

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

E.ON U.S. LLC, *et al.*

Docket No. ER06-20-002

ORDER ON COMPLIANCE FILING

(Issued July 7, 2006)

I. Introduction

1. In this order, the Commission addresses the April 11, 2006 compliance filing made by E.ON U.S. LLC, Louisville Gas and Electric Company, and Kentucky Utilities Company (collectively, Applicants) to meet the requirements of a Commission order that conditionally approved Applicants' request to withdraw from the Midwest Independent Transmission System Operator, Inc. (Midwest ISO).¹ As discussed below, we conditionally accept Applicants' compliance filing and direct Applicants to make additional revisions in a further compliance filing.

II. Background

2. Applicants submitted under sections 203 and 205 of the Federal Power Act (FPA)² a proposal to withdraw their transmission facilities from the transmission system operated by Midwest ISO. In place of their existing arrangements with Midwest ISO, Applicants proposed to delegate certain tariff administration duties to the Southwest Power Pool, Inc. (SPP), serving as an Independent Transmission Organization, and to appoint the Tennessee Valley Authority (TVA) as their Reliability Coordinator. In the Withdrawal Order, the Commission granted conditional approval for Applicants' proposal to withdraw from Midwest ISO and required Applicants to make a compliance filing to address several requirements and to make a filing under section 205 to propose a return on equity for use in the formula rate in their stand-alone Open Access Transmission Tariff (OATT).

¹ *Louisville Gas and Electric Co.*, 114 FERC ¶ 61,282 (2006) (Withdrawal Order).

² 16 U.S.C. §§ 824b and 824d (2000), *as amended by* the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 983-84 (2005).

3. The compliance obligations in the Withdrawal Order were established to ensure that Applicants' proposal: (i) satisfied the withdrawal provisions of the Midwest ISO Transmission Owners' Agreement (TO Agreement);³ (ii) fulfilled the conditions established by the Commission in connection with Applicants' merger, particularly those relating to independence and rate de-pancaking (Applicants' Merger Conditions);⁴ (iii) met the Commission's Order No. 888 non-discriminatory, open access transmission requirements;⁵ and (iv) was just, reasonable and not unduly discriminatory under section 205 of the FPA.

4. With respect to Applicants' withdrawal obligations under the TO Agreement, the Commission required Applicants to make a compliance filing to implement their hold harmless commitment and a finalized exit fee. With respect to Applicants' Merger Conditions, the Commission required Applicants to make a compliance filing that included: (i) a reciprocity agreement for non-pancaked transmission service and for non-pancaked ancillary services on Midwest ISO's system, or an alternative proposal to maintain de-pancaked rates for the loads located in the Kentucky Utility Company (KU) requirements customers' destination market; (ii) a revision to Applicants' Independent Transmission Organization and Reliability Coordinator proposal transferring certain transmission planning duties to the Independent Transmission Organization and clarifying the division of responsibilities as between Applicants, the Independent Transmission Organization, and the Reliability Coordinator; and (iii) a revision to Applicants' Independent Transmission Organization and Reliability Coordinator proposal addressing findings regarding the independence of these entities.

5. With respect to Applicants' proposed OATT, the Commission required Applicants to submit a compliance filing that includes: (i) a tariff mechanism addressing concerns regarding the hoarding of capacity and mitigation measures to be performed by the Independent Transmission Organization; (ii) the Joint Reliability Coordination

³ See Midwest ISO FERC Electric Tariff, First Revised Rate schedule No. 1.

⁴ *Louisville Gas and Electric Co.*, 82 FERC ¶ 61,308 (1998) (LG&E/KU Merger Order).

⁵ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and rev'd in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

Agreement;⁶ (iii) a revised proposal, as may be required by SPP, concerning Applicants' methodology for calculating Available Transmission Capability; (iv) revised tariff language making clear how reciprocity firm and reciprocal network integration transmission service will be incorporated into Applicants' OATT; and (v) a revised OATT incorporating the *pro forma* OATT provision regarding curtailment priority and eliminating Applicants' proposed pricing mechanism. Applicants also were required to propose an ROE for use in their formula rate in a new section 205 filing and to make certain revisions to their proposed formula rate for transmission service under their OATT.

6. Applicants assert that this compliance filing meets all the obligations in the Withdrawal Order except the requirement that Applicants submit a section 205 filing proposing a ROE for use in their formula rate and the filing of a finalized exit fee. Applicants request that the compliance filing be accepted without suspension or hearing, to be effective as of the date of the Commission's order.

III. Notice of Filings and Responsive Pleadings

7. Notice of Applicants' compliance filing was published in the *Federal Register*, with interventions, protests and comments due on or before April 28, 2006.⁷ PJM Interconnection L.L.C. (PJM) filed a timely motion to intervene and comments, and Midwest ISO filed a timely request for deferred action and protest. On May 15, 2006, Applicants filed an answer responding to the comments and protest.

IV. Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest unless otherwise ordered by the decisional authority.⁸ We accept Applicants' answer because it provides information that assisted us in our decision-making process.

⁶ Joint Reliability Coordination Agreement Among and Between Midwest Independent Transmission System Operator, Inc., PJM Interconnection L.L.C., and Tennessee Valley Authority, dated April 22, 2005.

⁷ 71 Fed. Reg. 21,008 (2006). On April 19, 2006, the Commission issued an errata notice correcting the comment due date from May 2, 2006, to April 28, 2006.

⁸ 18 C.F.R § 385.213(a)(2) (2005).

B. Request for Deferred Action

9. Midwest ISO requests that the Commission defer any decision on Applicants' compliance filing until the issues raised in Midwest ISO's request for rehearing of the Withdrawal Order are resolved.⁹ Midwest ISO contends that the resolution of these issues will define the nature and scope of Applicants' post-withdrawal arrangements (if any), and that the Commission should not prejudice its consideration of the serious legal challenges raised on rehearing of the Withdrawal Order by accepting Applicants' compliance filing before its decision on rehearing.

10. We deny Midwest ISO's request. Our consideration of Applicants' compliance filing in no way prejudices the Commission's consideration of the challenges raised by Midwest ISO in its request for rehearing of the Withdrawal Order.

C. Compliance Obligations

11. Except as discussed below, we find that Applicants' compliance filing satisfies the requirements of the Withdrawal Order.

1. Joint Reliability Coordination Agreement

a. Withdrawal Order

12. In the Withdrawal Order, the Commission accepted, in principle, Applicants' proposal to rely on TVA's Joint Reliability Coordination Agreement with Midwest ISO and PJM¹⁰ to address the interregional coordination and seams issues presented by Applicants' filing.¹¹ The Commission also required, consistent with FPA section 205(c) and the Commission's regulations,¹² and consistent with Commission

⁹ Midwest ISO filed a request for rehearing of the March 17 Order on April 17, 2006, in Docket Nos. EC06-4-002 and ER06-20-003.

¹⁰ The Joint Reliability Coordination Agreement also includes a document called the Congestion Management Process.

¹¹ March 17 Order, 114 FERC ¶ 61,282 at PP 183-186.

¹² 16 U.S.C. § 824d(c) (2000). *See also* 18 C.F.R. § 35.1 (2005) (providing that "[e]very public utility shall file with the Commission and post, in conformity with the requirements of this part . . . all contracts which in any manner affect or relate to such rates, charges, classifications, services rules, regulations or practices. . .").

precedent,¹³ that the Joint Reliability Coordination Agreement be filed with the Commission.¹⁴ In addition, the Commission required Applicants to clarify, in contractual terms, their commitment to the Joint Reliability Coordination Agreement. However, the Commission did not prejudge how Applicants must comply (whether Applicants must become signatories, be named as reciprocal entities or operating entities, or become subject to the terms and conditions by some other means, such as through SPP or TVA acting as their agent).¹⁵ In addition, the Withdrawal Order required Applicants to delineate in their OATT, at attachment L, the responsibilities, protocols and communications systems related to the implementation of the Joint Reliability Coordination Agreement.¹⁶

b. Compliance Filing

13. Applicants have filed as part of their OATT the Joint Reliability Coordination Agreement. However, Applicants contend that they need not formally execute or otherwise become a party to it. They explain that under section 2.3.5 of the Joint Reliability Coordination Agreement, TVA is obligated to perform the requisite functions under the agreement for each control area for which it serves as Reliability Coordinator.¹⁷

¹³ See, e.g., *North American Reliability Council*, 85 FERC ¶ 61,353 at 62,262 (requiring transmission loading relief procedures to be filed with the Commission under FPA section 205 and stating that changes in operating practices need to be filed if they affect, for example, reservation, scheduling and curtailment provisions of the *pro forma* OATT) and *MidAmerican Energy Co.*, 113 FERC ¶ 61,274 at P 47 (2005) (requiring the Transmission Service Coordinator agreement to be filed with the Commission under FPA section 205 because it affects acceptance or rejection of transmission service requests and interconnection requests).

¹⁴ March 17 Order, 114 FERC ¶ 61,282 at P 185.

¹⁵ *Id.* P 187.

¹⁶ *Id.* P 191.

¹⁷ Section 2.3.5 of the Joint Reliability Coordination Agreement states: “Geographic Scope. Each Party will perform this Agreement with respect to each Control Area for which the Party serves as transmission provider, and with respect to each Control Area for which it serves as Reliability Coordinator, provided that a Party shall be required to perform this Agreement with respect to a Control Area for which it serves as Reliability Coordinator only to the extent that the applicable agreement under which it serves in that capacity permits such performance.”

Once Applicants withdraw from Midwest ISO, TVA, which is a party to the Joint Reliability Coordination Agreement, will be Applicants' Reliability Coordinator. TVA will therefore perform Joint Reliability Coordination Agreement functions for Applicants, under section 2.3.5. In addition, Applicants' OATT has been revised to state that Applicants' operations will be fully incorporated into the procedures and protocols governing other facilities in the Reliability Coordinator's Reliability Area in accordance with the Joint Reliability Coordination Agreement. The Reliability Coordinator Agreement also says that TVA will perform Joint Reliability Coordination Agreement-related functions for Applicants.

14. Applicants have also revised their OATT, at attachment L, to state that they are "committed to upholding the terms and conditions of the Joint Reliability Coordination Agreement." In addition, Applicants have included a new appendix 4 to attachment L that: (i) delineates the responsibilities and protocols related to their implementation of the Joint Reliability Coordination Agreement; and (ii) provides information with respect to the communications systems and protocols upon which this implementation depends.

c. Responsive Pleadings

15. In its protest, Midwest ISO contends that Applicants' interpretation of section 2.3.5 of the Joint Reliability Coordination Agreement is not consistent with the intent and overall design of that agreement. Midwest ISO states that section 2.3.5 was intended to recognize that TVA supplies and buys power with, and acts as Reliability Coordinator for, other non-jurisdictional entities in the region and that the parties wanted the parallel flows from those entities to be accounted for in the allocation of flows on coordinated and reciprocal flowgates. It asserts that Applicants, as owners of stand-alone jurisdictional facilities, should be required to sign the Joint Reliability Coordination Agreement. Midwest ISO also contends that Applicants' reliance on section 2.3.5 of the Joint Reliability Coordination Agreement is an attempt to avoid meaningful negotiations with Midwest ISO and other affected entities with respect to seams issues and that the Commission should direct Applicants to negotiate.

16. In addition, Midwest ISO argues that the language added to the OATT stating that Applicants are committed to upholding the terms and conditions of the Joint Reliability Coordination Agreement falls short of the Commission's requirements because it does not create binding obligations for Applicants to abide by the Joint Reliability Coordination Agreement. The proposed language fails to provide clarity regarding Applicants' rights and obligations *vis-à-vis* Midwest ISO and PJM and does not address what happens if Applicants change Reliability Coordinator.

17. Midwest ISO further asserts that the Joint Reliability Coordination Agreement is ambiguous, at best, regarding whether Applicants will supply emergency energy across the seam, as provided for in other seams agreements on file with the Commission. The Joint Reliability Coordination Agreement states that TVA will not supply emergency

energy to Midwest ISO or PJM because TVA, a non-jurisdictional utility, has legal limitations on its ability to sell electric energy outside its statutory territory.

18. Midwest ISO also states that if the Joint Reliability Coordination Agreement is a jurisdictional agreement, Applicants are without authority to unilaterally file it as their rate schedule. The parties to the Joint Reliability Coordination Agreement have the right to amend their agreement, and Applicants cannot restrict those rights by filing the Joint Reliability Coordination Agreement as their own rate schedule without the consent of that agreement's signatories.

19. In its comments, PJM requests that Applicants' OATT make clear that reference to the Joint Reliability Coordination Agreement includes any amendments to the Agreement, as made by mutual agreement of the parties to the Agreement. PJM notes that Applicants are neither parties to the Joint Reliability Coordination Agreement, nor are they proposing to become signatories, and, therefore, Applicants will not have direct input into any future modifications to that Agreement. PJM states that it has no objection if the Commission requires that any amendments agreed upon by Midwest ISO, PJM and TVA be filed with the Commission. It also asserts that the Commission should require Applicants to file with the Commission alternative arrangements if, at any time in the future, Applicants terminate their relationship with TVA and, thus, no longer rely upon the Joint Reliability Coordination Agreement.

20. PJM also requests that Applicants be directed to amend their OATT to require SPP, as the Independent Transmission Organization, to comply with the Joint Reliability Coordination Agreement and any amendments to that agreement that are adopted by its signatories.

d. Applicants' Answer

21. In response to Midwest ISO's concerns regarding emergency energy, Applicants note that the Joint Reliability Coordination Agreement, at section 8.1.3, states "[t]he Parties will work together and with the Control Areas with respect to which they serve as RTO or Reliability Coordinator, as applicable, to jointly develop and commit to additional emergency principles and operating guides as the need for such procedures arises." In addition, section 8.1.7 states:

To the extent a Party is a [Reliability Coordinator] with respect to Control Areas, the Party will also coordinate in that capacity with the other Parties and, as may be provided under arrangements other than this Agreement, direct emergency action on the part of generation or transmission within such Control Areas to protect the reliability of the network. Each Party shall exercise such authority in accord with Good Utility Practice as required to resolve emergency conditions in another Party's Region of

which it is aware and, in conjunction with any applicable stakeholder processes, will develop detailed emergency operating procedures.

22. Applicants state that, in collaboration with TVA, they intend to develop these emergency protocols, and if appropriate, will include a mechanism to sell energy across the seam to Midwest ISO in the event of an emergency. Thus, although TVA cannot sell energy across its legal “fence,” nothing in any agreement governing Applicants’ relationship with TVA prevents TVA from directing Applicants to sell emergency power across the Midwest ISO seam, if doing so is necessary for Good Utility Practice.

23. In response to comments by PJM, Applicants state that they will amend their OATT so that the Joint Reliability Coordination Agreement is defined as TVA’s Joint Reliability Coordination Agreement between TVA, Midwest ISO and PJM, *as amended by mutual agreement of such parties from time to time*, adding the italicized portion to the existing definition. Applicants also commit to revise the OATT to make clear the Independent Transmission Organization’s obligation to comply with the Joint Reliability Coordination Agreement. Finally, Applicants clarify that if they cease to rely on the Joint Reliability Coordinator Agreement for seams management, they will make a filing with the Commission with an alternative seams management mechanism.

e. Commission Determination

24. Subject to certain conditions, discussed below, we find that Applicants have complied with the Commission’s directive to file the Joint Reliability Coordination Agreement. In addition, we find that, taken together, section 2.3.5 of the Joint Reliability Coordination Agreement and the proposed revisions to attachment L and to the Reliability Coordinator Agreement clarify sufficiently, in contractual terms, their commitment to the Joint Reliability Coordination Agreement.

25. Section 2.3.5 of the Joint Reliability Coordination Agreement requires TVA to perform its obligations under the Agreement for each control area for which it serves as Reliability Coordinator, to the extent that the agreement under which TVA serves as Reliability Coordinator permits such performance. The Reliability Coordinator Agreement between Applicants and TVA, and attachment L to Applicants’ OATT, require TVA to fully incorporate Applicants’ operations into the procedures and protocols governing other facilities in TVA’s Reliability Area in accordance with the provisions of the Joint Reliability Coordination Agreement.¹⁸ Specific functions TVA must perform to incorporate Applicants’ facilities into the Joint Reliability Coordination Agreement are also listed in attachment L. In addition, attachment L states that Applicants are “committed to upholding the terms and conditions of the [Joint Reliability

¹⁸ Reliability Coordinator Agreement, attachment A at section IV, and Applicants’ OATT, attachment L, appendix 4 at section 4.1.

Coordination Agreement], and providing the Reliability Coordinator with the information and support it needs in order to carry out its duties under section 2.3.5....”¹⁹ Attachment L also requires Applicants to provide information to and coordinate with the Independent Transmission Organization so that TVA has the information needed to fully incorporate Applicants’ facilities into the Joint Reliability Coordination Agreement.²⁰ These provisions indicate that Applicants and TVA intend to fulfill the requirements of and to incorporate Applicants facilities into the Joint Reliability Coordination Agreement. However, we find that Applicants’ statement that they are “committed” to the terms and conditions of the Joint Reliability Coordination Agreement is ambiguous. To remove any doubt, Applicants must revise their OATT to make clear that they are obligated to follow the terms and conditions of the Joint Reliability Coordination Agreement.

26. We disagree with Midwest ISO that section 2.3.5 of the Joint Reliability Coordination Agreement is being misinterpreted by Applicants. Indeed, Midwest ISO itself acknowledges that section 2.3.5 was intended to recognize that TVA acts as Reliability Coordinator for other entities in the region and that the parties wanted the parallel flows from those entities to be accounted for in the allocation of flows on coordinated and reciprocal flowgates.²¹ This description is entirely consistent with Applicants’ interpretation of, and reliance on, this section of the Joint Reliability Coordination Agreement. Once TVA becomes Applicants’ Reliability Coordinator, section 2.3.5 requires TVA to incorporate Applicants’ facilities into its Joint Reliability Coordination Agreement responsibilities, just as TVA does for other entities for which it acts as Reliability Coordinator. Midwest ISO also does not explain why Applicants must sign the Joint Reliability Coordination Agreement when other entities for which TVA acts as Reliability Coordinator and whose facilities are incorporated into the Joint Reliability Coordination Agreement did not sign the agreement.

27. We also disagree with Midwest ISO that Applicants are unauthorized to file the Joint Reliability Coordination Agreement as part of their OATT without the consent of that Agreement’s signatories. Midwest ISO does not allege, and we do not find, that any provision in the Joint Reliability Coordination Agreement will be altered by it being included as part of, and referred to by, Applicants’ OATT. In addition, Midwest ISO and PJM correctly note that only parties to the Joint Reliability Coordination Agreement can agree to amend it and that by not negotiating to become parties to the Joint Reliability Coordination Agreement, Applicants will not have direct input into any future amendments. Absent their filing of alternative arrangements, Applicants have obligated themselves to address seams issues that arise as a result of their withdrawal from

¹⁹ OATT, attachment L, appendix 4 at section 4.2.

²⁰ *Id.* and Reliability Coordinator Agreement, attachment A at section IV.

²¹ Midwest ISO protest at pp 7-8.

Midwest ISO through an agreement to which they are not parties and they do not have any right to amend. Therefore, Applicants' reliance on and filing of the Joint Reliability Coordination Agreement cannot affect the terms and conditions of the Agreement and are appropriate.

28. Given Applicants' reliance on the Joint Reliability Coordination Agreement, we accept the proposal in their answer, and direct Applicants in a compliance filing, to revise their OATT to make clear that the Joint Reliability Coordination Agreement they are using to address seams-related issues includes any amendments made by mutual agreement of the parties to that Agreement, subject to any necessary Commission approval, or by direction of the Commission. Though Midwest ISO is concerned that Applicants are trying to avoid meaningful negotiations with respect to seams issues, Midwest ISO, as a party to the Joint Reliability Coordination Agreement, can work with PJM and TVA if it feels amendments to the Agreement are needed to further address seams issues. In addition, Applicants must keep the Joint Reliability Coordination Agreement in their OATT updated with any amendments to that Agreement and must file changes to their OATT that may be necessitated by such amendments. Furthermore, as Applicants acknowledge in their answer, if they decide they do not want to coordinate their transmission facilities under the Joint Reliability Coordination Agreement, or if they want to switch to another Reliability Coordinator, they must file and receive Commission approval under section 205 of the FPA to make the necessary revisions to their OATT and under section 203 of the FPA to propose alternative coordination arrangements that fulfill their Merger Conditions.

29. In addition, we find that the Joint Reliability Coordination Agreement does not need to be revised to address the sale of emergency energy by Applicants to Midwest ISO.²² As Applicants note in their answer, TVA can direct Applicants to sell emergency energy across the Midwest ISO seam, if doing so is necessary for Good Utility Practice. For any emergency energy sales that Applicants make at the direction of TVA, Applicants must promptly file with the Commission the rate for such sales. Due to the nature of these transactions, we understand that the rates will be filed after the sales occur; however the Commission will generally grant waiver of the 60 day notice requirement for such emergency sales so long as Applicants make the filing as soon as practicable after such sales occur.

²² We note that the Joint Reliability Coordination Agreement at section 8.2 makes clear that Midwest ISO and PJM will sell each other emergency energy under their separate joint operating agreement, not under the Joint Reliability Coordination Agreement. It is therefore appropriate for the sale by Applicants of emergency energy to also be under separate agreement. In the alternative, PJM, Midwest ISO and TVA are free to propose modifications to Joint Reliability Coordination Agreement to address sales of emergency energy by Applicants.

30. Regarding concerns raised by PJM concerning the compliance with the Joint Reliability Coordination Agreement by SPP, as the Independent Transmission Organization, we accept Applicants' proposal to modify their OATT at attachment C (Methodology to Assess Available Transmission Capability) and attachment L to make clear the Independent Transmission Organization's responsibility to comply with the Joint Reliability Coordination Agreement. We direct Applicants to make these revisions in a compliance filing. In addition, we note that Applicants have already included a new section 3.2.11 to attachment L that requires the Independent Transmission Organization to coordinate and cooperate with the Reliability Coordinator in carrying out the functions under the Reliability Coordinator Agreement.²³ If there are disputes among the Independent Transmission Organization, the Reliability Coordinator and Applicants regarding their responsibilities, including those related to the Joint Reliability Coordination Agreement, Applicants have proposed a dispute resolution process to address such conflicts.²⁴

2. Hold Harmless Commitment

a. Withdrawal Order

31. In the Withdrawal Order, the Commission found that Applicants' hold harmless commitment means that existing customers will continue to receive transmission service at the same rates, level of service, and quality of service that they would have received, if Applicants had not withdrawn from Midwest ISO.²⁵ However, the Commission found that Applicants' filing failed to address how existing contracts will be incorporated into their OATT or what, if any, provisions in their OATT relate specifically to existing customers. The Withdrawal Order therefore directed Applicants to file a specific proposal to implement their hold harmless commitment and to include therein:

²³ However, certain responsibilities of the Independent Transmission Organization regarding the Joint Reliability Coordination Agreement are located in the OATT at attachment L, appendix 4, section 4.3, which is called "Enumerated Functions of the *Reliability Coordinator*." Responsibilities of the Independent Transmission Organization should not be solely in an appendix that addresses functions of the Reliability Coordinator and, therefore, Applicants are directed to file revisions to attachment L accordingly.

²⁴ OATT at attachment L, section 6.

²⁵ March 17 Order, 114 FERC ¶ 61,282 at P 33, n. 27 (citing TO Agreement at article V, section 2(a)) and P 45.

- (i) a list of all customers and transactions that will be covered by their commitment and
- (ii) revisions to their OATT necessary to protect customers with existing contracts.²⁶

b. Compliance Filing

32. Applicants' compliance filing lists, at attachment E to their OATT, those customers and transactions that will be covered by Applicants' hold harmless commitment. Applicants also propose to revise their OATT, at new section 15.8 and attachment E, to state that under article V of the TO Agreement, these customers will receive service subject to the same prices, terms and conditions to which they are subject immediately before Applicants' stand-alone OATT goes into effect.

c. Commission Determination

33. We find that Applicants have satisfied the requirement of the Withdrawal Order regarding the listing of all customers and transactions that are included in their hold harmless commitment. However, consistent with the Withdrawal Order and with article V of the TO Agreement, Applicants must revise the language in their OATT, at section 15.8 and attachment E, to state that the existing customers will receive service subject to the same prices, terms and conditions *that they would have received absent Applicants' withdrawal*.²⁷ Furthermore, Applicants revised the OATT to include their hold harmless commitment but fail to address how they intend to implement this commitment, such as how existing contracts will be incorporated into their stand-alone OATT and what, if any, provisions in their OATT apply to existing customers.²⁸ Consistent with the Withdrawal Order, Applicants must revise their OATT or propose other arrangements (e.g., non-conforming service agreements) to specify the rates, terms and conditions of service for the customers listed in attachment E that currently take service under the Midwest ISO Open Access Transmission and Energy Markets Tariff and that will receive service over Applicants' system after the withdrawal. For customers with grandfathered agreements, Applicants must also revise attachment E to include the Commission designation for the rate schedules that govern these transactions.

²⁶ *Id.* P 48.

²⁷ See March 17 Order, 114 FERC ¶ 61,282 at P 33, n. 27 (citing TO Agreement at article V, section 2(a)) and P 45.

²⁸ For example, how will customers listed in attachment E that are customers of Midwest ISO and currently receive service under the Midwest ISO Tariff be provided service on Applicants' system after the withdrawal? Will they be required to take service under Applicants' OATT, or will Applicants take service on the customers' behalf and file stand-alone rate schedules with each customer? What are the rates, terms and conditions for the service Applicants will provide to these customers?

3. Rate De-Pancaking

a. Withdrawal Order

34. In the Withdrawal Order, the Commission found that Applicants' rate de-pancaking proposal, subject to revision and the submittal of a reciprocity agreement, addressed the concerns regarding horizontal market power, described in the LG&E/KU Merger Order and was "consistent with or superior to" the *pro forma* OATT. The Commission found that the proposal will maintain de-pancaked rates between Applicants' system and the footprint of the remaining Midwest ISO members and thereby will mitigate horizontal market power in a manner comparable to that achieved by Applicants' Midwest ISO membership.²⁹ The Commission directed that if Applicants are unable to secure the necessary reciprocity agreement, they must develop an alternative proposal addressing horizontal market power concerns regarding the KU requirements customers' destination market. That proposal must hold the KU requirements customers harmless against any increased transmission costs, including pancaked ancillary service charges, resulting from the re-pancaking of rates that will occur once Applicants withdraw from Midwest ISO.³⁰

b. Compliance Filing

35. Applicants did not submit a reciprocity agreement, but state that they remain committed to working with Midwest ISO and the Midwest ISO transmission owners to obtain a reciprocity agreement that will allow Applicants to implement their rate de-pancaking plan. However, in order to expedite the withdrawal process, Applicants propose to implement the Commission's suggested alternative in the Withdrawal Order. Thus, they propose to hold the KU requirements customers harmless from any transmission service rate re-pancaking that may occur between Applicants' transmission system and the remaining members of Midwest ISO. Applicants assert that an existing rate schedule with the Kentucky Municipals³¹ already fulfills this hold harmless obligation. Specifically, Applicants contend that the rate schedule, which was accepted for filing by the Commission on March 17, 2006,³² offers de-pancaked transmission and

²⁹ March 17 Order, 114 FERC ¶ 61,282 at P 108.

³⁰ *Id.* PP 112-113.

³¹ Applicants note that the Kentucky Municipals covered by the rate schedule include all of the KU requirements customers referenced in the March 17 Order, including the Cities of Barbourville, Bardstown, Bardwell, Benham, Berea, Corbin, Falmouth, Frankfort, Madisonville, Nicholasville, and Providence.

³² *Louisville Gas and Electric Co.*, Docket No. ER06-602-000 (March 17, 2006) (unpublished delegated letter order).

ancillary service rates to any requesting Kentucky Municipal. Applicants have also deleted from the OATT their original rate de-pancaking proposal.

c. Commission Determination

36. We recognize that Applicants have codified in the rate schedule with the Kentucky Municipals and reiterate in the compliance filing their commitment to offer transmission and ancillary services at de-pancaked rates to the KU requirements customers. However, we find that Applicants' commitment to shield the KU requirements customers from rate re-pancaking does not unconditionally comply with the rate de-pancaking conditions in the Withdrawal Order. Specifically, it is not clear that the commitment in the rate schedule to offer de-pancaked rates to the KU requirements customers will become effective upon Applicants' withdrawal from Midwest ISO.

37. For example, section 1 of the rate schedule states that Applicants agree to offer transmission and ancillary services to any requesting Kentucky Municipal in accordance with the terms of Applicants' proposed rate de-pancaking plan. Also, section 8 of the rate schedule states that the commitments contained in the rate schedule are conditioned on the continued effectiveness of Applicants' rate de-pancaking plan. However, as the Withdrawal Order points out, Applicants' rate de-pancaking plan cannot be implemented or become effective without the reciprocity agreement, and Applicants have not secured such an agreement. Furthermore, the terms of the rate schedule indicate that the offer of de-pancaked transmission service rates is in accordance with the specific terms of Applicants' original rate de-pancaking plan, but that plan has been deleted from Applicants' OATT.

38. Therefore, while we accept Applicants' commitment to hold the KU requirements customers harmless from any rate re-pancaking effects of their withdrawal, Applicants must modify their rate schedule with the Kentucky Municipals, or file a new agreement, that specifies a mechanism through which they will shield the KU requirements customers from increased transmission costs, including pancaked ancillary service charges, resulting from rate re-pancaking caused by their withdrawal. Applicants must also make clear that such rate de-pancaking maintenance for service between Applicants' system and the remaining Midwest ISO members is to become effective upon Applicants' withdrawal from Midwest ISO, regardless of the effectiveness of the original rate de-

pancaking plan.³³ In addition, Applicants must specify the rates, terms and conditions for the transmission service they will offer to the KU requirements customers at de-pancaked rates.

4. Reliability Coordinator Duties

a. Withdrawal Order

39. The Withdrawal Order accepted Applicants' Reliability Coordinator proposals, subject to conditions. Among these conditions was the requirement that Applicants explain the role they will play in TVA's transmission loading relief (TLR) procedures and the issuance of energy emergency alerts.³⁴ Another requirement was that Applicants modify the Reliability Coordinator Agreement to require that any dispute regarding TVA's compensation be filed with the Commission for resolution.³⁵

b. Compliance Filing

40. Applicants do not explain the role they will play regarding TLRs and emergency alerts. In reference to the requirement that disputes regarding compensation be brought to the Commission for resolution, Applicants have added an additional paragraph at section 3.1 of the Reliability Coordinator Agreement that states:

Notwithstanding any provision to the contrary contained in this Agreement, if a Dispute should occur between the Parties with respect to the amount of compensation to be paid by LG&E/KU to the Reliability Coordinator (i) pursuant to this Sections [sic] 3.1 or (ii) in respect of additional services (other than the Functions) requested by LG&E/KU that the Reliability Coordinator elects, in its sole discretion, to provide, then, in each case, LG&E/KU shall file notice thereof with the FERC. The Parties acknowledge that any FERC order issues [sic] with respect to such a dispute will be for informational purposes only, and is not binding on the Parties.

³³ For example, Applicants could propose a mechanism under Applicants' OATT that grants a credit to the KU requirements customers for any charges those customers pay to Midwest ISO for imports from Midwest ISO after Applicants withdraw that result in rate pancaking.

³⁴ March 17 Order, 114 FERC ¶ 61,282 at P 166.

³⁵ *Id.* P 167.

c. Commission Determination

41. Applicants have not addressed the Commission's requirement in the Withdrawal Order to explain the role Applicants will play in TVA's TLR procedures and the issuance of energy emergency alerts. The OATT states that the Reliability Coordinator is generally responsible for bulk transmission reliability functions, including reliability analysis, loading relief procedures, re-dispatch of generation and ordering curtailment of transactions and/or load, and for coordinating transmission loading relief and voltage correction actions with Applicants and with other reliability coordinators.³⁶ However, we do not find any new or revised provisions that explain Applicants' role in these Reliability Coordinator duties. For example, Applicants do not make clear whether the Reliability Coordinator has exclusive authority to execute TLR procedures and to declare energy emergency alerts or whether Applicants share this responsibility. Therefore, Applicants must file an explanation in compliance with the Withdrawal Order and clarify their OATT and the Reliability Coordinator Agreement consistent with that explanation.

42. In addition, Applicants must revise the language they added to the Reliability Coordinator Agreement relating to the requirement that Applicants bring compensation disputes with TVA to the Commission for resolution. While proposed section 3.1 of the Reliability Coordinator Agreement requires Applicants to timely file disputes with the Commission, it further states that "[t]he Parties acknowledge that any FERC order issues [sic] with respect to such a dispute will be for informational purposes only, and is not binding on the Parties."³⁷ We understand that TVA is not subject to the jurisdiction of this Commission as a public utility. However, Applicants are bound by Commission orders regarding appropriate compensation for disputes with TVA. The revised Reliability Coordinator Agreement cannot exempt Applicants from any Commission directives. Therefore, we require Applicants to modify section 3.1 of the Reliability Coordinator Agreement to recognize that Applicants remain subject to Commission directives regarding compensation for disputes with TVA.³⁸

³⁶ See, e.g., OATT, appendix 4 at: (i) first paragraph; (ii) section 1.2; and (iii) section 2.1.4.

³⁷ Reliability Coordinator Agreement at section 3.1.

³⁸ Costs related to Reliability Coordinator compensation are also subject to our review and approval to the extent that Applicants seek to recover such costs in the rates they charge under their OATT for jurisdictional service.

5. Transmission Planning

a. Withdrawal Order

43. The Withdrawal Order directed Applicants to modify their proposed allocation of transmission planning functions to achieve the same level of independent, non-market-participant transmission planning that exists today for Applicants as members of Midwest ISO. The Commission explained that independent transmission planning on Applicants' system was necessary to mitigate the vertical market power concerns discussed in the LG&E/KU Merger Order, which were resolved through Applicants' participation in Midwest ISO.

44. Specifically, the Withdrawal Order directed Applicants to modify attachment L and all related agreements so that the Independent Transmission Organization is assigned "approval authority over all models, planning criteria, study criteria, plans, studies, the methodology for calculating Available Transmission Capability, and any inputs or numerical values provided by Applicants to the same extent as the Midwest ISO has authority over these matters today."³⁹ In addition, the Commission in the Withdrawal Order stated that "SPP's role [in transmission planning] must be expanded to ensure that it, as an independent non-market participant, will have the authority to ensure that transmission planning on Applicants' system is done on an independent, non-discriminatory basis."⁴⁰

b. Compliance Filing

45. Applicants describe the planning under their revised proposal as an iterative process where, first, Applicants develop the long-term annual transmission plan (Annual Plan); next, the Independent Transmission Organization reviews the Annual Plan and conducts applicable engineering assessments; and finally, if the Annual Plan has been approved by the Independent Transmission Organization, the Reliability Coordinator conducts a regional assessment of the Annual Plan and submits any suggested modifications to the Independent Transmission Organization for final review and approval.

46. Applicants also note that they have added section 3.3 to attachment L of the OATT to clarify that the Independent Transmission Organization will have ultimate

³⁹ March 17 Order, 114 FERC ¶ 61,282 at P 86.

⁴⁰ *Id.* P 85.

approval authority over all planning functions.⁴¹ Applicants have also added appendices to attachment L delineating responsibilities between Applicants, the Independent Transmission Organization and the Reliability Coordinator. Appendices 1 and 3 to attachment L provide that the Independent Transmission Organization, as tariff administrator, will have ultimate authority over all transmission service and interconnection requests and will take the lead in evaluating all transmission and interconnection service requests. In appendix 2, Applicants describe the iterative process for transmission planning, where: Applicants as the Transmission Owners are responsible for (a) initially developing transmission system and resource adequacy models, including the Base Case Model, (b) assessing and documenting transmission expansion plans and developing the Annual Plan to be sent to the Independent Transmission Organization for review and approval, (c) defining and collecting data and information for planning purposes, including transmission facility characteristics and ratings and resource/load forecasts, and (d) implementing transmission plans.

47. Appendix 2 further provides that the Independent Transmission Organization is responsible for: (a) reviewing and approving Applicants' planning criteria to ensure that the criteria are sufficiently defined, (b) reviewing and approving the Base Case Model to ensure that the model is representative of system power flows and consistent with the planning criteria, (c) independently assessing the transmission system using the Base Case Model and planning criteria, (d) holding a transmission planning conference to gather input on the planning process and Annual Plan, (e) assessing the Annual Plan and identifying issues that Applicants should address, and (f) reviewing and approving the Annual Plan after the Reliability Coordinator has reviewed and commented on it. Finally, appendix 2 provides that the Reliability Coordinator is responsible for (a) verifying that transmission plans are incorporated into and consistent with regional plans and reliability standards, (b) reviewing and reporting on potential resource adequacy deficiencies and compliance with appropriate reliability standards, and (c) submitting the Annual Plan with any changes or recommendations to the Independent Transmission Organization for final review and approval.

⁴¹ Attachment L at section 3.3 states:

The Independent Transmission Organization shall have ultimate approval authority over all planning activities discussed in the Tariff, including Appendix 2 [Division of Responsibilities for the Planning Function] of this Attachment L and Attachment M [the Independent Transmission Organization and Reliability Coordinator Agreements] of the Tariff. The planning activities may include the development of models, planning criteria, study criteria, plans, studies, the methodology for calculating ATC, and any inputs or numerical values provided by the Transmission Owner.

c. Commission Determination

48. We conditionally accept Applicants' revised transmission planning functions, subject to the modifications below. As a general matter, we find that Applicants' process for transmission planning, with the Independent Transmission Organization having ultimate review and approval authority over all planning functions, is consistent with the Commission's directives in the Withdrawal Order that the Independent Transmission Organization have review and approval authority over transmission planning to the same extent that Midwest ISO has today. As outlined in appendix B to the TO Agreement, Midwest ISO develops its regional transmission expansion plan by integrating, evaluating and modifying the plans, analyses, and studies initially developed by the individual transmission owners. Likewise, under Applicants' attachment L, transmission planning on Applicants' system is conducted using transmission system models, planning criteria, facility ratings, and other planning inputs that are initially developed by Applicants, with the Independent Transmission Organization having final review and approval authority.

49. Although we find that this process is generally consistent with the Withdrawal Order, additional modifications are necessary to fully comply. While Applicants have added general language to attachment L providing that the Independent Transmission Organization will have ultimate approval authority over planning activities, this authority must unambiguously include the Independent Transmission Organization's review and approval of transmission plans, and the models and assumptions underlying those plans. This will ensure that transmission planning is performed on an independent and nondiscriminatory basis, as was required by the Withdrawal Order.⁴²

50. In addition, some of the Independent Transmission Organization's specific tasks and responsibilities are so narrowly defined that they could be interpreted to limit its ultimate approval authority. For example, attachment L, appendix 2 at section 2.1 provides that the Independent Transmission Organization is responsible for reviewing and approving Applicants' planning criteria *to ensure that these criteria are sufficiently defined for customers to understand how transmission planning is conducted*. Similarly, attachment L, appendix 2 at section 2.2 provides that the Independent Transmission Organization will review and approve the base case model *to ensure that it accurately reflects annual and seasonal power flows and is consistent with the planning criteria*. Provisions such as these would limit the Independent Transmission Organization's authority to ensure that transmission planning is conducted on a non-discriminatory basis.

51. Accordingly, consistent with the Commission's directive in the Withdrawal Order, Applicants must modify section 3.3 and appendix 2 of attachment L to clarify that the Independent Transmission Organization has authority to review and approve all transmission planning functions, including all models, planning criteria, study criteria,

⁴² March 17 Order, 114 FERC ¶ 61,282 at P 85.

plans, studies, methodologies for calculating Available Transfer Capability, and any inputs, numerical values, or other assumptions, in a manner that ensures that transmission planning on Applicants' system is done on an independent, non-discriminatory basis. This clarification must ensure that the Independent Transmission Organization has ultimate review and approval authority for transmission planning that is not limited by any specific tasks or responsibilities outlined anywhere in the OATT.

52. Furthermore, as directed in the Withdrawal Order,⁴³ Applicants must modify the OATT and the Independent Transmission Organization and Reliability Coordinator Agreements, to provide that attachment L will be the governing document in describing and delineating responsibilities and functions among Applicants, the Independent Transmission Organization and the Reliability Coordinator. We note, for example, that section 17.9 of the Reliability Coordinator Agreement provides that its terms will be controlling, over attachment L. However, responsibilities and functions of Applicants, the Independent Transmission Organization and the Reliability Coordinator should not be stated differently in different places in the OATT, because this could cause confusion. Therefore, we direct Applicants to make revisions necessary to avoid any such confusion.

53. In addition, Applicants have proposed in attachment L at section 6 a dispute resolution process that applies to all disputes among Applicants, the Independent Transmission Organization and the Reliability Coordinator involving the division of responsibilities in the OATT. The dispute resolution process addresses the requirement that Applicants propose a mechanism to resolve disputes between these entities in their coordination with each other under the proposed transmission planning process. However, the dispute resolution provision is incomplete because it does not specify whose position will prevail pending the final outcome of the dispute resolution process. Applicants must therefore revise the dispute resolution provisions in attachment L to indicate whose position will prevail in the event of a dispute.

54. In the Midwest ISO, the transmission owner's planning inputs govern until a dispute is resolved. Therefore, in a dispute between the Reliability Coordinator and the Independent Transmission Operator involving matters for which Applicants have authority to provide input into the planning process, Applicants' position should control pending the outcome of the dispute resolution process. Similarly, where Applicants have authority to provide input into the planning process, their position should control in a dispute between them and either the Reliability Coordinator or the Independent Transmission Operator pending the outcome of the dispute resolution process. In a dispute between the Reliability Coordinator and the Independent Transmission Operator,

⁴³ *Id.* P 141 (directing Applicants to amend their proposal by withdrawing attachment A and providing, in its place (at attachment L to their OATT), detailed information, including the specific tasks and duties each entity will perform).

where Applicants do not have authority to provide input, the Reliability Coordinator's position should control in areas for which it has review and approval authority (generally, reliability matters) and the Independent Transmission Operator's position should control in all other cases, pending the outcome of the dispute resolution process.

55. We also note that attachment L states that "the Reliability Coordinator and the [Independent Transmission Organization] shall have no right or ability to compel the Transmission Owner to construct facilities of any kind."⁴⁴ This is not consistent with Midwest ISO's authority under appendix B of the TO Agreement.⁴⁵ Therefore, consistent with the directive in the Withdrawal Order that the Independent Transmission Operator have the same authority over transmission planning as Midwest ISO has today, Applicants must revise their OATT so that Applicants are required to make a good faith effort to design, certify, and build facilities in the Independent Transmission Organization-approved transmission plan.

6. Cost Recovery for System Expansions and Transmission Upgrades

a. Withdrawal Order

56. In the Withdrawal Order, the Commission rejected as premature Applicants' attachment N pricing proposal for system expansions and upgrades. The proposal, which would classify system upgrades as either Base Case Model or Supplemental in order to determine eligibility for rolled-in rate treatment for cost recovery, was unrelated to Applicants' proposal to withdraw from Midwest ISO and commence stand-alone operations. Accordingly, Applicants were directed to remove attachment N from their OATT.⁴⁶

b. Compliance Filing

57. Applicants state that they have removed their attachment N pricing proposal in their compliance filing.

⁴⁴ OATT at attachment L, appendix 2, section 5.2

⁴⁵ See, e.g., TO Agreement at appendix B, article VI, which states that the "affected Owner(s) shall make a good faith effort to design, certify, and build the designated facilities to fulfill the approved Midwest ISO Plan..."

⁴⁶ March 17 Order, 114 FERC ¶ 61,282 at P 194.

c. Commission Determination

58. We find that Applicants have complied with the directive in the Withdrawal Order to remove the attachment N pricing proposal from their OATT. However, vestiges of it remain in their OATT. For example, section 3.2.10 of attachment L refers to the classification and identification, by the Independent Transmission Operator, of Base Case Model and Supplemental Upgrades. Accordingly, Applicants are directed to remove section 3.2.10 of attachment L and any other provisions in their OATT that refer to the attachment N pricing proposal or the classification of Base Case Model or Supplemental Upgrades.

D. Remaining Compliance Issues

59. As Applicants acknowledge, they have not yet made a new section 205 filing with a proposed return on equity for use in their OATT formula rate. In addition, Applicants still must file a finalized exit fee.

60. Also, we accept the commitment Applicants make in their answer to fix pagination problems in their tariff sheets and to file a complete, clean version of their OATT, including attachments. Applicants must submit in their next compliance filing a fully conformed clean copy of their OATT that includes all proposed revisions and required modifications.⁴⁷

The Commission orders:

(A) Applicants' compliance filing is conditionally accepted for filing, as discussed in the body of this order.

(B) Applicants are hereby directed to submit a compliance filing, as discussed in the body of this order, within 30 days of the date of issuance of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁴⁷ Applicants correctly submitted in their compliance filing clean copies of only those pages of the OATT that have been revised. However, given the large number of revised pages, a full copy of their OATT that includes original unrevised sheets, substitute sheets, and new sheets will prevent potential confusion as to what tariff pages should be included in the OATT.

