UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Louisville Gas & Electric Company and Kentucky Utilities Company — Docket No. ER02-2560-001

ORDER ON REHEARING

(Issued May 1, 2003)

1. On December 16, 2002, East Kentucky Power Cooperative (EKPC) filed a request for rehearing of the Commission's order issued on November 15, 2002.[1] In its request for rehearing, EKPC states that the Commission failed to enforce contractual agreements that EKPC had entered into with Louisville Gas & Electric Company (LG&E) and Kentucky Utilities Company (KU) (collectively, LG&E/KU). Additionally, EKPC asserts that the Commission erred in finding that Opinion Nos. 453 and 453-A[2] do not prevent LG&E/KU from passing through the Midwest Independent System Operator Inc.'s (Midwest ISO) Schedule 10 Cost Adder and do not bar the renegotiation of grandfathered contracts. As discussed below, we deny EKPC's request for rehearing.

I. Background

2. LG&E/KU currently provides transmission service to EKPC, for delivery to EKPC loads served from LG&E/KU's transmission system, pursuant to two agreements: an Interconnection Agreement (IA) dated May 11, 1995,[3] and a Transmission Agreement (TA)

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[1]Louisville Gas & Electric Co. and Kentucky Utilities Co., 101 FERC ¶ 61,182 (2002) (November 15 Order).

[2]Midwest Independent Transmission System Operator, Inc., Opinion No. 453, 97 FERC ¶ 61,033 (2001), order on reh'g, Opinion No. 453-A, 98 FERC ¶ 61,141 (2002).

[3]The IA was accepted to become effective October 22, 1994, by letter order issued July 27, 1995, in Docket No. ER94-209-000, et al. See Kentucky Utilities Company, 72 FERC ¶ 61,097 (1995).

dated February 9, 1995 (collectively, Agreements).[4] LG&E/KU is a transmission-owning member of the Midwest ISO, and each Agreement is a grandfathered agreement under the Midwest ISO open access transmission tariff (OATT).

3. On December 5, 1997, the parties amended these Agreements to reflect the execution of a settlement agreement that resolved many issues concerning the then pending merger between LG&E and KU (Merger Settlement). Subsequently, on September 18, 1998, the parties executed another agreement to reflect the settlement of the related transmission rate proceeding (Transmission Settlement).

4. On September 18, 2002, LG&E/KU proposed to adjust the rates for certain transmission services provided to EKPC under the Agreements so that the charges reflect the corresponding charges that EKPC would pay if it were a transmission customer of the Midwest ISO.[5] LG&E/KU explained that the rates being charged to EKPC under the Agreements are less than the applicable rates for delivery within the LG&E/KU licence plate pricing zone under the Midwest ISO OATT. As such, LG&E/KU stated that, in making this rate filing, it sought to eliminate the under-recovery of its transmission revenue requirement, including the Midwest ISO charges that it is assessed for service provided under the Agreements.[6]

5. EKPC protested LG&E/KU's filing, arguing that LG&E/KU: (1) has previously contracted away its right to unilaterally seek modification of the Agreements under Section 205 of the Federal Power Act; (2) has violated prior Commission orders by failing to safeguard existing grandfathered contracts; and (3) has failed to adequately support its proposed rates.

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[4]The TA was accepted to become effective February 10, 1995, by unpublished letter order issued June 9, 1995, in Docket No. ER95-580-000.

[5]LG&E/KU stated that, pursuant to each Agreement, LG&E/KU has the unilateral right to file changes to the rates for service to EKPC, with one exception. According to LG&E/KU, this exception involves the "base load" amount of service provided under the IA, the rates for which are fixed for the initial ten-year term of the agreement. Therefore, LG&E/KU stated that it is not proposing to change the rates for base load amounts under the IA in this filing. Transmittal Letter at 2-3.

[6]Transmittal Letter at 2.

6. In the November 15 Order, the Commission determined that LG&E/KU retained the authority under Section 205 to file changes to the rates for service under the Agreements.[7] The Commission also explained that, contrary to EKPC's interpretation, Opinion No. 453-A did not shield transmission customers under grandfathered contracts from paying charges that the Midwest ISO levies on its transmission owners for service provided under grandfathered contracts, nor did Opinion No. 453-A mandate that transmission owners engage in negotiations with its customers prior to seeking any modification of a grandfathered contract.[8]

7. Finally, with respect to EKPC's claim that LG&E/KU failed to adequately support its proposed rates, the Commission's preliminary analysis indicated that the proposed rates had not been shown to be just and reasonable. Accordingly, we accepted and suspended the proposed tariff revisions, made them effective subject to refund, and set them for hearing. However, in order to provide the parties an opportunity to resolve these matters among themselves, we held the hearing in abeyance and initiated settlement judge procedures.[9]

II. EKPC's Request for Rehearing

8. EKPC seeks rehearing of all the decisions in the November 15 Order, contending that the Commission erred in: (1) failing to enforce the Merger Settlement and the amended Agreements, by permitting LG&E/KU to exercise filing rights; (2) failing to prohibit Midwest ISO transmission owners from passing through the Midwest ISO's Schedule 10 Cost Adder; and (3) failing to require the renegotiation of grandfathered contracts by the parties to those contracts.

A. Filing Rights

9. EKPC maintains that the Commission should have rejected LG&E/KU's rate filing in the December 19 Order because LG&E/KU previously contracted away its Section 205 filing rights in exchange for EKPC's agreement not to oppose the merger of LG&E and KU. EKPC states that in drafting the various agreements with LG&E/KU, it was the parties' intent to fix the transmission rates for the duration of the amended Agreements. As such, EKPC contends that the Mobile-Sierra doctrine protects the fixed rate contained in

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[7] November 15 Order, 101 FERC ¶ 61,182 at P 12-16.

[8] Id. at P 21-26.

[9] Id. at P 17-20.

the Agreements barring any finding by the Commission that its terms violate the public interest.[10]

10. EKPC states that, while EKPC expressly preserved its filing rights, the November 15 Order failed to recognize that LG&E/KU did not preserve its Section 205 rights in the Merger or Transmission Settlements. EKPC contends that absent an express reservation by LG&E/KU of its rights in the Merger Settlement, LG&E/KU has not preserved its right to unilaterally file rate changes.

11. Additionally, EKPC explains that the amendments to the Agreements were executed in order to implement the Merger and Transmission Settlements, and states that the parties' failure to expressly remove the provisions in the original Agreements expressly allowing for LG&E/KU to make unilateral rate filings was simply an oversight. EKPC contends that the amended Agreements, when read along with the Merger and Transmission Settlements, supercede any claim by LG&E/KU to the Section 205 rights that they possess in the original Agreements. Accordingly, EKPC states that the Commission should look beyond the amendments' failure to expressly remove LG&E/KU's filing rights and find instead that the Settlements, which do not expressly preserve LG&E/KU's filing rights, are the controlling agreements that set the rates that are paid by EKPC.

12. If the Commission does not summarily find that LG&E/KU has contracted away its Section 205 filing rights, EKPC requests that the Commission set for hearing the issue of whether LG&E/KU has the right under Section 205 to unilaterally modify the amended Agreements. EKPC states that absent a hearing, EKPC is not being afforded with an opportunity to provide additional evidence to the Commission.

B. Pass-Through of the Midwest ISO Charges

13. EKPC argues that the Commission's decision in the November 15 Order to consider the pass-through of the Midwest ISO Schedule 10 Cost Adder contradicts prior orders which expressly prohibit the pass-through of such charges. EKPC states that the November 15 Order's interpretation of Opinion No. 453-A is not supported by the text of Opinion No. 453-A, and argues that the Commission cannot assess such charges against customers holding grandfathered contracts.

C. Renegotiation of Grandfathered Contracts

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[10] See FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (Sierra); United Gas Pipeline Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956) (Mobile).

14. EKPC also argues that the Commission's finding that the renegotiation of grandfathered contracts is not mandatory contravenes Opinion No. 453-A and the decision in Docket No. ER02-945-000.[11] EKPC contends that, in both of these decisions, the Commission explained that any modifications to grandfathered agreements should first be negotiated between the parties to these agreements.

III. Discussion

A. Filing Rights

15. We continue to find no evidence that LG&E/KU ever intended to contract away the Section 205 filing rights expressly reserved in the Agreements. Section 15.02 of the IA and Section 14 of the TA contain language which expressly provides that either party has the right to make unilateral filings with the Commission to seek changes in the rates under the Agreements (with the exception of the rates associated with base load amounts of service under the IA, which LG&E/KU do not seek to change).[12] The amendments to the

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[11] LG&E Energy, 98 FERC ¶ 61,323 at 62,352 (2002).

[12] Section 15.02(b) of the IA provides:

> Except as provided for in paragraph (c) to this Section 15.02, nothing contained in this Agreement, or in any amendment hereto, or in the Service Schedules or Exhibits attached hereto, shall be construed as affecting in any way the right of either Party from time to time to unilaterally make application to the FERC (or any successor regulatory agency or department having jurisdiction) for the modification of, or change in, the rates and charges contained in this Agreement, or in the Service Schedule or Exhibits attached hereto, under Section 205 of the Federal Power Act...
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> (c) The charges for area load service for base load amounts as defined in Section 8.03 and as subject to potential reduction in accordance with Section 8.04, are fixed for the initial ten year term of this Agreement. It is the intent of the Parties to this Agreement to eliminate during the ten year initial term, solely with respect to said charges for area load service for base load amounts, [LG&E/]KU's right to make changes in said rates by making unilateral filings with the FERC pursuant to Section 205 of the Federal Power Act and EKPC's right to seek modification of such rates pursuant to Section 206 of the Federal Power Act and the rules and regulations promulgated thereunder...

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Agreements to implement the Merger Settlement did not modify these sections or affect LG&E/KU's filing rights in any other way. To the contrary, the language in the amendments to the IA and TA clearly state that these sections of the Agreements have not changed and "shall continue to be effective."[13]

16. While EKPC draws attention to the fact that LG&E/KU did not expressly preserve its Section 205 rights in the Merger or Transmission Settlements, and while this is true, the fact is that LG&E/KU did not have to preserve its rights in the Settlements. LG&E/KU's unilateral filing rights are laid out in the original Agreements and were subsequently reaffirmed in the amendments to the IA and TA.[14] Although EKPC argues that it would not have agreed to the Settlements but for a concession that LG&E/KU would fix the rates for the duration of the Agreements and surrender its Section 205 filing rights, such arguments are simply not determinative of the parties' intent given the language quoted above. Ultimately, EKPC has not demonstrated that LG&E/KU agreed in the Settlements to contract away the Section 205 filing rights expressly reserved in the Agreements.[15]

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[12](...continued)

Section 14 of the TA provides:

> Nothing contained in this Agreement shall be construed as affecting or limiting in any way the right of [LG&E/]KU to unilaterally file with the FERC for a change in any aspect of this Agreement including the rates for service hereunder under Section 205 or 206 of the Federal Power Act pursuant to the FERC's Rules and Regulations promulgated thereunder or otherwise prejudice the rights of [LG&E/]KU under the Federal Power Act. EKPC retains whatever rights it has with respect to filing a complaint before the FERC under Section 206 of the Federal Power Act.

[13]The amendments to the IA and TA also contain merger clauses indicating that the IA and TA, as amended, "constitute the entire agreement between the Parties in respect of the subject matter hereof, an there are no other understandings or agreements between the Parties in respect thereof."

[14]See supra notes 14 and 15 (quoting the IA, TA, and the amendments).

[15]Contrary to EKPC's argument that it has not been afforded the opportunity to present evidence to the Commission, we disagree. EKPC has had two separate opportunities, both in its original protest and in its request for rehearing here, in which to present evidence to the Commission in support of its claim. EKPC has not done so.

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B. Pass-Through of the Midwest ISO Charges

17. As we explained in the November 15 Order, EKPC misinterpreted our decision in Opinion No. 453-A. In Opinion No. 453-A, we denied requests by the Midwest ISO Transmission Owners to permit either (1) the Midwest ISO to directly charge its Schedule 10 Cost Adder to customers under grandfathered contracts, or (2) transmission owners to indiscriminately pass-through Schedule 10 Cost Adder charges to customers under grandfathered contracts. In the November 15 Order, we explained that, in rejecting these proposals, the Commission did not intend to categorically disallow recovery from customers under grandfathered contracts of all charges that the Midwest ISO levies on transmission owners for service provided under grandfathered contracts. Rather, we explained, we rejected these proposals because they would amount to generic alteration of grandfathered contracts and the rates under those contracts without an opportunity for a case-by-case review to ensure that the rates under the contracts remain just and reasonable.

18. In contrast to the generic alteration of grandfathered contracts at issue in Opinion No. 453-A, we are presented in the instant proceeding with a proposal to change the rates in a particular contract, with an opportunity to review the rates under the contract to ensure that they remain just and reasonable. EKPC makes no arguments on rehearing that persuade us that we erred in finding that charges that the Midwest ISO levies on transmission owners under grandfathered contracts may be considered when evaluating whether the proposed rates at issue here reflect LG&E/KU's cost of providing service.

19. In the November 15 Order, we clarified that it was not the Commission's intention in Opinion No. 453-A to shield customers holding grandfathered contracts from Midwest ISO charges that are assessed to the transmission owners for service provided under these grandfathered contracts. While EKPC would like to believe that customers holding grandfathered contracts are not responsible for any charges associated with the Schedule 10 Cost Adder, this is simply not the case.

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[15](...continued)

Moreover, as we explained in the November 15 Order, the fact that the parties expressly agreed to preserve EKPC's filing rights does not support EKPC here. EKPC expressly agreed to limit its rights in other respects (i.e., its rights to oppose the merger), and so it was understandable that the parties would equally identify when EKPC's rights were, in contrast, not being limited. See November 15 Order, 101 FERC ¶ 61,182 at P13. That same concern was not present with respect to LG&E/KU's filing rights.

C. Renegotiation of Grandfathered Contracts

20. Opinion No. 453-A states that "any modifications to grandfathered agreements should first be a matter for negotiation between the parties to those contracts."[16] As the November 15 Order explained, we did not intend this language to be interpreted to mean that any modifications to grandfathered agreements must be a matter for negotiation; rather, we only stated that any modifications should be a matter for negotiation.[17] Accordingly, while we would encourage transmission owners and customers to engage in negotiation prior to making any rate filings, we are not requiring that such negotiation be mandatory.

The Commission orders:

EKPC's request for rehearing is hereby denied, as discussed above.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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[16] Opinion No. 453-A, 98 FERC at 61,614.

[17] November 15 Order, 101 FERC ¶ 61,182 at P 26.