

127 FERC ¶ 61,134
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

E.ON U.S., LLC

Docket Nos. ER09-759-000
ER09-759-001

ORDER CONDITIONALLY ACCEPTING NON-CONFORMING AGREEMENTS

(Issued May 15, 2009)

1. On February 25, 2009, as amended on March 17, 2009, E.ON U.S., LLC, on behalf of its public utility subsidiaries Louisville Gas and Electric Company and Kentucky Utilities Company (LG&E/KU) (collectively, E.ON) filed, pursuant to section 205 of the Federal Power Act (FPA),¹ a non-conforming Network Integration Transmission Service Agreement (Service Agreement) and associated non-conforming Network Operating Agreement (Operating Agreement) (collectively, Agreements) between itself and Kentucky Municipal Power Agency (KMPA).² The Agreements allow for E.ON to provide partial interim network transmission service to KMPA until such time that certain direct assignment facilities and network upgrades are completed to allow for full service to commence. E.ON requests waiver of section 35.3 of the Commission's regulations³ to permit the Agreements to become effective February 26, 2009. In this order, we will conditionally accept the Agreements, effective February 26, 2009, as requested, subject to submission of a compliance filing, as discussed below.

I. Description of the Filings

2. In February 2008, KMPA submitted to E.ON a request for network transmission service to begin December 1, 2009 and continue until January 1, 2020.⁴ KMPA

¹ 16 U.S.C. § 824d (2006).

² KMPA's members are Paducah Power System in Paducah, Kentucky (Paducah), and the Princeton Electric Plant Board in Princeton, Kentucky (Princeton).

³ 18 C.F.R. § 35.3 (2008).

⁴ KMPA currently receives full requirements service from the Tennessee Valley Authority (TVA), but has notified TVA that it will be terminating service later this year.

(continued)

requested service to three designated 161 kV delivery points: (1) Paducah Substation No. 8 (Paducah No. 8); (2) Princeton Substation; and (3) Coleman Road Substation (Coleman). KMPA's request identified certain designated network resources (DNRs), including purchased power from a supplier located near the Cinergy hub and a total of 128 MW of generation from Prairie State Energy Campus (Prairie State), representing the percentage output that KMPA owns of the Prairie State facility.⁵ The annual coincident peak network load at the three delivery points requested is forecasted to total 204 MW in 2009, and is projected to grow to 225 MW during the ten year service term.

3. In May 2008, Southwest Power Pool, Inc. (SPP)⁶ conducted a System Impact Study, which concluded that the requested service could not be provided without upgrading certain transmission facilities. In July 2008, E.ON conducted a Facilities Study, which concluded that direct assignment facilities and network upgrades were needed to provide KMPA's requested service and that some facilities would take up to 42 months to complete.⁷ The Facilities Study also found that, due to a transmission line limitation that would lead to possible voltage collapse if the full load was served, the full service requested could not be provided until certain of these additional facilities were constructed.

4. Therefore, E.ON, KMPA and SPP developed an interim solution involving a curtailment scheme under which KMPA could receive partial interim network transmission service until all of the required facilities are built. Due to E.ON's concern that failing to provide service to KMPA as of December 1, 2009 would leave the municipal customers without service, E.ON and KMPA agreed to a means for E.ON to

The TVA contract with Paducah will terminate in December 2009, and the TVA contract with Princeton will terminate in January 2010.

⁵ E.ON states that KMPA has certified DNRs for most of the ten-year service period, but that some of the resources only will be available through the beginning of 2015. E.ON states that, due to the lack of information regarding the location of the remainder of KMPA's DNRs to serve its load, additional studies may be required to determine if additional facility upgrades are necessary at such time that KMPA designates additional resources for that period. E.ON also states that it is concerned that the third-party transmission arrangements for some of the DNRs that KMPA is relying upon do not yet exist, so these arrangements may not be available at the time service to network load is required from those DNRs.

⁶ SPP is E.ON's Independent Transmission Organization.

⁷ E.ON states that certain direct assignment facilities and network upgrades may not be complete until 2012 or later.

provide partial service to KMPA beginning the later of December 2009 or the date on which construction of the direct assignment facilities and/or network upgrades listed in Appendix 1 to the Service Agreement as required for full network transmission service is completed.⁸ Thus, E.ON requests Commission approval to offer this partial service to KMPA under the instant Agreements.

5. E.ON states that it is filing these Agreements because they deviate from the *pro forma* service agreement and operating agreement contained in the LG&E/KU joint Open Access Transmission Tariff (Tariff). For instance, the Service Agreement provides that E.ON can serve the full 28 MW load forecasted at the Princeton delivery point, but that the combined connected load at Coleman and Paducah No. 8 shall not exceed 125 MW, whereas the *pro forma* service agreement provides for service to the full load at each delivery point.⁹ Furthermore, the Service Agreement also provides that the partial service is subject to curtailment before all other firm services if, in the judgment of E.ON, the partial service is adversely affecting the ability to provide reliable service to other firm users of the transmission system or adversely affecting reliability, whereas the *pro forma* service agreement provides for *pro rata* curtailment of network and native load.¹⁰

6. The Operating Agreement also contains certain deviations from the *pro forma* operating agreement, including: (1) section 1—Balancing—has been updated to reflect an obligation to adhere to the standards, approved by the Commission, of the North American Electric Reliability Corporation (NERC) and the SERC Reliability Corporation (SERC); (2) section 3—Redispatch Procedures—clarifies the procedures that will be followed prior to any curtailment of service; (3) special operating provisions in sections 6, 7 and 8 of the Operating Agreement related to the partial service E.ON will

⁸ E.ON states that it is not clear at this time that the facilities required to provide the partial interim service will be ready on that date. While it is committed to exercising diligence in constructing facilities to meet the December 2009 date, E.ON explains that the construction timeline is very short and it cannot control all of the factors that could cause a delay.

⁹ E.ON notes that the actual load at Paducah (i.e., Coleman and Paducah No. 8 delivery points) has exceeded 120 MW in each of the summer months, defined as May through October. See E.ON's February 25, 2009 Transmittal at n.9. The Service Agreement indicates a forecasted 2010 peak summer load resulting in a shortage of 51 MW.

¹⁰ E.ON states that, consistent with the *pro forma* service agreement, the transmission service will be elevated to *pro rata* curtailment as soon as all facilities needed to provide full network transmission service are constructed.

provide, addressing potential supply shortages in the event that a DNR is interrupted for supply or delivery issues, and clarifying that E.ON will provide ancillary services per its Tariff, but that it is not required to provide back-up energy; and (4) an automatic pass through of NERC and SERC penalties should KMPA fail to shed load if instructed by E.ON pursuant to the Agreements.

7. The Agreements also recognize that E.ON does not employ any Special Protective Schemes and does not allow its own load to use Special Protective Schemes. E.ON states that KMPA has not requested that E.ON create a Special Protective Scheme for the requested transmission service. However, in the event that SERC deems that the limitations under the Agreements (i.e., combined connected load at Paducah No. 8 and Coleman delivery points that cannot exceed 125 MW under the partial interim network service arrangement) constitute a Special Protective Scheme, E.ON indicates that it will not be able to provide the partial service due to the associated risks.

8. On March 17, 2009, E.ON filed revised Agreements to reflect certain changes necessitated by a full review of the Agreements by SPP. E.ON states that SPP does not have any substantive disagreement with the Agreements, but that SPP identified certain revisions to the *pro forma* operating agreement and service agreement and to the KMPA Agreements.¹¹ E.ON states that the proposed revised Agreements now accurately reflect the division of responsibilities between E.ON, as the transmission owner and operator of the LG&E/KU transmission system, and SPP, as the Independent Transmission Organization for E.ON, consistent with Attachment P of the E.ON Tariff.¹² Furthermore, the Agreements have also been revised to remove SPP as a signatory because SPP does not believe that it is necessary for the Independent Transmission Organization to be a signatory to service agreements.

II. Notice of Filings and Responsive Pleadings

9. Notice of E.ON's February 25, 2009 filing in Docket No. ER09-759-000 was published in the *Federal Register*, 74 Fed. Reg. 9812, with interventions and protests due on or before March 18, 2009. KMPA filed a timely motion to intervene and comments supporting E.ON's filing.

¹¹ E.ON states that it will file similar changes, as applicable, to the *pro forma* service agreement and operating agreement.

¹² Attachment P to E.ON's Tariff provides the functions of E.ON's Reliability Coordinator and the Independent Transmission Organization.

10. Notice of E.ON's March 17, 2009 filing in Docket No. ER09-759-001 was published in the *Federal Register*, 74 Fed. Reg. 14,119, with interventions and protests due on or before April 7, 2009. None was filed.

III. Commission Determination

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹³ KMPA's timely, unopposed motion to intervene serves to make it a party to this proceeding.

12. The Commission will accept the Agreements, subject to certain revisions, as discussed further below. We find good cause to grant waiver of the Commission's 60-day prior notice requirement to allow the Agreements to become effective on February 26, 2009, as requested.¹⁴

13. Given the extenuating circumstances surrounding KMPA's service request, we will accept the arrangement for E.ON to provide partial service to KMPA prior to the direct assignment facilities and network upgrades being completed for the commencement of full service. We agree with E.ON that not providing network transmission service to KMPA as of December 1, 2009 may leave the municipal customers without service. Moreover, we agree with E.ON that the proposed partial service arrangement is unique due to KMPA's request that the service commence in a short period of time and the related timing of the termination of KMPA's existing service arrangements with TVA. Thus, we find the Agreements to be just and reasonable and not unduly discriminatory or preferential. Nevertheless, we encourage E.ON and KMPA to continue to work together to develop feasible engineering solutions for E.ON to provide full network transmission service to KMPA as soon as possible.

14. We will, however, require E.ON to revise section 4.0 of the Service Agreement—Specifications For Network Integration Transmission Service. Section 4.0 of the Service Agreement currently states that “[t]he proposed engineering solution must be accepted by SERC and FERC.” We find that the engineering solutions are only subject to SERC review to determine whether the limitations under the Agreement constitute a Special Protective Scheme (unless SERC based a registration determination on this “engineering solution” and the registry determination was appealed to the Commission; however, we

¹³ 18 C.F.R. § 385.214 (2008).

¹⁴ See *Central Hudson Gas and Electric Corp.*, 60 FERC ¶ 61,106, at 61,339, *reh'g denied*, 61 FERC ¶ 61,089 (1992); *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,983-84 (1993), *clarified*, 65 FERC ¶ 61,081 (1993).

do not understand this to be the intent in section 4.0 of the Service Agreement). Therefore, we will require E.ON to submit a compliance filing, as directed below, to delete the phrase “SERC and” from section 4.0 of the Service Agreement.

15. With respect to E.ON’s proposal in the Operating Agreement to require KMPA to pay NERC and SERC penalties if KMPA fails to shed load,¹⁵ we will accept E.ON’s proposal conditioned upon E.ON making certain modifications in a compliance filing, consistent with the Guidance Order,¹⁶ as discussed below. First, E.ON may only directly pass-through the costs of a penalty to KMPA when a Regional Entity, NERC or the Commission concludes from its fact-finding that KMPA’s actions caused or contributed to the violation. Second, KMPA should only be required to pay its proportionate share of any penalty costs based on the percentage of the violation caused by, or contributed to by, KMPA that led to the penalty assessment. Third, we will require that E.ON file, through a FPA section 205 filing, for Commission approval of the pass-through to KMPA of the costs of each specific penalty.¹⁷ To avoid duplicative investigations and hearings, the Commission does not intend any section 205 direct assignment proceeding to function as a second, de novo review of an investigation or hearing related to the extent of KMPA’s responsibility for any violation of a reliability standard by E.ON. Rather, such a section 205 proceeding will be limited to the question of whether penalty costs should be assigned to KMPA if it already had been identified during the investigative or hearing stage of the enforcement process. Fourth, to ensure due process to KMPA, the Commission will not entertain a section 205 filing by E.ON unless KMPA, NERC, the Regional Entity and the Commission have been notified during the course of the

¹⁵ Section 6(f) of the Operating Agreement states “[i]n the event that the [n]etwork [c]ustomer fails to shed [n]etwork [l]oad as required hereunder, the [n]etwork [c]ustomer shall pay an unauthorized use charge as set forth in [s]chedule 13 of the Tariff applied on a monthly basis to the amount of load at those [d]elivery [p]oints that the [t]ransmission [o]wner requested to be shed at those [d]elivery [p]oints that was not shed; and any other costs or damages incurred due to the [n]etwork [c]ustomer’s failure to shed [n]etwork [l]oad (including, but not limited to, costs in connection with unit start up, system losses and changes in the generation dispatch and all NERC and SERC penalties).”

¹⁶ *See Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators*, 122 FERC ¶ 61,247 (2008) (Guidance Order).

¹⁷ *Southwest Power Pool, Inc.*, 126 FERC ¶ 61,061, at P 28 (2009).

investigation, other inquiry into, or hearing of that matter, that E.ON believes that KMPA may be responsible for a violation.¹⁸

16. Thus, E.ON must revise the language of the Operating Agreement to clarify that: (1) E.ON only may require KMPA to pay penalty costs if NERC, a Regional Entity or the Commission determines that KMPA's actions caused or contributed to a violation of the applicable reliability standards; (2) KMPA is only responsible to pay its proportionate share of such penalty costs; (3) E.ON will request Commission approval, through a section 205 filing, of the pass-through of the costs to KMPA of each specific penalty, in the event that NERC, a Regional Entity, or the Commission imposes penalties; and (4) E.ON will notify KMPA, NERC, the Regional Entity and the Commission during the course of any investigation, other inquiry into, or hearing of that matter by NERC, a Regional Entity or the Commission that E.ON believes KMPA may be responsible for the violation. E.ON is directed to submit the revised Operating Agreement within 30 days of the date of this order.

The Commission orders:

(A) E.ON's filing is hereby conditionally accepted, effective February 26, 2009, subject to E.ON making a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

¹⁸ Guidance Order, 122 FERC 61,247 at P 23. The Commission also notes that, pursuant to section 39.7(b)(4) of our regulations, 18 C.F.R. § 39.7(b)(4) (2008), each alleged violation and violation of a reliability standard generally is non-public until NERC files a notice of penalty concerning the matter with the Commission, unless the Commission has previously authorized public disclosure. *See Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 533, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006). If, under the Operating Agreement, E.ON gives notice of an alleged violation to KMPA, and to NERC, the Regional Entity and the Commission, while the alleged violation is non-public, E.ON's notice also must be non-public. In particular, in these circumstances E.ON must submit its notice to the Commission staff on a non-public basis, rather than file the notice with the Commission.

(B) Waiver of the 60-day prior notice requirement is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.