166 FERC ¶ 61,131
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Owensboro Municipal Utilities

v.

Louisville Gas and Electric Company and
Kentucky Utilities Company

Docket No. EL18-203-000

ORDER GRANTING COMPLAINT IN PART

(Issued February 21, 2019)

1. On September 21, 2018, pursuant to section 306 of the Federal Power Act (FPA) and Rule 206 of the Commission's Rules of Practice and Procedure,[1] Owensboro Municipal Utilities (Owensboro)[2] filed a complaint (Complaint) requesting that the Commission find that Louisville Gas and Electric Company (LG&E) and Kentucky Utilities Company (KU) (together, LG&E/KU) has violated LG&E/KU Rate Schedule FERC No. 402 (RS 402) by failing to reimburse Owensboro for pancaked transmission charges incurred to import energy from a source in the Midcontinent Independent System Operator, Inc. (MISO) to serve Owensboro's load connected to the LG&E/KU transmission system. Owensboro asks that the Commission order LG&E/KU to promptly reimburse Owensboro for pancaked transmission reservation costs it incurred from

[1] 16 U.S.C. § 825e (2012); 18 C.F.R. § 385.206 (2018). Owensboro states that as a complaint seeking enforcement (rather than change) of an existing rate schedule, the Complaint is filed principally under FPA section 306, 16 U.S.C. § 825e, and that FPA sections 206, 309 & 316, 16 U.S.C §§ 824e, 825h & 825o, provide further basis for the relief Owensboro requests.

[2] Owensboro states that the City Utility Commission of the City of Owensboro, Kentucky is commonly known as Owensboro Municipal Utilities. Complaint at 1.

February 1, 2018 forward, with interest. For the reasons discussed below, we grant the Complaint in part.

I. Background

2. Owensboro is a municipally-owned utility that serves retail electric customers with an annual peak load of approximately 185 MW. Owensboro owns the Elmer Smith coal-fired generating plant (Elmer Smith Plant) that has a capacity in excess of 400 MW, but the two Elmer Smith Plant units will be retired in 2019 and 2020. Owensboro also has a 62 MW entitlement to power from the Southeastern Power Administration (SEPA). LG&E/KU provides transmission service to Owensboro pursuant to their joint Open Access Transmission Tariff (OATT) under which Owensboro is a Network Integration Transmission Service customer.

3. In 1997, when the Commission approved the merger of LG&E and KU, it conditioned its approval on LG&E/KU's continued participation in MISO in order to provide, among other things and as relevant here, de-pancaked transmission rates between the LG&E/KU transmission system and the remainder of the MISO footprint.[3] The Commission stated that participation in independent system operators can make markets more competitive by eliminating pancaked transmission in regions and thereby ensuring the expansion of geographic markets and by making transmission service available at a single rate thereby increasing the number of suppliers able to reach markets resulting in lower market concentration.[4] In 2006, the Commission approved LG&E/KU's withdrawal from MISO conditioned on, among other things, LG&E/KU shielding parties in the KU requirements customers' destination market, including

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[3] *Louisville Gas and Elec. Co.*, 82 FERC ¶ 61,308, at 62,222-23 (1998) (Merger Order). The Commission determined that the merger application raised concerns regarding LG&E/KU's increased vertical market power through the combination of LG&E's and KU's transmission and generation facilities, and that there were horizontal market screen failures in the KU requirements customers' destination market. However, the Commission found that these concerns were addressed by LG&E/KU's commitment to join MISO and, as relevant here, the resulting elimination of pancaked rates. In approving the merger request, the Commission found that LG&E/KU's proposed mitigation measures (applicable to the KU requirements customers' destination market), their proposed ratepayer protection mechanisms (applicable to LG&E/KU's wholesale requirements customers), and their anticipated participation in the then-proposed MISO, taken together, ensured that the merger was consistent with the public interest. *Id.*

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

Owensboro, from rate pancaking.[5] With respect to rate de-pancaking, the Commission suggested that if LG&E/KU were unable to reach a reciprocal arrangement under which MISO transmission owners would waive charges for transmission into the LG&E/KU area, LG&E/KU could satisfy this obligation by reimbursing "all additional costs … that are due to re-pancaking of transmission and ancillary service rates and that occur as a result of Applicants' withdrawal" from MISO.[6]

4. On April 11, 2006, LG&E/KU submitted a compliance filing to address various requirements directed by the Withdrawal Order.[7] In the compliance filing, with respect to rate de-pancaking, LG&E/KU stated that it had an existing agreement with the Kentucky Utilities municipal customers (including Owensboro), RS 402, which was already on file with the Commission (but not submitted with the compliance filing), that offers de-pancaked transmission and ancillary service rates.[8] The Commission conditionally accepted LG&E/KU's compliance filing on July 7, 2006, subject to further revisions required in another compliance filing.[9] On July 19, 2006, as amended on July 21 and July 26, 2006, LG&E/KU submitted additional filings to comply with the various directives of the July 7, 2006 order. This included an amended RS 402 that was filed unexecuted on July 19, 2006 and an updated executed version filed on July 26,

[5] *Louisville Gas and Elec. Co.*, 114 FERC ¶ 61,282, at PP 108-119, 204 (2006) (Withdrawal Order). To ensure that LG&E/KU's withdrawal from MISO continued to satisfy the merger conditions, the Commission, among other things, required LG&E/KU to submit a compliance filing that includes a reciprocity agreement or alternative proposal to maintain de-pancaked rates for the loads located in the KU requirements customers' destination market. *Id.* PP 108-114, 204.

[6] *Id.* at P 113.

[7] *E.ON U.S. LLC,* et al., Compliance Filing, Docket Nos. EC06-4-000, et al., (filed Apr. 11, 2006).

[8] *E.ON U.S. LLC,* 116 FERC ¶ 61,019, at P 35 (2006) (Order on Compliance Filing).

[9] *Id.* P 1. Specifically, the Commission found that LG&E/KU's proposal did not unconditionally comply with the rate de-pancaking conditions in the Withdrawal Order, and required LG&E/KU to modify RS 402, or file a new agreement, that specifies a mechanism through which it will shield the requirements customers from increased transmission costs, including pancaked ancillary service charges, resulting from rate re-pancaking caused by their withdrawal. *Id.* PP 36-38. The Commission further required that LG&E/KU specify the rates, terms and conditions for the transmission service it will offer to the requirements customers at de-pancaked rates. *Id*. at P 38.

2006, with revisions addressing de-pancaking, which is referred to in that agreement as Merger Mitigation De-pancaking (MMD). The Commission accepted the executed version of the amended RS 402 via delegated letter order on August 28, 2006.[10]

5. As it relates to the MISO transmission service for which Owensboro seeks LG&E/KU reimbursement in the Complaint, RS 402 states, in part at section 1.a:

> [LG&E/KU] shall shield MMD Parties from any pancaking of transmission and ancillary services charges for MMD Transactions … as follows:
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> i. "Drive-Out" of [MISO]: With respect to any MMD Transaction in which an MMD Party purchases electricity from a source in [MISO] for delivery to such party's load interconnected with the Transmission System: [LG&E/KU] shall credit their TO Charges to the MMD Party by an amount equal to the [MISO] Charges which the MMD Party incurs to deliver such purchased electricity to the [MISO]/LG&E/KU interface …
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> . . . .
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> iv. With respect to any MMD Transactions in which TO charges will be waived, such waived TO Charges shall include only those charges for transmission service and ancillary services where both [MISO] and the Transmission Owner provide and charge for corresponding services.[11]

6. MMD Parties, as defined in RS 402, include Owensboro and other KU Municipals, and Applicants are LG&E/KU.[12] In addition, MMD Transaction is defined

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[10] *E.ON U.S., LLC*, Docket No. ER06-1279-000 (Aug. 28, 2006) (delegated order). The Commission also accepted the earlier-filed unexecuted version of the agreement on August 23, 2006 in Docket Nos. ER06-20-004 and ER06-20-005. *E.ON U.S., LLC*, Docket Nos. ER06-20-004 and ER06-20-005 (Aug. 23, 2006) (delegated order).

[11] RS 402, First Revised Sheet No. 2, § 1.a.i.

[12] *Id.* at. 1, Definitions Section; Complaint at 5 n.6. KU Municipals is defined in RS 402 as the Frankfort Electric and Water Plant Board and the Cities of Barbourville, Bardstown, Bardwell, Benham, Berea, Corbin, Falmouth, Madisonville, Nicholasville, Paris and Providence, Kentucky and Owensboro.

as "a transaction that: (a) sources in [MISO] and sinks in Applicants' control area; or (b) sources in Applicants' control area and sinks in [MISO]."[13]

II. Complaint

7. In its Complaint, Owensboro explains that it is among the KU Municipals identified by RS 402 and as such is entitled to reimbursement by LG&E/KU of transmission charges for MISO Drive-Out transactions to remedy pancaked rates.[14] However, Owensboro states that since February 1, 2018, LG&E/KU has violated and continues to violate its obligation under RS 402 by refusing to reimburse Owensboro for pancaked transmission service charges incurred on a Drive-Out transaction from MISO.[15] Owensboro requests that the Commission: (1) find that LG&E/KU has violated RS 402; (2) order LG&E/KU to cease the violation; and (3) order refunds of the amount that LG&E/KU should have reimbursed Owensboro, with interest.[16] Owensboro claims that the current unpaid reimbursement that it is due from LG&E/KU pursuant to RS 402, prior to applicable interest, totals $2,644,759 for February through July 2018, and is continuing to accrue in amounts of approximately $450,000 per month.[17]

8. According to Owensboro, the charges to be reimbursed relate to 115 MW of firm point-to-point MISO transmission service to the LG&E/KU border for a term of five years beginning February 1, 2018, plus what Owensboro describes as "two smaller, one-month reservations (for August and October 2018) on the same path."[18] Owensboro states that the service is for firm transmission capacity on the MISO transmission system so that it is able to receive energy when needed.[19] Owensboro argues that the rates it paid

[13] RS 402, First Revised Sheet No. 2, Definitions Section.

[14] Complaint at 5 n.6.

[15] *Id.* at 1.

[16] *Id.* at 1-2, 11-12.

[17] *Id.* The calculations are shown in the Complaint in Attachment B-3. That attachment shows that the $2,644,759 figure is the total of the amounts invoiced by MISO less the amounts billed for Schedules 10 and 33, for which Owensboro assumes responsibility and does not seek reimbursement from LG&E/KU.

[18] *Id.* at 13 n.25.

[19] *Id.* at 8, 24 (Owensboro notes that the service is potentially utilized at a low load factor).

were pancaked from February 1, 2018 to August 3, 2018, because it paid for both its firm point-to-point transmission reservation from MISO to the LG&E/KU border and its secondary non-firm network service in LG&E/KU to import energy from the MISO border to Owensboro's load in LG&E/KU. Owensboro contends that the rates it paid beginning August 4, 2018 through the present continue to be pancaked after Owensboro began taking firm network service from LG&E/KU, which Owensboro states is supported by a Designated Network Resource in MISO, and it continues to pay for firm point-to-point transmission service in MISO. Owensboro additionally claims that LG&E/KU is required to reimburse Owensboro for its purchase of additional MISO firm monthly point-to-point transmission service for the months of August and October of 2018 along the same transmission path as the long-term point-to-point transmission service.

9. Owensboro explains that in June 2017, it initiated concurrent processes under the MISO Open Access Transmission, Energy, and Operating Reserve Markets Tariff and the LG&E/KU OATT, seeking to secure the 115 MW firm point-to-point reservation out of MISO, while also ending (effective June 1, 2019) the Designated Network Resource status under the LG&E OATT of its retiring Elmer Smith Plant Unit 1 generator. Owensboro states that its 115 MW firm point-to-point service out of MISO commenced on February 1, 2018.[20] Owensboro explains that it needed the firm point-to-point transmission reservation out of MISO because its two units at its Elmer Smith Plant are scheduled for retirement in 2019 and 2020 and the Elmer Smith Plant is increasingly susceptible to forced outages.[21] Owensboro states that it knew it needed assured access to the MISO-area generation fleet in order to be able to replace its Elmer Smith Plant in the event of an outage, and that it placed the reservation in conjunction with specific plans, that have since been realized, to procure a Designated Network Resource within MISO.

10. On July 20, 2018, Owensboro states that it entered an agreement with Big Rivers Electric Corporation (Big Rivers) for service commencing that same day to purchase firm energy from Big Rivers when Owensboro's load is expected to exceed its available resources (i.e., its SEPA purchase and its Elmer Smith Plant).[22] Owensboro states that LG&E/KU claims that Owensboro contracted with Big Rivers solely for the purpose of qualifying for MMD credits but argues that this claim is absurd and, in fact, Owensboro started its efforts to secure a power supply to replace its Elmer Smith Plant well before its 115 MW transmission reservation started on February 1, 2018.

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

[21] *Id.* at 2, 10, 21.

[22] Owensboro Reply at Attachment B, Master Power Purchase and Sale Agreement Confirmation Letter at 1.

11. As relates to the period prior to August 4, i.e., February 1, 2018 through August 3, 2018, Owensboro argues:

> LG&E/KU does not and cannot contest that non-firm point-to-point service under MISO Schedule 8 and secondary network service under LG&E/KU [OATT] Section 28.4 are "corresponding services." But for a given duration of service, MISO's charges for firm point-to-point service under Schedule 7 and non-firm point-to-point service under Schedule 8 are identical. For "Drive-Through and Out," as is used to reach the MISO-LG&E/KU border, they are presently both priced at $3,090.4237/MW-Month.[23]

12. Owensboro reasons, therefore, if Schedule 8 (i.e., non-firm point-to-point) MISO service "corresponds" with LG&E/KU Section 28.4 service within the meaning of RS 402 Section 1.a.iv, then so does the same priced Schedule 7 (i.e., firm point-to-point) MISO service that Owensboro reserved.[24]

13. Owensboro argues that it had valid reasons to secure its 115 MW firm point-to-point transmission reservation out of MISO. In particular, Owensboro states that it needed a long-term reservation, and with the firm and non-firm variants of MISO's point-to-point service costing the same per MW, but the latter coming with lower reservation and curtailment priorities, Owensboro's opted for MISO's firm point-to-point service.[25] Owensboro further argues that "[t]ransmission out of the MISO area may not be available on short notice, or may be curtailed if reserved only on a non-firm basis," and that "under the LG&E/KU OATT, as is standard, resources located outside the LG&E/KU system must be supported by firm transmission to the system's border in order to be eligible to be designated as a network resource."[26] According to Owensboro, between April 2013 and January 2018, "out of the 437 short-term transmission reservations from MISO that Owensboro sought, validated, and did not retract or withdraw, 271 requests were refused."[27] Owensboro argues, therefore, that without the firm transmission reservation

[23] Complaint at 19-20 (citing Zonal Pricing at 3, MISO (2018); https://cdn.misoenergy.org/Zonal%20Pricing108030.pdf.).

[24] *Id.* at 19.

[25] *Id.* at 27.

[26] *Id.* at 10-11.

[27] *Id.* at 10; Lyons Affidavit at 3 (discussing his analysis of the availability outcomes when Owensboro sought short-term point-to-point transmission out of MISO

from MISO in place, it would have to gamble on whether it would be able to secure a short-term reservation in the event it needed back-up electricity.

14. According to Owensboro, LG&E/KU informed Owensboro that it would not be reimbursed under RS 402 because Owensboro used two delivery segments that did not "correspond" as defined in RS 402 section 1.a.iv.[28] Specifically, Owensboro asserts that LG&E/KU stated that Owensboro had not designated a network resource within MISO and was using its long-term firm point-to-point service out of MISO to deliver non-firm energy to the MISO-LG&E/KU border, which was then delivered to Owensboro using secondary network service over the LG&E/KU system.[29] Owensboro argues that LG&E/KU's continued refusal to reimburse Owensboro shows that this "corresponding" services argument was simply an excuse because Owensboro completed the process of designating a network resource located within MISO as of August 4, 2018.[30] Owensboro argues that once it designed a network resource in MISO, the MISO and LG&E/KU segments became indisputably "corresponding" under LG&E/KU's theory that the "corresponding" term in RS 402 required that both segments be of the same firmness.[31] Owensboro argues that, as a result, LG&E/KU should have made clear that it will cease withholding reimbursements, at least from August 4, 2018 forward.[32]

15. Owensboro states that it needs the MISO firm point-to-point transmission reservation to provide service to its loads when its Elmer Smith Plant is unavailable and that even for hours when it had not used the reservation to import energy, it has been using the reservation to access needed capacity in MISO to provide reliable service to its firm loads.[33] Owensboro further states that it will soon be using its reservation at a high load factor, and it is not LG&E/KU's place to determine whether Owensboro has been making sufficient use of its transmission reservation. Owensboro also states that it has

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over a study period of approximately five years, April 2013 through January 2018); Complaint at Attachment B-1 (spreadsheet showing the availability outcomes for short-term point-to-point was requested to Drive-Out of MISO).

[28] Complaint at 15.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 16.

[33] *Id.* at 21.

made it clear for many years that if it did not have an emergency agreement with LG&E/KU, then it planned to rely on backup supply from MISO.[34]

16. Owensboro argues that in the past, LG&E/KU has generally, but not always reimbursed pancaked charges to Owensboro under RS 402.[35] Owensboro states that it has previously purchased electricity from sources within MISO, using a two-segment path with the first leg being point-to-point service out of MISO and the second leg being network service in LG&E/KU. Specifically, Owensboro claims that LG&E/KU has reimbursed the point-to-point transmission access charges from MISO under Schedules 7 and 8 as well as certain associated MISO schedules (such as certain ancillary service charges) for that path.

17. Owensboro argues that notwithstanding LG&E/KU's assertions that Owensboro might use the MISO reservation to arbitrage opportunity sales, "it is not improper 'arbitrage' to be both a buyer and seller over time, or even at the same time," because "that is how power markets are supposed to work …," and "[b]ecause commitments to long-term resources, dispatch commitments, and real-time matching of resources to loads all occur on different time scales, with the later of these commitments representing fine tuning based on more recent information, transactions in multiple directions are needed to produce an efficient outcome."[36]

III. <u>Notice of Filing and Responsive Pleadings</u>

18. Notice of Owensboro's Complaint was published in the *Federal Register*, 83 Fed. Reg. 49,077 (2018), with interventions and protests due on or before October 11, 2018. East Kentucky Power Cooperative, Inc. filed a timely motion to intervene. LG&E/KU filed an answer to the Complaint on October 11, 2018, which it supplemented on

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[34] *Id.* at 22.

[35] *Id.* at 6. Owensboro states that the principal prior exception to LG&E/KU having generally honored their RS 402 obligations was when it denied reimbursement for Owensboro's long-term-firm LG&E/KU-to-MISO point-to-point reservation that was temporarily redirected to PJM, on a non-firm basis, in order to support short-term Owensboro sales into the PJM energy market. Owensboro states that the Commission ordered LG&E/KU to reimburse in that case (citing *Owensboro Mun. Utils. v. Louisville Gas and Elec. Co.*, 145 FERC ¶ 61,072 (2013)).

[36] Complaint at 25.

October 12, 2018 (together, LG&E/KU Answer).[37] Owensboro filed a reply to the LG&E/KU Answer on October 26, 2018 (Owensboro Reply). LG&E/KU filed a response to the Owensboro Reply on November 8, 2018 (LG&E/KU Response). On November 26, 2018, Owensboro filed a response to the LG&E/KU Response (Owensboro Response).

A. LG&E/KU Answer

19. LG&E/KU argues that the Complaint presents a standard contract interpretation question under RS 402 and the Commission should dismiss the Complaint.[38]

20. LG&E/KU asserts that RS 402 does not require LG&E/KU to provide unlimited MMD credits whenever a RS 402 customer reserves transmission service on the MISO system. LG&E/KU argues that four elements must be met before a customer can qualify for full MMD credits: (1) there must be a proposed "transaction" that would require depancaking; (2) the transaction must involve a purchase of electricity; (3) any costs credited are required to be for delivery to load; and (4) there must be corresponding services between LG&E/KU and MISO.[39] LG&E/KU argues that Owensboro does not meet these requirements to receive MMD credits under RS 402.[40]

21. Specifically, LG&E/KU argues that from February 1, 2018 through August 3, 2018, Owensboro (1) did not have corresponding services between MISO and LG&E/KU, and (2) made only limited use of the MISO transmission reservation for purchase of electricity from a resource in MISO for delivery to Owensboro's load in LG&E/KU.[41] LG&E/KU claims that there was no corresponding service because Owensboro's MISO transmission service during that time was for firm point-to-point transmission service, while Owensboro took non-firm secondary network service, an as-available service, from LG&E/KU. LG&E/KU claims that the two delivery segments of Owensboro's MISO firm point-to-point reservations and LG&E/KU secondary non-firm

[37] The October 12, 2018 supplement included the signature page for an affidavit. that LG&E/KU omitted from its October 11, 2018 answer.

[38] LG&E/KU Answer at 1.

[39] *Id.* at 16.

[40] *Id.* at 14, 17.

[41] *Id.* at 8.

network service from February 1, 2018 through August 3, 2018 do not "correspond" within the meaning of RS 402 Section 1.a.iv.[42]

22. LG&E/KU further argues that Owensboro has made only limited use of its MISO transmission reservations from February through at least August 3, 2018. LG&E/KU claims that Owensboro has more than enough generation supply to meet its load requirements between the generation Owensboro owns and its SEPA entitlements, but Owensboro still procured the 115 MW firm MISO transmission reservation.[43] LG&E/KU asserts that Owensboro only used the firm 115 MW MISO transmission reservation a few times for spot energy services from the MISO market.[44] In addition, LG&E/KU states that Owensboro's usage factor for the 115 MW reservation from February 1 to August 3 has only been approximately 7 percent and the usage after the Designated Network Resource was nominated effective August 3, 2018 has been even lower at 2.4 percent.[45] According to LG&E/KU, other RS 402 customers[46] use their firm point-to-point transmission reservations to import resources from MISO to serve their load and use the reservations throughout the year with usage factors of approximately 58 percent and 41 percent.[47] LG&E/KU avers, therefore, that to the extent that the Commission finds Owensboro is to be reimbursed, LG&E/KU should only reimburse for the periods when Owensboro made actual transactions for the purchase of electricity from sources in MISO to serve its load in LG&E/KU.

23. In addition, LG&E/KU argues that the record is undisputed that from February 2018 to early August 2018 there was no information to show that Owensboro had any entitlements to dedicated generation or supply resources associated with its 115 MW firm MISO transmission reservation.[48] LG&E/KU further states that Owensboro requested the

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[42] *Id.* at 17 (citing RS 402, § 1.a.iv).

[43] *Id.* at 18.

[44] *Id.* at 8.

[45] *Id.* at 10.

[46] Other RS 402 customers who receive MMD credits associated with imports from MISO are the cities of Princeton and Paducah, Kentucky, which operate together as Kentucky Municipal Power Agency (KMPA), and the cities of Paris and Benham, Kentucky who are former KU requirements customers. *Id.* at 11.

[47] *Id.* at 11-12.

[48] *Id.* at 9 (citing LG&E/KU Tom Jessee Aff. at 7, Complaint at Attachment C-2).

115 MW firm transmission reservation from MISO to LG&E/KU although the retirement of Owensboro's first generator, Elmer Smith Plant Unit 1, was still two years away.

24. With respect to the period from August 4, 2018 to the present, LG&E/KU argues that although Owensboro now claims to have a Designated Network Resource, important RS 402 contract interpretation and administration questions remain unresolved.[49] For example, LG&E/KU states that Owensboro has entered a power purchase agreement for full requirements service with Big Rivers.[50] However, LG&E/KU notes, the full requirements service does not commence until June 1, 2020 and the transmission upgrades needed to support full requirements service will not be completed until approximately late 2019 or the first half of 2020.[51] Thus, LG&E/KU questions whether Owensboro had any entitlement to dedicated generation or supply resources associated with its 115 MW reservation.

25. LG&E/KU expresses concern that the excessive nature of Owensboro's 115 MW MISO reservation is akin to hoarding because it keeps the capacity that it seldom uses from being used by others.[52] With respect to arbitrage, LG&E/KU agrees with Owensboro that there is nothing "objectively" improper about a utility both buying and selling electricity. However, LG&E/KU argues, this does not mean that MMD is intended or should be used to ensure a competitive and financial advantage for Owensboro for these market activities.[53]

26. In response to Owensboro's arguments regarding LG&E/KU's past performance for reimbursement under RS 402, LG&E/KU argues that the service cited by Owensboro was non-firm to non-firm and thus corresponding under RS 402.[54] It also states that the only other RS 402 customers with MISO transmission reservations that receive MMD credits are KMPA and the cities of Paris and Benham, who use their firm transmission in MISO to schedule and deliver energy to their loads every day. In addition, it argues that the instant proceeding involves a contract interpretation issue and that Owensboro's

[49] LG&E/KU Answer at 17.

[50] *Id.* at 9.

[51] *Id.*

[52] *Id.* at 20.

[53] *Id.* at 19.

[54] *Id*. at 21-22.

complaint is based on extrinsic or parol evidence (i.e., drafting history) that is not admissible unless the Commission finds RS 402 to be ambiguous.[55]

B. Owensboro Reply to LG&E/KU

27. In its reply, Owensboro states that its long-term reservation out of MISO is needed to access capacity in MISO to backstop its aging Elmer Smith Plant, and it was used for that purpose in July and September of 2018.[56] Owensboro further asserts that nothing in RS 402 allows LG&E/KU to reimburse Owensboro only for those hours or days when Owensboro scheduled energy under a reservation for which MISO charges a monthly rate. In addition, Owensboro argues that LG&E/KU's claim that the corresponding services clause in RS 402 defines the transactions to which de-pancaking applies is incorrect. Owensboro argues that the corresponding services clause in RS 402 addresses which of the various line item charges associated with the reservation get reimbursed *after* it has already been determined that a transaction triggers reimbursement.[57]

28. With regard to its low usage of the 115 MW path out of MISO, Owensboro states that without that reservation, its load would have gone unserved during many of those usage hours when Owensboro's load exceeded its energy-limited SEPA resources and the Elmer Smith Plant was unavailable. Owensboro further asserts that it has also been using the 115 MW reservation to access needed generation capacity in order to be able to continue providing reliable service to its firm retail loads.[58]

29. In response to LG&E/KU's contention that RS 402 de-pancaking credits apply "only during periods when electricity was purchased *and scheduled,*" Owensboro argues that reimbursing MISO charges for point-to-point export transmission only for hours or days when energy is scheduled would not accomplish RS 402's explicit intention to "shield MMD Parties from any pancaking of transmission and ancillary service charges from MMD Transactions."[59] Owensboro additionally argues that "because MISO's billing units for its long-term point-to-point service are per MW-month of Reserved Capacity, rather than per MWh of transmission usage, the MISO charges which Owensboro 'incurs to deliver' electricity from a source in MISO to the MISO/LG&E/KU

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[55] *Id*. at 1, 2.

[56] Owensboro Reply at 5-6.

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

[58] *Id.* at 5-7 (citing LG&E/KU First Answer at 10, 18, 22).

[59] *Id.* at 10-11.

interface are based on Owensboro's full 115 MW reservation, regardless of usage factor."[60] Owensboro argues that nothing in RS 402 allows LG&E/KU to reimburse only for those hours or days when Owensboro schedules energy under a reservation for which MISO charges every month.

30. In response to LG&E/KU's questioning whether Owensboro has a contract in place currently to support having a Designated Network Resource in MISO and accompanying network service, Owensboro states that it separately contemporaneously contracted with Big Rivers to supply firm system power as a back-up supply starting July 20, 2018 up to the date of commencement of its other contract with Big Rivers in 2020. Owensboro states that the contract with Big Rivers states that "Buyer will schedule energy hereunder solely to the extent that its load in a given hour is expected to exceed energy that is available to Buyer from the Southeast Power Administration and Buyer's Elmer Smith [Plant]."[61] Owensboro argues that "having now completed its designation of a network resource, located within MISO and delivered to the LG&E/KU network service area using Owensboro's 115 MW transmission reservation out of MISO, it now has 'corresponding service' under even LG&E/KU's definition because service on both segments is now long-term-firm."[62] However, Owensboro states that LG&E/KU "have not reimbursed the pancaked charges that Owensboro paid to MISO for service during August 2018, which Owensboro submitted to LG&E/KU on September 20, 2018."[63]

31. In response to LG&E/KU's argument that Owensboro's transmission reservation may be akin to hoarding, Owensboro claims that it had valid, non-hoarding reasons to secure its 115 MW firm reservation out of MISO. Namely, it needed a long-term reservation to serve its loads and the output of its Elmer Smith Plant and even for the hours it did not import energy it used that reservation as a means to access needed capacity in MISO.[64]

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[60] *Id.* at 11 (citing RS 402 § 1.a.i).

[61] *Id.* at 9 (citing Owensboro Reply at Attachment B, Master Power Purchase and Sale Agreement Confirmation Letter at 1).

[62] Owensboro Reply at 14.

[63] *Id*.

[64] *Id.* at 4, 6-7.

C. LG&E/KU's Response

32. In its response to Owensboro's Reply, LG&E/KU again argues that from February 1, 2018 through August 3, 2018, Owensboro's 115 MW MISO reservation failed to meet the criteria LG&E/KU believes are required to receive MMD credits at any point in time because there was either "no transaction at all, or, on the infrequent occasions when [Owensboro] did purchase electricity for delivery to its load, MISO and LG&E/KU were not providing corresponding services . . . ."[65] LG&E/KU further asserts that it believes that the provisions of RS 402 are clear, but if the Commission does find RS 402 to be ambiguous, LG&E/KU's past practices in implementing the terms of RS 402 takes precedence over the evidence of past practices and contract drafting history presented by Owensboro.[66]

D. Owensboro's Response

33. In its response to LG&E/KU's Response, Owensboro argues that only its position is consistent with RS 402's intent to shield it (and other customers) from any re-pancaking of rates for transmission service between LG&E/KU's transmission system and MISO.[67] Owensboro further claims that LG&E/KU does not contest that it is legitimate for long-term point-to-point transmission reservations to be used infrequently, by way of example, when the customer's behind-the-meter generation is out of service.[68] According to Owensboro, had LG&E/KU remained in MISO, no pancaked transmission charges would have applied when Owensboro procured any generating resource located elsewhere in MISO whether it was "a capacity-only [D]esignated [N]etwork [R]esource, a capacity-and-energy [D]esignated [N]etwork [R]esource, or a non-designated resource transmitted under Secondary Network Service."[69] Finally, Owensboro asserts that reimbursing MISO charges for point-to-point export transmission only for indeterminate periods when energy is scheduled would not achieve RS 402's goal of shielding it from pancaked rates.[70]

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[65] LG&E/KU Response at 5.

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

[67] Owensboro Response at 2.

[68] *Id.*

[69] *Id.*

[70] *Id.*

IV. Discussion

A. Procedural Matters

34. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

35. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2017), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We accept Owensboro's Reply, LG&E/KU's Response and Owensboro's Response because they provided information that assisted us in our decision-making process.

B. Substantive Matters

36. For the reasons discussed below, we grant Owensboro's Complaint with the exception of Owensboro's request for reimbursement of the costs of the two smaller one-month reservations in MISO (for August and October 2018) on the same path as the 115 MW transmission reservation.[71] We deny the portion of the complaint regarding these two shorter time periods, without prejudice.

37. The parties agree on the nature of the transmission services at issue in the Complaint and the relevant time periods for which Owensboro seeks reimbursement under RS 402. First, from February 1, 2018 to August 3, 2018 Owensboro had MISO long-term firm point-to-point transmission service to the MISO border with LG&E/KU, and secondary, as available network service from LG&E/KU. Second, from August 4, 2018 to the present Owensboro continued taking firm point-to-point transmission service from MISO to the MISO border with LG&E/KU, and took network service from LG&E/KU. The parties dispute whether Owensboro is owed reimbursement for its MISO transmission service charges during each of these two time periods given

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[71] LG&E/KU has made a related section 203 and section 205 filing that is pending before the Commission in Docket Nos. EC98-2-001 and ER18-2162-000 in which LG&E/KU is seeking Commission approval to remove MMD provisions of RS 402 (MMD Removal Filing). LG&E/KU states that if the Commission does not dismiss the Complaint, it should clarify that any MMD credits it is directed to pay would be only for a locked in period subject to the outcome of the pending MMD Removal Filing. LG&E/KU Answer at 2-3. Owensboro does not oppose such a clarification. Owensboro Reply at 2. We clarify that the issues raised in the MMD Removal Filing will be addressed in the order issued in that proceeding including whether, and if so, for what period of time going forward, LG&E/KU will be required to provide MMD credits pursuant to RS 402.

Owensboro's infrequent use of the MISO transmission reservation and the different firmness of transmission services involved for the earlier period.

38. Our analysis of the Complaint turns on whether the 115 MW firm point-to-point MISO transmission reservation satisfies the requirements for reimbursement set forth in RS 402, which were intended to implement the mitigation conditions set forth in the Withdrawal Order and the Order on Compliance Filing. RS 402 states that it is intended to implement various orders related to LG&E/KU's merger and withdrawal from MISO. Specifically, RS 402 states that:

> The MMD described under this Section 1 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 & Electric Co., et al.*, 114 FERC ¶ 61,282 (2006), 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.[72]

39. In addition, RS 402 references the Withdrawal Order when it states that the definition of MMD "shall mean the commitment of Applicants to 'shield ... [requirements customers] from any re-pancaking of rates for transmission service between Applicants' transmission system and the remaining members of [MISO],' [quoting the Withdrawal Order], as provided for in Section 1 of this Amended Agreement."[73] The introductory sentence to the section that describes MMD also states that "Applicants shall shield MMD Parties from any pancaking of transmission and ancillary services charges for MMD Transactions."[74]

40. The Commission's Withdrawal Order found that LG&E/KU's proposal to maintain de-pancaked transmission rates will "preserve the expanded geographic scope of the [requirements customers' destination] market that resulted from [LG&E/KU's]

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[72] RS 402, First Revised Sheet No. 3 at Section 1.a.v. The orders cited in this section include *Louisville Gas and Elec. Co.*, 82 FERC ¶ 61,308, which is the order approving the LG&E/KU merger; *Withdrawal Order*, 114 FERC ¶ 61,282, which is the order approving LG&E/KU's withdrawal from MISO; and *E.ON U.S., LLC*, 116 FERC ¶ 61,019, which is the order that addresses LG&E/KU's compliance filing to satisfy the Commission's requirements in the Withdrawal Order.

[73] RS 402, First Revised Sheet No. 1, Definitions section.

[74] *Id.* § 1.a.

participation in [MISO] . . . ."[75] The Order on Compliance Filing reiterated the Commission's intent for the rate schedule implementing the rate de-pancaking mechanism to hold KU requirements customers harmless from any rate re-pancaking effects of LG&E/KU's withdrawal from MISO by shielding such customers from increased transmission costs.[76] Rate de-pancaking for requirements customers under RS 402 is a condition of LG&E/KU's withdrawal from MISO.[77] Our holding is guided by the Commission's expectations as discussed in the Withdrawal Order and the Order on Compliance.[78]

41. For the reasons discussed below, we find that Owensboro's MISO transmission reservation meets the requirements of RS 402, for both the period from February 1, 2018 to August 3, 2018 and the period beginning August 4, 2018 to present to qualify for MMD credits. As discussed further below, Owensboro's 115 MW transmission reservation in MISO satisfies the requirement that it (a) be used for a purchase of electricity from a source in MISO for delivery to Owensboro's load;[79] and (b) be a corresponding service with the service that Owensboro pays for and receives from LG&E/KU.[80] Accordingly, we grant the Complaint with respect to reimbursement for Owensboro's 115 MW firm point-to-point transmission reservation from MISO for service beginning February 1, 2018. We direct LG&E/KU to reimburse or credit to Owensboro, within 30 days from the date of this order, an amount equal to the MISO charges for that transmission reservation beginning February 1, 2018, with interest until

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[75] *See* Withdrawal Order, 114 FERC ¶ 61,282 at P 114.

[76] Order on Compliance Filing, 116 FERC ¶ 61,019 at PP 36-38.

[77] The Withdrawal Order states: "we condition our section 203 approval of Applicants' withdrawal on Applicants' willingness and ability to shield its [requirements customers] from any re-pancaking of rates for transmission service between Applicants' transmission system and the remaining members of [MISO]." Withdrawal Order, 114 FERC ¶ 61,282 at P 112.

[78] *See Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1545 (D.C. Cir. 1985) ("The purposes for which a tariff was imposed should be considered when interpreting the tariff, for 'to decide the question of the scope of [a] tariff without consideration of the factors and purposes underlying the terminology employed would make the process of adjudication little more than an exercise in semantics'") (citing *United States v. Western Pacific Railroad*, 352 U.S. 59, 67, 77 (1956)).

[79] RS 402, First Revised Sheet No. 2, § 1.a.i.

[80] *Id.* § 1.a.iv.

reimbursed or credited, calculated from the date the reimbursement or credit should have been made if LG&E/KU had recognized the MISO transmission service as part of an MMD Transaction, and to file a refund report within 60 days of the date of this order.[81] We further direct LG&E/KU to credit to Owensboro an amount equal to the MISO charges on a going forward basis unless and until circumstances change such that credit is no longer required under RS 402.

42. We deny, without prejudice, Owensboro's request for reimbursement for what it describes as two smaller one-month reservations in MISO because Owensboro has not provided any information regarding those transmission reservations beyond stating that it has made such reservations. Without additional information regarding how the reservations were used, we do not have sufficient information to determine whether these two transmission reservations meet the requirements for MMD credits under RS 402.

1. "Purchases of electricity" under RS 402

43. We find that Owensboro's 115 MW firm point-to-point transmission reservation from MISO, for the periods from February 1, 2018 to August 3, 2018 and from August 4, 2018 going forward, qualifies as a transaction for purchases of electricity from a source in MISO to serve Owensboro's load in LG&E/KU, as required by section 1.a.i of RS 402. Owensboro has demonstrated that it currently needs the 115 MW MISO firm point-to-point transmission reservation for reliability purposes, and that it has used that reservation to serve its load in LG&E/KU when its Elmer Smith Plant is out of service. Owensboro stated that it used the 115 MW transmission reservation to purchase and deliver electricity to serve its load on at least two occasions when the Elmer Smith Plant unexpectedly went out of service. Specifically, Owensboro states that it would not have been able to serve its load during most hours on July 9 through July 10, 2018 and again on September 26, 2018 without purchases from MISO that utilized the 115 MW MISO transmission reservation.[82] With respect to why Owensboro made a long term firm reservation on the MISO system as opposed to a short-term non-firm reservation, Owensboro has demonstrated that transmission service is not always available from MISO on short notice or may be curtailed if it is only reserved on a non-firm basis. As Owensboro states, between April 2013 and January 2018, "out of the 437 short-term

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[81] The Commission may order refunds for past periods where a public utility has either misapplied a rate or charged rates contrary to the filed rate. *Owensboro Mun. Utils. v. Louisville Gas and Elec. Co.,* 145 FERC ¶ 61,072, at P 29 (2013) (citing *City of Holland*, *Michigan v. Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,076, at P 24 (citation omitted), *order on reh'g*, 112 FERC ¶ 61,105 (2005)).

[82] Owensboro Reply at 5-6.

transmission reservations from MISO that Owensboro sought, validated, and did not retract or withdraw, 271 requests were refused."[83] We agree with Owensboro that without the long-term firm point-to-point transmission reservation beginning February 1, 2018, Owensboro risked not being able to secure MISO transmission service when needed to deliver electricity to its load in LG&E/KU.

44. We disagree with LG&E/KU's arguments to apply a load factor test and that Owensboro should receive MMD credits "only during periods when electricity was purchased and scheduled against its 115 MW MISO reservation for delivery to load."[84] RS 402 does not contain any language that imposes a minimum transmission reservation load factor requirement in order to receive MMD credits for Drive-Out transmission service, nor does it limit MMD credits to only those periods when electricity was actually purchased and scheduled. Although Owensboro's load factor for the 115 MW transmission reservation may have been relatively low, RS 402 contains no minimum load factor qualification requirement for MMD credits. The language of RS 402 requires Owensboro to "purchase electricity from a source in [MISO] for delivery to [Owensboro's] load interconnected with the [LG&E/KU] Transmission System . . . " in order to receive MMD credits.[85]

2. "Corresponding services" under RS 402

45. We find that Owensboro's use of MISO firm point-to-point transmission service and LG&E/KU secondary network service from February 1, 2018 through August 3, 2018 were for corresponding services per the terms of RS 402. As discussed below, the difference in firmness of the two services is not relevant to the determination of whether the reservations are corresponding services because the same firmness is not required under RS 402. Because both MISO and LG&E/KU provided and charged for base transmission service, as well as for certain ancillary services and other services, that Owensboro used for MISO Drive-Out transactions to serve its load in LG&E/KU during this period, we find that such base transmission service, ancillary services and other services are "corresponding services" despite the difference in firmness of the transmission services.

46. We disagree with LG&E/KU's argument that the "corresponding services" provision in section 1.a.iv of RS 402 requires that the two parts of the pancaked

[83] Complaint at 10 (citing Complaint, Attachment B (Lyons Aff. P 14; Attachment B-1).

[84] LG&E/KU Answer at 16.

[85] RS 402, First Revised Sheet No. 2, § 1.a.i.

transmission service must be of the same firmness, i.e., firm to firm or non-firm to non-firm, in order for Owensboro to be eligible for credits under RS 402. There is no requirement in RS 402 that both transmission services must have the same firmness, and we do not believe such an interpretation is reasonable.

47. In addition, we agree with Owensboro's assertion that the "corresponding services" provision in RS 402 does not serve to determine whether a transaction is eligible to be de-pancaked, but instead speaks to which charges will be reimbursed after it has been determined that a transaction is eligible.[86] Specifically, sections 1.a.i to 1.a.iii of RS 402 describe which transactions are eligible for depancaking. Section 1.a.iv, which contains the "corresponding" provision, addresses which charges will be waived for eligible transactions. Specifically, section 1.a.iv states that "[w]ith respect to any MMD Transactions in which TO Charges will be waived, such waived TO 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."[87] That section goes on to provide an illustrative example to show that credits will not be 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.[88]

48. We also find that Owensboro's firm point-to-point transmission service in MISO and network service in LG&E/KU since August 4, 2018, the date that Owensboro's request to LG&E/KU for a Designated Network Resource was accepted, is a corresponding service, as required by the terms of RS 402. As discussed above, the Commission finds that firmness is not a determinative factor in deciding whether the services are "corresponding services." Nonetheless, even under LG&E/KU's interpretation that firmness is relevant to the determination of whether the services are corresponding, such services would be corresponding for the period after August 4, 2018.

49. LG&E/KU relies on the following arguments to explain why it has not reimbursed Owensboro for its MISO transmission service starting August 4, 2018 to the present: (1) LG&E/KU expresses a lack of confidence that Owensboro had obtained a valid Designated Network Resource in MISO; and (2) LG&E/KU states it did not have any evidence of Owensboro's interim agreement with Big Rivers that would support recognizing a Designated Network Resource until July 20, 2020.[89] However, Owensboro

[86] Complaint at 16.

[87] RS 402, First Revised Sheet No. 3, § 1.a.iv.

[88] *Id.*

[89] LG&E/KU Answer at 9-10.

filed evidence with its reply in this proceeding of a firm energy contract with Big Rivers for the interim period starting July 20, 2018, and stated in its Complaint that LG&E/KU accepted its network resource designations starting August 4, 2018.[90] Therefore there is no basis for LG&E/KU to dispute that Owensboro obtained a Designated Network Resource that would allow Owensboro to use network service instead of secondary, as available network service as of August 4, 2018.

50. For these reasons, we find that the Owensboro 115 MW firm point-to-point reservation on the MISO system and its transmission reservation on the LG&E/KU system represent corresponding services as required by the terms of RS 402, for the period beginning February 1, 2018 going forward

3. LG&E/KU's hoarding and arbitrage arguments

51. We reject LG&E/KU's arguments related to Owensboro's alleged use of the 115 MW of firm MISO transmission for purposes of hoarding and arbitrage. We disagree with LG&E/KU's assertions that Owensboro's infrequent use of the 115 MW transmission reservation is akin to hoarding. As discussed above, we believe Owensboro has demonstrated that it needs the 115 MW firm point-to-point transmission reservation out of MISO to serve its loads, and has used it for such in back-up supply. Further, RS 402 has a mechanism that LG&E/KU can use to address hoarding if it believes that is occurring.[91]

52. In addition, we find that LG&E/KU's assertions that Owensboro is using the MMD to ensure a competitive and financial advantage for its market activities through arbitrage are without merit because Owensboro has demonstrated it uses the 115 MW transmission reservation to serve its load in certain circumstances.

The Commission orders:

(A) Owensboro's Complaint is hereby granted, in part, and denied in part, without prejudice, as discussed in the body of this order.

(B) Within 30 days of this order, LG&E/KU is hereby directed to reimburse or credit to Owensboro an amount equal to the MISO charges for Owensboro's 115 MW

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[90] *See* Owensboro Reply at Attachment B, Master Power Purchase and Sale Agreement Confirmation Letter; Complaint at 15-16.

[91] *See* RS 402, First Revised Sheet No. 5, § 1.c. That section provides that LG&E/KU is "free to take steps" at the Commission to prevent transmission hoarding and the terms of RS 402 shall be subject to any terms and conditions accepted by the Commission to prevent hoarding.

transmission reservation from MISO for service commencing February 1, 2018, with interest, calculated in accordance with 18 C.F.R. § 35.19 (a)(2)(ii) (2008), and for subsequent charges incurred for that same reservation, as discussed in the body of this order.

(C) LG&E/KU is hereby directed to file a refund report within 60 days of the date of the order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.