

169 FERC ¶ 61,030
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Owensboro Municipal Utilities

Docket No. EL18-203-001

v.

Louisville Gas and Electric Company
Kentucky Utilities Company

ORDER DENYING REHEARING

(Issued October 17, 2019)

1. On March 25, 2019, Louisville Gas and Electric Company (LG&E) and Kentucky Utilities Company (KU) (together, LG&E/KU) filed a request for rehearing of the Commission's March 21, 2019 order.¹ The Complaint Order granted in part Owensboro Municipal Utilities' (Owensboro) complaint requesting that the Commission find that LG&E/KU 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. LG&E/KU argues that the Commission erred in its interpretation of RS 402.

2. As discussed below, we deny LG&E/KU's rehearing request.

I. Procedural History and Background

3. As recounted in the Complaint Order,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

¹ *Owensboro Mun. Utils. v. Louisville Gas and Elec. Co.*, 166 FERC ¶ 61,131 (2019) (Complaint Order).

² *Id.* PP 2-6.

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.

4. In 1997, when the Commission approved the merger of LG&E and KU, it conditioned its approval on LG&E/KU's 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 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 Owensboro, from rate pancaking.⁴ 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.⁵

5. On April 11, 2006, LG&E/KU submitted a compliance filing to address various requirements directed by the Withdrawal Order.⁶ 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 offered de-pancaked transmission and ancillary service rates.⁷ The Commission conditionally accepted LG&E/KU's compliance filing on July 7, 2006, subject to LG&E/KU making further

³ *Louisville Gas and Elec. Co.*, 82 FERC ¶ 61,308, at 62,222-23 (1998) (Merger Order).

⁴ *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.

⁵ *Id.* P 113.

⁶ *E.ON U.S. LLC*, et al., Compliance Filing, Docket No. EC06-4-000, et al. (filed Apr. 11, 2006).

⁷ *E.ON U.S. LLC*, 116 FERC ¶ 61,019, at P 35 (2006) (Order on Compliance Filing).

revisions in another compliance filing.⁸ On July 19, 2006, as amended on July 21 and July 26, 2006, LG&E/KU submitted additional filings to comply with the Order on Compliance Filing. These included an amended RS 402 with revisions addressing de-pancaking that are referred to in RS 402 as Merger Mitigation De-pancaking (MMD). The Commission accepted the executed version of the amended RS 402 via delegated letter order on August 28, 2006.⁹

6. As it relates to the MISO transmission service for which Owensboro sought 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:

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 ...

....

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.¹⁰

⁸ *Id.* P 1.

⁹ *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).

¹⁰ RS 402, First Revised Sheet No. 2, § 1.a.i.

7. MMD Parties, as defined in RS 402, include Owensboro and other KU Municipals.¹¹ In addition, MMD Transaction is defined as “a transaction that: (a) sources in [MISO] and sinks in [LG&E/KU’s] control area; or (b) sources in [LG&E/KU’s] control area and sinks in [MISO].”¹²

8. In its Complaint, Owensboro stated it is among the KU Municipals identified by RS 402 as entitled to reimbursement by LG&E/KU of transmission charges for MISO Drive-Out transactions to remedy pancaked rates. However, Owensboro argued 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. Owensboro requested 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.

9. Specifically, Owensboro claimed 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.¹³ Owensboro claimed that 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.”¹⁴ Owensboro stated that the service is for firm transmission capacity on the MISO transmission system so that Owensboro is able to receive energy when needed.¹⁵ Owensboro stated 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

¹¹ *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.

¹² RS 402, First Revised Sheet No. 2, Definitions Section.

¹³ Complaint at 1-2, 11-12.

¹⁴ *Id.* at 13 n.25.

¹⁵ *Id.* at 8, 24 (Owensboro notes that the service is potentially utilized at a low load factor).

reservation to access needed capacity in MISO to provide reliable service to its firm loads.¹⁶

10. With limited exceptions not at issue here, the Complaint Order granted Owensboro's Complaint.¹⁷

II. Request for Rehearing

11. LG&E/KU argues that the Commission failed to consider certain material facts in granting the Complaint in relevant part.¹⁸ Specifically, LG&E/KU states that between February 1, 2018 and August 3, 2018, Owensboro only fulfilled the conditions precedent to any transmission credit obligation for 7 percent of the time because it made no purchase of electricity and no delivery to load for 93 percent of the period.¹⁹ Further, LG&E/KU argues that for 97.6 percent of the time after August 3, 2018, the second condition precedent was not met for the transmission credit obligation because no transmission charge was incurred to deliver a purchase of electricity to Owensboro's load.²⁰

12. LG&E/KU contends that the Commission failed to consider the plain meaning of RS 402 in reaching its conclusions.²¹ According to LG&E/KU, RS 402 clearly states that for the reimbursement obligation to be triggered, transmission charges must be incurred to deliver a purchase of electricity sourced in MISO to a party's load in LG&E/KU, and that condition is not adequately met here.²² Similarly, LG&E/KU argues that the Commission inappropriately considered extrinsic evidence in interpreting the meaning of RS 402 without first finding that the language was ambiguous.²³

¹⁶ *Id.* at 21.

¹⁷ Complaint Order, 166 FERC ¶ 61,131, at P 36.

¹⁸ Request for Rehearing at 4-6.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 5-6.

²¹ *Id.* at 6-9.

²² *Id.*

²³ *Id.* at 9-11.

III. Determination

13. For the reasons discussed below, we deny LG&E/KU's request for rehearing.

14. As discussed in the Complaint Order,²⁴ Owensboro's MISO transmission reservation meets the requirements of RS 402 to qualify for MMD credits for both the period from February 1, 2018 to August 3, 2018 and the period beginning August 4, 2018 to present.²⁵ Specifically, we affirm that 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;²⁶ and (b) be a corresponding service with the service that Owensboro pays for and receives from LG&E/KU.²⁷

15. We reject LG&E/KU's interrelated arguments that the Commission erred by rejecting LG&E/KU's "plain meaning" interpretation of RS 402 and by considering extrinsic evidence.²⁸ As discussed below, we find that consideration of extrinsic evidence was appropriate both because RS 402 does not have an unambiguous meaning when the context of the entire agreement is taken into account, and because RS 402 states explicitly that the MMD provisions are intended to implement various orders related to LG&E/KU's merger and withdrawal from MISO.

16. While LG&E/KU is correct that the Commission does not look at extrinsic evidence where an agreement is unambiguous, the Commission also does not look at individual sentences in isolation from the rest of an agreement to determine whether such ambiguity exists. Rather, the Commission "must review the entire agreement and particular words should be considered, not as if isolated from the context, but in light of the obligations as a whole and the intention of the parties as manifested therein."²⁹ To determine ambiguity, the Commission considers whether a provision "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the

²⁴ Complaint Order, 166 FERC ¶ 61,131 at PP 36-52.

²⁵ *Id.* P 41.

²⁶ RS 402, First Revised Sheet No. 2, § 1.a.i.

²⁷ *Id.* § 1.a.iv.

²⁸ Request for Rehearing at 6-11.

²⁹ *Xcel Energy Servs. Inc. v. Am. Transmission Co., LLC*, 140 FERC ¶ 61,058, at P 60 (2012).

customs, practices, usages and terminology as generally understood in the particular trade or business.”³⁰

17. LG&E/KU’s “plain meaning” arguments rely on isolated readings of a provision stating that reimbursement is required “[w]ith 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.”³¹ LG&E/KU claims that this provision must be read narrowly to mean that reimbursement is only required when there are “both a purchase of electricity and a delivery of such purchased electricity,” and that a simple application of this meaning would require denial of reimbursement.³² However, LG&E/KU acknowledges that Owensboro in fact purchased and had delivered some electricity under the first transmission reservation,³³ but does not explain how its plain meaning interpretation renders this fact irrelevant. LG&E/KU also asserts that Owensboro “did not have a long term firm purchase of electricity sourced in MISO” during the first transmission reservation,³⁴ but does not explain where this requirement is found in the plain language of RS 402. LG&E/KU is thus incorrect in asserting that there is a plain meaning of RS 402 that disqualifies Owensboro from reimbursement.

18. Moreover, as the Commission explained in the Complaint Order, RS 402 explicitly states that the MMD provisions were intended to implement the section 203 mitigation requirements.³⁵ The introductory sentence to the provision that LG&E/KU cites to support its plain meaning argument states that RS 402 is intended to “shield MMD Parties from any pancaking of transmission and ancillary services charges for MMD Transactions.”³⁶ Thus, contrary to LG&E/KU’s arguments, consideration of all of

³⁰ *Id.* (quoting *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 914 (2d Cir. 2010)).

³¹ RS 402, First Revised Sheet No. 2, § 1.a.i, *cited in* Request for Rehearing at 7.

³² Request for Rehearing at 3.

³³ *Id.* at 4.

³⁴ *Id.*

³⁵ Complaint Order, 166 FERC ¶ 61,131 at PP 38-40.

³⁶ RS 402, First Revised Sheet No. 2, § 1.a.i; *see also* RS 402, Definitions Section (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 the Midwest ISO”).

the terms of RS 402 does not support LG&E/KU's contention that RS 402 has an unambiguous plain meaning with respect to the reimbursement requirement. The Commission properly considered extrinsic evidence when interpreting the provision and, as discussed in the Complaint Order, concluded that Owensboro satisfied the requirements of RS 402 through its use of point-to-point transmission reservations.³⁷

19. We reject LG&E/KU's argument that the Commission inappropriately considered the expectations discussed in the Commission's Withdrawal Order and the Order on Compliance Filing.³⁸ "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.'"³⁹ This is especially important here, where, as discussed above, the parties expressly incorporated the intent of these orders into their agreement.⁴⁰

20. LG&E/KU's remaining argument, that the Commission failed to consider material facts,⁴¹ restates its prior arguments, and the Commission rejects it for the reasons stated in the Complaint Order.⁴² Specifically, LG&E/KU claims that the Commission ignored the fact that Owensboro's actual electricity purchases were limited. The Commission did not ignore this fact, but explicitly acknowledged it, and found that there was no language in RS 402 that specified a load factor qualification for reimbursement.⁴³ As explained in the Complaint Order, Owensboro has demonstrated that it currently needs the 115 MW MISO firm point-to-point transmission reservation for reliability purposes, and that it has

³⁷ Complaint Order, 166 FERC ¶ 61,131 at PP 36-52.

³⁸ *Id.* P 40, *quoted in* Request for Rehearing at 11.

³⁹ *Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1545 (D.C. Cir. 1985) (citing *United States v. Western Pacific Railroad*, 352 U.S. 59, 67, 77 (1956)).

⁴⁰ RS 402, First Revised Sheet No. 3 at Section 1.a.v. provides that "[t]he MMD described under this Section 1 is intended to implement the Section 203 mitigation requirements ordered by the Commission in [the Withdrawal Order], and [Order on Compliance Filing]". Complaint Order, 166 FERC ¶ 61,131 at P 30 (quoting RS 402, First Revised Sheet No. 3 at Section 1.a.v.).

⁴¹ Request for Rehearing at 4-6.

⁴² Complaint Order, 166 FERC ¶ 61,131 at PP 38-41, 43-44; *see also id.* PP 51-52.

⁴³ *Id.* P 44.

used that reservation to serve its load in LG&E/KU when its Elmer Smith Plant is out of service.⁴⁴ Further, because the Commission determined that a showing of transmission reservations was sufficient to trigger the reimbursement obligation under RS 402, and that RS 402 does not limit credits to only those periods when electricity was actually purchased and scheduled,⁴⁵ the Commission gave appropriate consideration to the facts LG&E/KU cites.

The Commission orders:

LG&E/KU's request for rehearing is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁴ *Id.* P 43.

⁴⁵ *Id.* P 44.