late 2009 and early 2010 and, until Prairie State commenced commercial operation in 2012, sourcing from other power in MISO; (4) executing a Network Integration Transmission Service Agreement and Network Operating Agreement between KMPA and LG&E/KU in 2009, which required costly feasibility studies and negotiation; (5) being parties to a power sales contract with AMP, dated November 1, 2007, for power generated in MISO; and (6) constructing and commencing operation of a gas-fired combustion turbine peaking facility within LG&E/KU's control area in 2010 under the expectation that Paducah, its owner, would have the ability to make "Drive-In" sales into MISO without incurring pancaked transmission charges as provided for in the De-pancaking Mitigation.[35]

27. Thus, KMPA asserts that, because it and its members are similarly situated with the Transition Customers, it is unduly discriminatory for KMPA and its members to not also be eligible for the Transition Mechanism.[36]

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

[35] *Id.* at 20-23.

[36] *Id.* at 15.

c. Commission Determination

28. In the March Order, the Commission identified 11 customers entitled to De-pancaking Mitigation under the Transition Mechanism.[37] In addition, in the order on rehearing of the March Order, which is being issued concurrently with this order, the Commission has identified three additional customers, KMPA and its members Paducah and Princeton, as being located in the LG&E/KU market and thus entitled to service under the Transition Mechanism.[38] As discussed below, these 14 entities as well as the Kentucky Municipal Energy Agency should be referred to as the "Transition Customers." Nonetheless, we address LG&E/KU's arguments regarding which customers should be considered Transition Customers.

29. In its Filing, LG&E/KU presents arguments as to why three of the Transition Customers—Falmouth, Princeton, and Paducah—should not be entitled to service under the Transition Mechanism.[39] Accordingly, the Agreement does not include these customers as being entitled to the Transition Mechanism. We reject LG&E/KU's arguments regarding these customers and find that all three customers should be considered Transition Customers eligible for the Transition Mechanism.

30. First, the Commission specifically identified Falmouth in the March Order as being entitled to the Transition Mechanism.[40] LG&E/KU did not request rehearing of that finding. LG&E/KU's argument in this proceeding that Falmouth should not be entitled to the Transition Mechanism is based on the fact that Falmouth joined PJM in 2018, a fact that was known before the March Order.[41] That LG&E/KU presented this argument for the first time here represents a collateral attack on the March Order and so is rejected.[42]

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[37] The Commission identified these customers as "10 of the 12 KU Requirements Customers (i.e., Barbourville, Bardwell, Benham, Corbin, Falmouth, Frankfort, Madisonville, Paris, Providence, and Berea) and Owensboro." March Order, 166 FERC ¶ 61,206 at P 80.

[38] Rehearing Order, 168 FERC ¶ 61,152 at P 109.

[39] Transmittal at 6-8.

[40] March Order, 166 FERC ¶ 61,206 at P 80.

[41] *See, e.g.*, *City of Falmouth, Kentucky*, 165 FERC ¶ 61,250.

[42] We note that LG&E/KU asserts that Falmouth no longer is a designated network load or a network customer of LG&E/KU. Transmittal at 6. If this is correct and if Falmouth does not take any other transmission service from LG&E/KU to transmit power

31. The Commission did not specify in the March Order that Princeton and Paducah were entitled to the Transition Mechanism, and therefore LG&E/KU is not barred from arguing here that these customers should not be entitled to the Transition Mechanism because of a lack of reliance. However, we find that LG&E/KU's argument on this issue is without merit.

32. LG&E/KU asserts that Princeton and Paducah, operating through KMPA, could not have relied on transmission rate de-pancaking at the time KMPA committed in 2005 to invest in Prairie State located in MISO to serve their loads. According to LG&E/KU, KMPA's commitment was made well before Rate Schedule No. 402 went into effect, but after the Kentucky Public Service Commission initiated an investigation into LG&E/KU's MISO membership and LG&E/KU's subsequent announcement that it was leaving MISO.[43] According to LG&E/KU, "KMPA had no reasonable expectation that the transmission landscape would remain unchanged by the time Prairie State went into service."[44]

33. We disagree that it must have been apparent to KMPA at the time of its Prairie State investment that LG&E/KU would not remain in MISO. While that certainly was a possibility, the proposed withdrawal was controversial, and it was not clear whether ultimately LG&E/KU would leave MISO. Further, as KMPA explains, LG&E/KU filed the original Rate Schedule No. 402, providing for transmission rate de-pancaking, in February 2006, before KMPA executed the definitive agreements committing it to the Prairie State project. KMPA also made other later commitments in reliance on transmission rate de-pancaking.[45]

34. In any event, LG&E/KU's argument ignores that, in approving the 1998 Merger of LG&E and KU, the Commission relied on the transmission rate de-pancaking provided by LG&E/KU joining MISO to mitigate the market power created by the Merger.[46] Specifically, the Commission stated:

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purchased in MISO to serve Falmouth's load during the Covered Period, the definition of which is discussed below, then LG&E/KU would not have any obligation to Falmouth under the Transition Mechanism in any event.

[43] *Id.* at 6-8.

[44] *Id.* at 7.

[45] KMPA Protest at 19-23.

[46] Merger Order, 82 FERC at 62,222-23.

> 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.[47]

35. It thus was likely that, if LG&E/KU were to be permitted to leave MISO in 2006, it would have to propose some kind of de-pancaking mechanism to replace MISO membership in order to continue to satisfy the Commission's market power concerns expressed in the Merger Order. Indeed, LG&E/KU's notice of withdrawal did just that.[48] Although the provisions of Rate Schedule No. 402 ultimately adopted represented a different form of rate de-pancaking than what LG&E/KU originally proposed, this was because the Commission found the original proposal to be inadequate.[49] There never was any question in the proceeding addressing LG&E/KU's withdrawal from MISO that de-pancaking might not be required.

36. Consequently, regardless of what KMPA may have known or should have expected regarding LG&E/KU's continued membership in MISO at the time KMPA committed to Prairie State, KMPA reasonably could have relied on there being some form of transmission rate de-pancaking that would apply to the transmission of power from Prairie State to Princeton and Paducah based on the Commission's holding in the 1998 Merger Order. Therefore, it is appropriate to include Princeton and Paducah, as well as KMPA, as Transition Customers entitled to the Transition Mechanism.

37. We also find that the Kentucky Municipal Energy Agency should be included as a Transition Customer eligible for the Transition Mechanism. As Kentucky Municipals explain, although the Kentucky Municipal Energy Agency's members currently are identified as Transition Customers, the Kentucky Municipal Energy Agency is the entity holding the Covered TSR. Because the Kentucky Municipal Energy Agency entered into certain PPAs for its members, who have been identified as Transition Customers, and the

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[47] *Id.*

[48] *See Louisville Gas and Elec. Co.*, 114 FERC ¶ 61,282, at PP 99-100 (2006).

[49] The transmission rate de-pancaking mechanism went through several iterations before it was finalized in Rate Schedule No. 402 and accepted. *E.ON U.S., LLC*, Docket No. ER06-1279-001 (Nov. 9, 2006) (delegated order); *see also* Louisville Gas and Electric Company and Kentucky Utilities Company, Joint Application under FPA Section 203 and Section 205, Docket Nos. EC98-2-001 and ER18-2162-000, at 11-16 (filed Aug. 3, 2018).

Commission established the Transition Mechanism to ensure those customers retain access to alternative competitive supply arrangements, it is appropriate to include the Kentucky Municipal Energy Agency as a Transition Customer as well. However, we clarify that the Kentucky Municipal Energy Agency may not, as a Transition Customer, use the Transition Mechanism to benefit members that may join it after the issuance of the March Order that have not been identified as Transition Customers.

2. Covered PPAs

a. Transmittal

38. LG&E/KU explains that the Agreement defines three terms—"Covered PPA," "Covered TSRs," and "Covered Period"[50]—which together establish the parameters of the commitments that Transition Customers made in reliance on the De-pancaking Mitigation for which LG&E/KU will reimburse the Applicable MISO Charges.[51] LG&E/KU states that it defined Covered PPA to extend to: (1) Master Power Purchase and Sale Agreement Confirmation Letter between Owensboro and Big Rivers Electric Corporation, dated July 20, 2018; (2) Agreement for the Purchase and Sale of Full-Requirements Capacity and Energy Between Big Rivers Electric Corporation and the City Utility Commission of the City of Owensboro, Kentucky, dated June 22, 2018; (3) Agreement for the Purchase and Sale of Firm Capacity and Energy Between Big Rivers Electric Corporation and the Kentucky Municipal Energy Agency, dated July 13, 2016; (4) City of Berea, Kentucky Full Requirements Energy Supply Schedule (AMP Contract No. 2019-003352-SCHED), a Schedule to Master Service Agreement No. 2016-003351-MAS, dated September 2, 2016; and (5) Electric Plant Board of the City of Benham, Kentucky Remaining Requirements Power Sales Schedule (AMP Contract No. 2019-004883-SCHED), a Schedule to Master Service Agreement No. 2015-001518-MAS. LG&E/KU states that, based on a review of the PPAs provided to LG&E/KU by the Transition Customers, these PPAs are the ones that Transition Customers entered into prior to the March Order and that will use MISO transmission service to deliver to their loads.[52]

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[50] The term "Covered Period" is discussed below.

[51] Transmittal at 11. The term "Applicable MISO Charges," including the specific schedules for which LG&E/KU will provide Transition Customers with reimbursement, is discussed below.

[52] *Id.*

b. <u>Protest</u>

39. Kentucky Municipals contend that LG&E/KU's proposed Agreement improperly omits certain PPAs that meet the Commission's criteria in the March Order.[53] Included among these, Kentucky Municipals argue, were the following Kentucky Municipal Energy Agency PPAs to supply KU Requirements Customers: (1) Kentucky Municipal Energy Agency-Big Rivers Electric Corporation PPA; (2) Vistra Energy PPA; (3) Paducah PPA; (4) Kentucky Municipal Energy Agency-Ashwood Solar PPA; (5) Paris PPA; and (6) Southeastern Power Administration PPAs. According to Kentucky Municipals, these PPAs were signed prior to the issuance of the March Order and went into effect on May 1, 2019, except for the Kentucky Municipal Energy Agency-Ashwood Solar PPA, which will not begin until construction of the project is complete. Kentucky Municipals explain that each of these PPAs, except for the Kentucky Municipal Energy Agency-Big Rivers Electric Corporation PPA, which is currently a Covered PPA, relies on access to the MISO market for backup supply service and economy energy because those services are not available from LG&E/KU. Kentucky Municipals state that, to ensure access to those services and other resources from MISO when needed, the Kentucky Municipal Energy Agency has entered into the financially binding Kentucky Municipal Energy Agency-CIN TSR to reserve 100 megawatts (MW) of MISO firm point-to-point transmission service from MISO Zone 6 into the LG&E/KU market to allow for deliverability under these PPAs.[54]

40. In addition, Kentucky Municipals contend that the Benham and Berea PPAs, including Benham-AMP PPA, Berea-AMP PPA, and Berea-Kentucky Municipal Energy Agency Seasonal Capacity PPA, should also be included as Covered PPAs. According to Kentucky Municipals, those PPAs were entered into in reliance on De-pancaking Mitigation prior to March 21, 2019, to serve Benham and Berea requirements in LG&E/KU market from resources located in MISO and for backup supply service and economy energy service due to unavailability of those services from LG&E/KU.[55]

41. Kentucky Municipals further argue that KMPA, Paducah, and Princeton PPAs should be included as Covered PPAs. Kentucky Municipals explain that KMPA and its members have entered into power supply arrangements for resources located in MISO that directly rely on transmission service on the MISO transmission system and that were entered into in reliance on the De-pancaking Mitigation prior to March 21, 2019. According to Kentucky Municipals, KMPA's largest financial commitment is its multi-hundred-million dollar investment in its 124 MW ownership interest in Prairie State

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[53] Kentucky Municipals Protest at 18-19.

[54] *Id.* at 20 (citing Painter Aff., Ex. KM-1 at 11, Table B).

[55] *Id.* at 20-21.

located in MISO, and KMPA has relied on the De-pancaking Mitigation in committing to MISO firm point-to-point reservations for the import of Prairie State output into the LG&E/KU market. Further, Kentucky Municipals argue that MISO charges have been reimbursed under Rate Schedule No. 402 since December 2009 for this output. Kentucky Municipals additionally explain that KMPA members, Paducah and Princeton, are each a party to a power sales contract with AMP, dated November 1, 2007, which pertains to three hydroelectric generation projects developed by AMP at locks and dams on the Ohio River at Smithland, Cannelton, and Willow Island, Kentucky.[56] Accordingly, Kentucky Municipals argue that the following PPAs should be included as Covered PPAs: (1) KMPA-Paducah PPA; (2) KMPA-Princeton PPA; (3) Paducah-AMP PPA for hydroelectric generation; and (4) Princeton-AMP PPA for hydroelectric generation.[57]

c. **Commission Determination**

42. We agree with Kentucky Municipals that each of the PPAs it lists should be included in the Transition Mechanism as "Covered PPAs" to the extent they are not already considered as such. Each of these PPAs was entered into before the issuance of the March Order, exists to serve the loads of the Kentucky Municipal Energy Agency's and KMPA's customers, and was entered into in reliance on the continued existence of the De-pancaking Mitigation. Further, as explained in the Rehearing Order, the list of PPAs described by the Commission in the March Order was not meant to be an exhaustive list.[58] Accordingly, it is appropriate for LG&E/KU to include these PPAs as "Covered PPAs."

3. **Definition of "Covered TSRs"**

a. **Transmittal**

43. LG&E/KU states that the term "Covered TSRs" refers to the specific TSRs that Transition Customers had on the MISO system for delivery of energy to their loads as of the March Order. LG&E/KU thus states that the Agreement provides that LG&E/KU will provide reimbursement for Applicable MISO Charges under the Covered TSRs for delivery of energy under the Covered PPAs. LG&E/KU explains that the intersection of the Covered PPAs and the Covered TSRs represents the level of commitment the Transition Customers made prior to the March Order.

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[56] *Id.* at 22.

[57] *Id.* at 22-23.

[58] Rehearing Order, 168 FERC ¶ 61,152 at P 110.

44. LG&E/KU explains that, given this intersection, it is further defining the scope of its reimbursement obligation to Benham and Berea under the applicable Covered TSR. LG&E/KU states that, because the Kentucky Municipal Energy Agency, which includes Benham and Berea, has a TSR for delivery of resources from MISO and this TSR is being used for delivery of Benham's and Berea's requirements service under their respective Covered PPAs, LG&E/KU will reimburse up to the full amount of Benham's and Berea's designated peak loads of the Applicable MISO Charges on this particular TSR. LG&E/KU explains that, because this TSR can be used for purposes other than delivery to Benham and Berea, this limitation ensures that reimbursement is limited to what is necessary to effectuate delivery under Benham's and Berea's Covered PPAs.[59]

b. Protest

45. Kentucky Municipals contend that the March Order provided that the Transition Mechanism applies to each of the Kentucky Municipals "located in the LG&E/KU market" that "reasonably relied on the De-pancaking Mitigation when exercising their rights to de-pancaked transmission."[60] Kentucky Municipals argue that this includes long-term TSRs. They additionally state that they have asked that the Commission provide clarification on this matter, but note that even LG&E/KU's proposed Agreement includes "Covered TSRs."[61] Kentucky Municipals contend that all financial commitments undertaken in reliance on de-pancaked transmission across the MISO-LG&E/KU seam, whether committing to transmission reservations before committing to specific resources or, conversely, committing to resources in MISO before subscribing to MISO transmission service prior to March 21, 2019, should be covered.[62]

46. Kentucky Municipals argue that LG&E/KU's Agreement omits TSRs that are binding financial commitments entered into in reliance on De-pancaking Mitigation. Specifically, Kentucky Municipals argue that the Kentucky Municipal Energy Agency's TSR from MISO Zone 6 to the LG&E/KU market (i.e., the Kentucky Municipal Energy Agency-CIN TSR) is a long-term financial commitment made in reliance on De-pancaking Mitigation and thus should be included in the Transition Mechanism. According to Kentucky Municipals, the Kentucky Municipal Energy Agency-CIN TSR

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[59] Transmittal at 12.

[60] Kentucky Municipals Protest at 4 (citing March Order, 166 FERC ¶ 61,206 at PP 77-78).

[61] *Id.* at 4-5; *see also* Kentucky Municipals Request for Rehearing and Clarification, Docket Nos. EC98-2-002 and ER18-2162-001, at 5 (filed Apr. 22, 2019).

[62] Kentucky Municipals Protest at 5.

has a nine-year term from May 2019 to April 2027 and "serves multiple purposes as part of [the Kentucky Municipal Energy Agency's] overall, unified portfolio . . . , and was entered into in reliance on De-pancaking Mitigation."[63]

47. In addition, Kentucky Municipals argue that LG&E/KU's determination that it will only reimburse the portion of the costs of the Kentucky Municipal Energy Agency-CIN TSR used to deliver Benham's and Berea's designated peak loads under the PPAs with AMP is based on an unduly narrow reading of the March Order. Kentucky Municipals argue that this narrow reading incorrectly assumes that the Commission sought to protect only one form of financial commitment—power purchase agreements—rather than any financial commitment made in reliance on De-pancaking Mitigation, and that such a reading "is inconsistent with the reality of planning a unified portfolio, which includes making commitments to TSRs."[64]

48. Kentucky Municipals argue that, even if it was the Commission's intention that the Transition Mechanism applies only to PPAs entered into prior to March 2019, Kentucky Municipal Energy Agency would still be entitled to de-pancaked rates for the Kentucky Municipal Energy Agency-CIN TSR's full 100 MW under the Transition Mechanism. Kentucky Municipals state that the Kentucky Municipal Energy Agency-CIN TSR also supports four other PPAs "entered into in reliance on De-pancaking Mitigation," including the Vistra Energy PPA, the Paducah PPA, the Kentucky Municipal Energy Agency-Ashwood Solar PPA, and the Paris PPA, "each of which Kentucky Municipals contend is a long-term financial commitment that satisfies the March [] Order's criteria for being included in the transition mechanism."[65] Kentucky Municipals contend that these four PPAs rely on de-pancaking because, to reliably and economically integrate them into the Kentucky Municipal Energy Agency's overall portfolio, they require backup supply service and economy energy purchases from MISO. Kentucky Municipals thus explain that the commitment the Kentucky Municipal Energy Agency made in the Kentucky Municipal Energy Agency-CIN TSR would provide an adequate level of firm transmission service for reliable access to the MISO market to support the four PPAs.[66]

49. Kentucky Municipals also argue that LG&E/KU's proposed Transition Mechanism improperly excludes two TSRs by KMPA and its members. Specifically,

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[63] *Id.* at 12.

[64] *Id.* at 12-13.

[65] *Id.* at 13.

[66] *Id.* at 13-14.

those are a 111 MW long-term yearly firm point-to-point transmission reservation from Prairie State to the MISO border with LG&E/KU and a 17 MW long-term yearly firm point-to-point transmission reservation from Prairie State to the MISO border with LG&E.[67]

c. **Commission Determination**

50. The Agreement provides that reimbursement for pancaked MISO transmission charges applies only to transmission service pursuant to "Covered TSRs."[68] The Agreement defines Covered TSRs as the specific TSR that Transition Customers had submitted to MISO as of the March Order to transmit energy to their loads.[69]

51. We find that the Agreement's definition of Covered TSRs is too narrow. The Commission required that the Transition Mechanism cover the transmission of electricity on the MISO system for the initial term of each PPA entered into in reliance on the De-pancaking Mitigation. The Commission did not require that the transmission service with MISO also be in place for the entire term of such PPAs as of the date of the March Order. Consequently, transmission service covered by the Transition Mechanism can be arranged with MISO at any point in the future. So long as the transmission service being provided is for the delivery of energy from a PPA that is covered by the Transition Mechanism, the transmission service likewise is covered by the Transition Mechanism, regardless of when it is arranged.

52. We therefore reject the definition of Covered TSRs included in the Agreement. Instead, that definition must include all transmission service provided by MISO and used to deliver energy from PPAs covered by the Transition Mechanism, regardless of the date of the TSR. However, we clarify that, to the extent that a Covered TSR could be used to provide for additional services not contracted for as of the date of the March Order, such as future backup supply service and economy energy purchases, these future services are not eligible for the Transition Mechanism. Furthermore, as we clarified in the Rehearing Order,[70] the Transition Mechanism will only cover TSRs so long as such TSRs are used for the initial term of the power purchase or sales agreement covered by the Transition Mechanism, which include imports to the LG&E/KU market from generation located on

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[67] *Id.* at 18.

[68] Transmittal at 11.

[69] *Id.*

[70] Rehearing Order, 168 FERC ¶ 61,152 at P 110.

the MISO system and exports to the MISO market from generation located on the LG&E/KU transmission system.

4. Applicable MISO Charges

a. Transmittal

53. LG&E/KU explains that the term "Applicable MISO Charges" in the Agreement includes MISO Schedule 1 (Scheduling, System Control and Dispatch Service), Schedule 2 (Reactive Supply and Voltage Control), and Schedule 7 (Long-Term and Short-Term Point-to-Point Service). LG&E/KU states that Rate Schedule No. 402 lacked this specificity which, as MISO developed new charges and schedules, has led to conflict between LG&E/KU and the Rate Schedule No. 402 customers about which MISO schedules were subject to reimbursement. LG&E/KU states that Rate Schedule No. 402 provided that LG&E/KU would de-pancake transmission charges where both it and MISO provided and charged for "corresponding" services. LG&E/KU thus proposes to clarify what specific MISO Schedules correspond to LG&E/KU transmission and ancillary services charges in light of previous conflict. LG&E/KU acknowledges, however, that it has historically resolved conflicting interpretations of Rate Schedule No. 402 by providing for reimbursement under MISO Schedules 26 (Network Upgrade From Transmission Expansion Plan), 26-A (Multi-Value Project Usage Rate), 11 (Wholesale Distribution Service), and 45 (Cost Recovery of NERC Recommendation or Essential Action).[71]

54. LG&E/KU submits that it is appropriate to exclude Schedules 26 and 26-A from the definition of Applicable MISO Charges. LG&E/KU argues that both Schedules 26 and 26-A include charges associated with projects determined in the MISO transmission expansion process to be eligible for regional cost sharing. According to LG&E/KU, the factors MISO uses to determine cost recovery under Schedule 26 have no corollary with LG&E/KU planning criteria and projects that meet LG&E/KU planning criteria would not pass the criteria to qualify as a Schedule 26 project in MISO. LG&E/KU thus argues that Schedule 26 charges do not pancake onto corresponding charges within LG&E/KU.[72] Likewise, LG&E/KU argues that charges under Schedule 26-A derive from a unique portfolio of projects designed to address MISO-specific issues and are unlike anything recoverable through LG&E/KU transmission charges.[73]

[71] Transmittal at 8-9 & n.40.

[72] *Id.* at 9.

[73] *Id.* at 9-10.

55. In addition, LG&E/KU submits that it is appropriate to exclude Schedules 8, 11, and 45 from the definition of Applicable MISO Charges. As to Schedule 8, which applies to non-firm transmission service, LG&E/KU states that, under the Agreement, reimbursement is limited to Covered TSRs, which are for firm transmission service. LG&E/KU thus posits that Schedule 8 will no longer apply. LG&E/KU states that charges under Schedule 11, which is associated with Wholesale Distribution Service, do not pancake onto corresponding charges within LG&E/KU transmission rates because, among other reasons, LG&E/KU addresses such service through direct assignment agreements. Lastly, LG&E/KU states that Schedule 45 is an elective schedule for the recovery of costs associated with North American Electric Reliability Corp. (NERC) Alerts and that, based on the discretion afforded to utilities in responding to those Alerts, it is not possible to adequately determine whether charges under Schedule 45 correspond to or pancake with charges in LG&E/KU transmission rates.[74]

b. Protest

56. Kentucky Municipals oppose LG&E/KU's proposal to narrow the existing De-pancaking Mitigation by only reimbursing Schedule 1, 2 and 7 charges and no longer reimbursing Schedule, 8, 11, 26, 26-A and 45 charges. Kentucky Municipals argue that parties have relied on reimbursement of these schedules in entering into substantial binding financial commitments and that LG&E/KU should continue to honor payments for these schedules consistent with its past practice and interpretation of Rate Schedule No. 402.[75]

c. Commission Determination

57. As explained below, we reject LG&E/KU's attempt to limit its de-pancaking obligation under the Transition Mechanism by not reimbursing charges associated with certain schedules, except for LG&E/KU's exclusion of charges under Schedule 11 (Wholesale Distribution Service).

58. LG&E/KU's justification for eliminating reimbursement for Schedule 8 (Non-Firm Point-to-Point Transmission Service) is that "[u]nder the [Agreement], reimbursement is limited to Covered TSRs, which are for firm transmission service."[76] However, as explained above, we reject the narrow definition of Covered TSRs included

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[74] *Id.* at 10.

[75] Kentucky Municipals Protest at 8 (citing *Entergy Servs., Inc. v. FERC*, 568 F.3d 978, 985 (D.C. Cir. 2009); *S.D. Pub. Utils. Comm'n v. FERC*, 934 F.2d 346, 350 (D.C. Cir. 1991); *Bethany v. FERC*, 727 F.2d 1131, 1144 (D.C. Cir. 1984)).

[76] Transmittal at 10.

in the Agreement. Instead, Covered TSRs must include any transmission service used to deliver electricity for the initial term of the power purchase or sales agreement covered by the Transition Mechanism, which include imports to the LG&E/KU market from generation located on the MISO system and exports to the MISO market from generation located on the LG&E/KU transmission system. In the event that non-firm transmission is used as a Covered TSR, the Agreement must require LG&E/KU to provide reimbursement for such transmission service.

59. LG&E/KU's arguments regarding charges under Schedules 26 (Network Upgrade From Transmission Expansion Plan) and Schedule 26-A (Multi-Value Project Usage Rate) are essentially the same for each schedule. LG&E/KU asserts that these schedules relate to the recovery of costs associated with transmission facilities benefitting the MISO region as a whole, and the factors considered by MISO are different from the factors that LG&E/KU considers in planning its transmission system.[77] Moreover, LG&E/KU contends that it is appropriate for Transition Customers to bear the cost of Schedule 26-A facilities because "Transition Customers are the external load that benefits from these market projects."[78]

60. Similarly, LG&E/KU argues that charges under Schedule 45 (Cost Recovery of NERC Recommendation or Essential Action) should not be reimbursed because MISO utilities are given "broad discretion" in determining what costs can be included in Schedule 45 and "it is not possible to adequately determine whether charges under Schedule 45 correspond to or pancake with charges in LG&E/KU transmission rates."[79]

61. We find that LG&E/KU's arguments are not persuasive for two reasons. First, the Agreement provides for reimbursement of charges under MISO Schedule 7 (Long-Term and Short-Term Firm Point-To-Point Service).[80] Section 2 of Schedule 7, which establishes the Schedule 7 charges for firm transmission for the Single System-Wide Rates applicable to Covered TSRs,[81] specifically incorporates charges under MISO

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[77] *Id.* at 9-10.

[78] *Id.* at 10.

[79] *Id.*

[80] *Id.* at 8.

[81] Section 2 of MISO Schedule 7 provides that the Single System-Wide Rate applies to firm transmission service "where the generation source is located within the Transmission System Region and the load is located outside of" MISO.

Schedules 26, 26-A, 26-C, and 45. Consequently, these charges already are part of the Schedule 7 rates that specifically are covered by the Agreement.[82]

62. In addition, we find that charges under Schedules 26, 26-A, and 45 are "corresponding charges" as defined by Section 1.a.iv of Rate Schedule No. 402. That section provides that such charges "shall include only those charges for transmission service and ancillary services where both [MISO] and the Transmission Owner provide and charge for corresponding service."[83] That section also provides illustrative examples, including the example where credits are not required for congestion or marginal losses incurred in MISO if there is not a corresponding congestion or marginal loss charge for use of LG&E/KU's system.[84] As this example illustrates, the corresponding charges provision of Rate Schedule No. 402 is not intended to require a line-by-line comparison of the MISO and LG&E/KU transmission rate cost of service, but rather to exclude from reimbursement MISO charges that have no conceptual counterpart in LG&E's transmission rates.

63. The charges under Schedules 26, 26-A, and 45 are different from congestion and marginal losses, and instead conceptually should be considered as elements of MISO's cost of service for its charges for firm transmission service. Schedules 26 and 26-A represent MISO's mechanism for allocating the costs of transmission facilities that cannot be assigned to a single zone. Although it is true that LG&E/KU provides no multi-zone transmission service, this is because LG&E/KU is a single balancing authority area that is not part of a larger regional transmission organization (RTO). LG&E/KU's transmission charges include the cost of LG&E/KU's transmission facilities, and consequently the LG&E/KU transmission charge corresponds to the charges imposed by MISO for the transmission facilities associated with Schedules 26 and 26-A.

64. Similarly, MISO uses a separate Schedule 45 (Cost Recovery of NERC Recommendation or Essential Action) to account for the fact that not all of its member utilities will incur such costs or incur them to the same extent. LG&E/KU may not have a separate schedule for the recovery of its costs of responding to a NERC Alert, but there is no doubt that any such costs incurred by LG&E/KU would be recoverable in LG&E/KU's transmission rates to the extent they were prudently incurred and otherwise satisfy applicable standards for rate recovery. We note that LG&E/KU is silent as to

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[82] Section 2 of MISO Schedule 8 (Non-Firm Point-To-Point Transmission Service) similarly incorporates the same MISO schedules. We also find that Schedule 8 must be included as reimbursable under the Agreement, and charges under the same schedules must be reimbursed when a Transition Customer takes non-firm service from MISO.

[83] Rate Schedule No. 402, First Revised Sheet No. 3, § 1.a.iv.

[84] *Id.*

whether it has included any such costs in its transmission rates. Consequently, we find Schedule 45 charges also correspond to the LG&E/KU transmission charge that could (and perhaps does) include the costs covered by Schedule 45.

65. Finally, we agree with LG&E/KU that Schedule 11 (Wholesale Distribution Service) charges are not reimbursable because wholesale distribution service is distinct from transmission service and thus there is no pancaking of this service when LG&E/KU charges for transmission service.

5. Reimbursement Adjustments

a. Transmittal

66. LG&E/KU explains that the Agreement includes provisions which will reduce the amount of Applicable MISO Charges which may be eligible for reimbursement, depending on certain actions that the Transition Customers may take. First, if a Covered PPA is undesignated as a Designated Network Resource for any period in a given month, then the amount of Applicable MISO Charges subject to reimbursement in that month will be reduced accordingly. LG&E/KU states that this provision will ensure that the Covered PPAs are used for their intended purpose, i.e., to serve load.[85]

67. In addition, the Agreement provides that, if all or a portion of a Transition Customer's load ceases to be a part of the LG&E/KU balancing authority area, the portion of Applicable MISO Charges associated with that now external load will be removed from LG&E/KU's reimbursement obligation.[86]

b. Commission Determination

68. We agree, for the most part, with LG&E/KU's proposed reduction in the reimbursement amount if a Transition Customer physically leaves the LG&E/KU balancing authority area. However, to the extent that a Transmission Customer electrically leaves the LG&E/KU balancing authority area (e.g., pseudo-tied to another balancing authority area), such Transmission Customer could still depend on the LG&E/KU transmission system for delivery to its load and should not have its reimbursement reduced in such instance. Additionally, as noted above, LG&E/KU failed to request rehearing of the Commission's ruling that Falmouth, which moved to the PJM balancing authority area in 2018, is a Transition Customer entitled to de-pancaking under the Transition Mechanism. Therefore, to the extent that Falmouth (or the Kentucky Municipal Energy Agency on behalf of Falmouth) takes transmission service from

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[85] Transmittal at 12.

[86] *Id.*

LG&E/KU to deliver electricity to Falmouth's load during the initial term of a Covered PPA, LG&E/KU may not apply the proposed reimbursement adjustment to Falmouth.

69. Additionally, because a Designated Network Resource that is undesignated for any period of the month could potentially still serve the Transmission Customer's load, albeit on a non-firm basis, we disagree with LG&E/KU that a reduction in the reimbursement should occur for such undesignation to the extent that the resource is used to serve the Transmission Customer's load during the period it was undesignated.

6. Covered Period and Termination of Reimbursement Obligations

a. Transmittal

70. LG&E/KU explains that the term "Covered Period" refers to the initial term under each Covered PPA.[87] In addition, LG&E/KU explains that the Agreement specifies several circumstances under which LG&E/KU's obligation to provide reimbursement for Applicable MISO Charges for either individual Transition Customers or all Transition Customers will terminate.

71. First, LG&E/KU explains that it will no longer provide such reimbursement to any Transition Customer if LG&E/KU joins MISO or PJM (or another RTO, independent system operator (ISO), or similar construct), or to an individual Transition Customer if it joins MISO or PJM (or another RTO, ISO, or similar construct), such that the transmission rate pancake for a Transition Customer is eliminated.[88]

72. In addition, LG&E/KU states that its obligation to provide reimbursement to any Transition Customer will cease upon the earlier of: (1) termination of a Covered TSR, on the basis that the Transition Customer no longer has MISO transmission service costs to be reimbursed; (2) termination of a Covered PPA, on the basis that the Transition Customer has made or will make new and different supply arrangements that are not reliant on the existence of de-pancaked transmission; (3) termination of the Transition Customer's transmission service under the LG&E/KU Tariff, on the basis that the Transition Customer is no longer receiving pancaked transmission service; and (4) in any event, at the end of the Covered Period (i.e., the initial term) for each Covered PPA, as provided for in the March Order.[89]

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[87] *Id.*

[88] *Id.* at 12-13.

[89] *Id.* at 13.

b. Protest

73. Kentucky Municipals argue that LG&E/KU's proposed Covered Period limits the transition period in ways inconsistent with the March Order.[90] Kentucky Municipals contend that the Transition Mechanism should be "simple and clear" with the De-pancaking Mitigation continuing to apply to each qualifying PPA and TSR until the expiration (or earlier termination) of its initial term. In the case that a qualifying PPA extends beyond the initial term of the associated TSR, Kentucky Municipals proposes that the De-pancaking Mitigation should continue for the needed transmission service associated with the PPA until the end of the initial term (or earlier termination) of the PPA.[91] Kentucky Municipals also contend that it is unclear whether LG&E/KU's proposed Transition Mechanism excludes reimbursements for a pre-March 21, 2019 TSR beyond the end of its initial term on grounds that the exercise by the customer of rollover rights under the TSR would constitute an "amendment, supplement or other modification" of the TSR. If so, Kentucky Municipals argue, the Agreement would be inconsistent with the March Order's requirement that the De-pancaking Mitigation "must continue for a transition period equal to the initial term of each power purchase agreement."[92]

74. Kentucky Municipals also note that, in proposing an automatic termination date of no later than May 31, 2029, LG&E/KU appears to have based that date on the latest date of any Covered Period for the PPAs it described. Kentucky Municipals argue that "[t]o the extent additional PPAs are included in the [T]ransition [M]echanism, that automatic date should be revised based on the latest ending date of the initial periods of all covered PPAs."[93]

c. Commission Determination

75. We reject LG&E/KU's proposed termination conditions in two respects. First, as noted above, LG&E/KU cannot limit its de-pancaking obligation to TSRs in effect as of the date of the March Order. Consequently, the de-pancaking obligation cannot be terminated upon the termination of a Covered TSR unless the Transition Customer does not put another transmission arrangement in place that also satisfies the conditions for a Covered TSR. Second, LG&E/KU cannot terminate its de-pancaking obligation when a

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[90] Kentucky Municipals Protest at 23.

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

[92] *Id.* at 25 (quoting March Order, 166 FERC ¶ 61,206 at P 82).

[93] *Id.* at 25.

Transition Customer terminates its service under the LG&E/KU Tariff unless the Transition Customer does not replace that service with different service delivering electricity from MISO to the Transition Customer's load.[94] However, as we clarified in the Rehearing Order,[95] the Transition Mechanism will only cover TSRs so long as such TSRs are used for the initial term of the power purchase or sales agreement covered by the Transition Mechanism, which include imports to the LG&E/KU market from generation located on the MISO system and exports to the MISO market from generation located on the LG&E/KU transmission system.

7. Termination of De-pancaking for Exports

a. Transmittal

76. LG&E/KU explains that Rate Schedule No. 402 included terms pursuant to which LG&E/KU waived its transmission charges when a Rate Schedule No. 402 customer sold energy into MISO. LG&E/KU states that it has not included these terms in the new Agreement because the March Order limited the scope of the Transition Mechanism to addressing imports under the Covered PPAs and did not require LG&E/KU to include any provision for exports from MISO from generation located on the LG&E/KU transmission system.[96]

b. Protest

77. Kentucky Municipals argue that LG&E/KU's decision to exclude the Owensboro-MISO TSR from the Agreement because it involves export into MISO, which LG&E/KU proposes to no longer waive, is inconsistent with the March Order and unjust and unreasonable. According to Kentucky Municipals, LG&E/KU offered Owensboro a five-year transmission reservation that waived the charges associated with exporting into MISO, but now seeks to change the terms of that bargain. According to Kentucky Municipals, if Owensboro is obliged to retain that reservation and pay pancaked charges at LG&E/KU's current rates, the cost will exceed $100,000/month.[97] Kentucky Municipals argue that, "[i]f LG&E/KU expect to hold [Owensboro] to the remainder of its five-year commitment, then LG&E/KU should be required to honor its obligation until

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[94] For example, if network service were replaced with point-to-point service, or vice-versa, LG&E/KU's de-pancaking obligation could not be terminated.

[95] Rehearing Order, 168 FERC ¶ 61,152 at P 110.

[96] Transmittal at 13 (citing March Order, 166 FERC ¶ 61,206 at P 82).

[97] Kentucky Municipals Protest at 16-17.

the end of that term, which ends on May 31, 2020 . . . or at minimum, Owensboro should be given the option to rescind that reservation as of the date when it becomes subject to incremental charges."[98]

c. **Commission Determination**

78. We reject LG&E/KU's proposal to eliminate its de-pancaking obligation for exports from the LG&E/KU balancing authority area to MISO.[99] As LG&E/KU acknowledges, the De-pancaking Mitigation contained in Rate Schedule No. 402 required de-pancaking for such exports.[100] Consequently, the Commission's requirement that LG&E/KU retain the De-pancaking Mitigation for Transition Customers as a Transition Mechanism included the requirement that LG&E/KU retain the de-pancaking provisions for exports that is provided in Rate Schedule No. 402.

79. In Paragraph 78 of the March Order, the Commission found 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. Therefore, the Commission held that the existing De-pancaking Mitigation, which covers imports to the LG&E/KU market from generation located on the MISO system and exports to the MISO market from generation located on the LG&E/KU transmission system, should remain in effect for a transition period. In Paragraph 82 of the March Order, the Commission explained how the Transition Mechanism would operate for certain power purchase agreements that import power to the LG&E/KU market from generation located on the MISO system. However, Paragraph 82 did not, as LG&E/KU asserts, limit the scope of the Transition Mechanism for the De-Pancaking Mitigation to imports.

80. Further, it appears that the ability of Transition Customers to export power to MISO was factored into at least some of such customers' calculations as to which supply options to select. For example, in opposing LG&E/KU's petition to have its de-pancaking obligation terminated, KMPA asserted that Paducah's peaking plant "was constructed and financed with the expectation that Paducah would have the ability to make 'Drive-In' sales into MISO without incurring pancaked transmission charges as is specifically provided for in the De-pancaking Agreement."[101] Consequently, preserving

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[98] *Id.* at 17.

[99] *Id.* at 13-14.

[100] *Id.* at 13.

[101] KMPA Protest at 11, 23; *see also* Kentucky Municipal Power Agency, Supplemental Protest, Docket Nos. EC98-2-001 and ER18-2162-000, at 10 (filed Oct. 10,

Transition Customers' de-pancaking for export transactions is consistent with the Commission's finding that the Transition Mechanism is appropriate to protect the Transition Customers' reliance on de-pancaked rates when making their initial supply arrangements.[102]

The Commission orders:

LG&E/KU's proposed Agreement is hereby rejected without prejudice, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

2018); Kentucky Municipals, Protest, Docket Nos. EC98-2-001 and ER18-2162-000, at 21 (filed Oct. 10, 2018) (noting Owensboro markets excess energy and capacity in MISO).

[102] March Order, 166 FERC ¶ 61,206 at PP 74-79.