

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisville Gas & Electric Company and
Kentucky Utilities Company

Docket No. ER02-2560-003

v.

East Kentucky Power Cooperative, Inc

ORDER AFFIRMING REMAND DECISION

(Issued September 1, 2006)

1. In this order, the Commission affirms the Presiding Judge's Remand Decision¹ determining a just and reasonable adjustment to the rate proposed by Louisville Gas & Electric Company (Louisville Gas) and Kentucky Utilities Corporation (Kentucky Utilities) (jointly LG&E/KU) for transmission services to East Kentucky Power Cooperative (East Kentucky) under the terms of an Interconnection Agreement and a Transmission Agreement (Agreements) between LG&E/KU and East Kentucky for transmission service to the Gallatin Steel Company (Gallatin).

A. Background

2. Kentucky Utilities and East Kentucky are parties to an Interconnection Agreement which allows each to use the other's transmission system to avoid costly duplication of facilities. Kentucky Utilities and East Kentucky also entered into a Transmission Agreement for transmission service to Gallatin; Gallatin is an East Kentucky load, but is

¹ *Louisville Gas & Electric Co. and Kentucky Utilities Co.*, 113 FERC ¶ 63,022 (2005) (Remand Decision).

located on Kentucky Utilities' system. The Transmission Agreement was likewise designed to avoid the cost of duplicate facilities.

3. After the Agreements were negotiated, Kentucky Utilities merged with Louisville Gas. LG&E/KU are transmission owning members of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO), but the Agreements are "Grandfathered Agreements" under the Midwest ISO Open Access Transmission Tariff (OATT), *i.e.*, transmission service outlined in the Agreements continues to be provided pursuant to the rates, terms and conditions of the Agreements and not the Midwest ISO OATT.²

1. LG&E/KU Filing

4. In September 2002, LG&E/KU filed with the Commission a proposal to restructure the Agreements and essentially sought to "adjust the rates ... under the Agreements so that the charges reflect the corresponding charges that [East Kentucky] would pay if it were a transmission customer of the Midwest ISO."³ In amending the Agreements, LG&E/KU sought to "eliminate the under-recovery of their transmission revenue requirement, including the Midwest ISO charges that they are assessed for service provided under the Agreements."⁴ The Commission accepted and suspended LG&E/KU's proposed rate changes, made them effective November 18, 2002, subject to refund, and set them for hearing.⁵

² On July 21, 2006, the Commission accepted for filing a notice of cancellation for the Agreements, effective September 1, 2006. *See Kentucky Utilities Co.*, Docket No. ER06-1124-000 (July 21, 2006) (unpublished letter order). Therefore, the rates at issue in this proceeding are for the locked-in period of November 18, 2002 to September 1, 2006. In addition, LG&E/KU agreed to certain rate treatments for EKPC as part of their withdrawal from Midwest ISO. *See Louisville Gas & Electric Co. and Kentucky Utilities Co.*, Docket No. ER06-519-000 (March 17, 2006) (unpublished letter order).

³ *See Louisville Gas & Electric Co. and Kentucky Utilities Co.*, 101 FERC ¶ 61,182 at P 3 (2002).

⁴ *Id.*

⁵ *Id.*

2. Presiding Judge's Initial Decision and Commission's Order on Initial Decision

5. Following a hearing, the Presiding Judge issued an initial decision finding that: (1) LG&E/KU may not charge for ancillary services under the Agreements, other than Load Following and Regulation Service on loads that are not dynamically scheduled; (2) LG&E/KU may pass through the Midwest ISO Schedule 10 adder only for loads in excess of the base load amounts in the Agreements; (3) LG&E/KU may include a 50 basis point return on equity adder in rates for loads in excess of the base load amounts in the Agreements; (4) East Kentucky should be charged the Regional Through and Out Rate under the Midwest ISO OATT to import power to serve the base load amounts under the Agreements,⁶ but not to serve any loads for which the Midwest ISO OATT rate has been adopted for service under the Agreements; (5) LG&E/KU must eliminate the cost of the Virginia facilities from the transmission rates it charges under the Agreements; (6) LG&E/KU may not automatically pass through under the Agreements charges under any future schedules that are added to the Midwest ISO OATT but instead must make a new filing under section 205 of the Federal Power Act (FPA);⁷ (7) LG&E/KU may charge the Midwest ISO Schedule 9 rates for network service only for loads in excess of the base load amounts in the Agreements; and (8) LG&E/KU should be charged the rates in East Kentucky's OATT for service they take from East Kentucky in excess of the base load amounts in the Agreements.⁸

⁶ “The Presiding Judge explained that when East Kentucky imports energy from Midwest ISO transmission owners other than [LG&E/KU] to serve loads under the Agreements, it currently pays the Through & Out Rate in addition to the charges under the Agreements, and, thus, is subjected to rate pancaking. The Presiding Judge found that it would be unfair, discriminatory, and duplicative for [LG&E/KU] to adopt the Midwest ISO OATT rate for service under the Agreements and deny East Kentucky the elimination of rate pancaking for use of the Midwest ISO transmission system.” *Louisville Gas & Electric Co. and Kentucky Utilities Co.*, 109 FERC ¶ 61,330 at P 29 (2004) (December 2004 Order), *reh'g denied*, 111 FERC ¶ 61,323 (2005).

⁷ 16 U.S.C. § 824d (2000).

⁸ *Louisville Gas & Electric Co. and Kentucky Utilities Co.*, 106 FERC ¶ 63,039 (2004) (Initial Decision).

6. As to issue 4, the issue that is relevant here,⁹ the Commission disagreed with the Presiding Judge's explanation that East Kentucky is now entitled to service over the entire Midwest ISO system because the proposed rate was the same as the Midwest ISO OATT rate for load in the LG&E/KU zone. The Commission stated that "the appropriate solution is not to expand the scope of service under the Agreements to include access to the entire Midwest ISO system. Rather, the appropriate solution is to adjust the proposed rate, to reflect an allocation of costs to the Agreements assuming that LG&E/KU did not provide access to its system under the Midwest ISO OATT."¹⁰ The Commission then remanded this issue back to the Presiding Judge to determine what adjustment to the proposed rate is necessary.

3. Presiding Judge's Remand Decision

7. On November 16, 2005, following a further hearing, the Presiding Judge issued the Remand Decision on the sole remaining issue: determining the appropriate adjustment to the rate proposed by LG&E/KU for transmission service to East Kentucky under the terms of the Agreements.

8. In the Remand Decision, the Presiding Judge concluded that: (1) the Midwest ISO Attachment O formula rates which LG&E/KU proposed to use here are multi-zonal rates which presume the right of the customer to service over the entire Midwest ISO system at a single, non-pancaked rate; (2) on all amounts of service covered by the Agreements, including amounts of service in excess of the base load amounts however, LG&E/KU offered service at Agreement rates only over their own transmission system; (3) East Kentucky was denied the right to multi-zonal service under the Agreements; (4) LG&E/KU's proposed rates, however, are calculated as though they provided multi-zonal service (although, as noted, LG&E/KU provided only single-zone service to East Kentucky); (5) in order to adjust the proposed multi-zonal rates to single-zone rates, to reflect East Kentucky having to pay pancaked rates when importing from other Midwest ISO members to its Agreements load on the LG&E/KU system, LG&E/KU's "source" throughput must be added to the "sink" throughput that is already included in the denominator of the rate equation; (6) by adjusting the rates in this manner (and multiplying them by the amount of East Kentucky's throughput), LG&E/KU will have apportioned its costs of service to East Kentucky to properly reflect the service provided

⁹ The Commission affirmed the Presiding Judge on issues (2), (3), (5), (6), and (7), affirmed the Presiding Judge in part on issue (1), and disagreed with the Presiding Judge on issues (4) and (8). *See infra* note 9.

¹⁰ December 2004 Order at P 32.

to East Kentucky under the Agreements; (7) LG&E/KU should be required to demonstrate that they have adjusted their proposed rates by adding the source-only throughput¹¹ to the denominator of the rate equation (or must revert to the rates already provided in the Agreements, which are currently applied to the base load amounts under those Agreements); and (8) any proposed rate that does not take into account the costs of service that should be attributed to source transactions and, instead, apports them to East Kentucky, would not reflect the single-zone service that is provided to East Kentucky and thus would be unjust and unreasonable.¹²

4. Briefs on Exceptions

9. According to LG&E/KU, the proposed formula rate is only for service on LG&E/KU's transmission system and contains no rate component for Midwest ISO-wide service, and therefore, no adjustment to the formula rate is necessary. LG&E/KU argue that there is no rate pancaking concern caused by LG&E/KU's rate filing because that rate filing did not change the number of transmission rates paid by East Kentucky, nor did it reflect multi-zonal service.¹³

10. Second, LG&E/KU assert that the Presiding Judge's proposed adjustment to the denominator of the formula rate is in error for at least four reasons, including: (1) it is a customer-specific rate adjustment for rates that are not customer-specific; (2) transmission revenue eliminated through rate de-pancaking is mostly associated with adjustments to the numerator, not the denominator, in the cost of service equation; (3) for all of LG&E/KU's long-term "source throughput" transmission arrangements, the billing determinants are already included in the denominator of the proposed rates; and

¹¹ For purposes of this order, source-only throughput includes those transactions that source on the LG&E/KU system but sink elsewhere in Midwest ISO and which LG&E/KU currently does not include in the denominator of its proposed formula rate.

¹² See Remand Decision at P 98.

¹³ Moreover, LG&E/KU state that the points of receipt and delivery are defined under the Agreements. If East Kentucky wishes to use other receipt and delivery points, LG&E/KU assert that it is a business decision of East Kentucky, and if East Kentucky decides to purchase from the Midwest ISO and deliver that energy under the Agreements, as opposed to under the Midwest ISO OATT, it necessarily results in the payment of two rates. LG&E/KU also asserts that they should not have their rates lowered when East Kentucky is free to convert its grandfathered service to service under the Midwest ISO OATT.

(4) adding back the revenue credits lost through rate de-pancaking would actually increase East Kentucky's rates.

11. Third, LG&E/KU argue that the Presiding Judge is in error when he implies that LG&E/KU ever prevented East Kentucky from becoming a customer under the Midwest ISO OATT.

12. And fourth, LG&E/KU requested in its initial brief that the Presiding Judge make 29 findings of fact and 14 conclusions of law. However, in the Remand Decision, the Presiding Judge only issued 8 "findings and conclusions", which LG&E/KU argue demonstrates that the Presiding Judge ignored a number of issues.

13. In its Brief on Exceptions, East Kentucky requests that the Commission decline to adopt the Presiding Judge's rate adjustment, order the removal of Midwest ISO charges from the Agreements, and order the implementation of East Kentucky's own two-part pancaked-rate elimination proposal, including refunds with interest.

14. Under East Kentucky's refund proposal, it would pay the full Midwest ISO OATT charges for the service under the OATT, and would pay the rate under the Agreements for service provided under the Agreements, but would not pay both rates for the same transactions. Billings under the Agreements would be reduced by the amount of OATT service taken. East Kentucky asserts that LG&E/KU agreed to this going-forward arrangement at hearing and its requested refunds merely apply this proposal to the period from November 18, 2002 until a final order is issued in this proceeding.

15. East Kentucky asserts that, throughout the Remand Decision, both the Presiding Judge and Commission Trial Staff indicated strong support for East Kentucky's proposal to eliminate rate pancaking. However, the Presiding Judge rejected this proposal as being beyond the scope of his authority. According to East Kentucky, the Presiding Judge came to this conclusion without properly considering either the Commission's order establishing the remand proceeding or the evidence produced on remand. East Kentucky argues that its refund proposal is not an expansion of service under the Agreements; rather, it is an adjustment to the billing determinants and therefore does not require the Presiding Judge to go beyond his mandate established by the Commission in the December 2004 Order.

16. Moreover, East Kentucky argues that the Presiding Judge's proposed adjustment to LG&E/KU's proposed formula rate does not fully remedy the rate pancaking and may be impossible to calculate because LG&E/KU testified that it could not recreate the source throughput data needed. By focusing on that rate, East Kentucky argues that the Presiding Judge inappropriately ignores the other Midwest ISO rates that LG&E/KU is effectively importing into the Agreements. Finally, East Kentucky argues that should the

rates ultimately revert back to the pre-existing rates, the Virginia Facilities should be removed from those pre-existing rates in the same way they have been removed from the proposed rates.

17. Gallatin argues that the Presiding Judge acted inconsistently with established ratemaking procedures by allowing LG&E/KU to support their proposed rates through a compliance filing (*i.e.*, by giving them the opportunity to implement the proposed adjustment to the denominator of the proposed formula rate). Gallatin argues that any compliance directive must come from the Commission itself and that the Commission has already stated that it would not make a final finding on the justness and reasonableness of the rates until the remand proceeding had concluded. Gallatin asserts that the Presiding Judge should have instead rejected LG&E/KU's proposed rates as unsupported and unworkable and ordered the reinstatement of the original rates under the Agreements.

18. In addition, Gallatin asserts the Presiding Judge should have also addressed a potential rate adjustment for the Midwest ISO Schedule 10 charges. Similarly, Gallatin argues that, by focusing on a limited rate adjustment, the Presiding Judge ignored other rate adjustments required to eliminate the cost of the Virginia facilities and ancillary services.

19. Commission Trial Staff argues that the Presiding Judge misinterpreted the Commission's December 2004 Order as directing him to adjust the LG&E/KU rate to make it just and reasonable, but not to eliminate rate pancaking. Trial Staff argues the Presiding Judge violated Order No. 2000¹⁴ by proposing a rate adjustment that does not eliminate rate pancaking and also that the rationale for eliminating rate pancaking should apply to any period in which LG&E/KU charged East Kentucky both the rates under the Agreements and the Midwest ISO Regional Through and Out Rate. Trial Staff also argues that the Presiding Judge should have ordered LG&E/KU to refund to East Kentucky approximately \$3.5 million associated with rate pancaking for December 2002 through January 2005.

¹⁴ *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

20. Trial Staff further argues that the Presiding Judge's rate adjustment proposal is inappropriate and unworkable because the adjusted rates would not necessarily reflect the cost of the services provided to the customer and the information needed to implement the rate adjustment is not available. Therefore, Trial Staff advises that the Commission should reverse the Presiding Judge's remedy and require LG&E/KU to eliminate rate pancaking and develop the rate based on the source rather than the sink.

5. Briefs Opposing Exceptions

21. LG&E/KU responds that transmission service under the Agreements is defined with all points of receipt as 'source' East Kentucky points and all points of delivery as 'sink' East Kentucky points. Thus, LG&E/KU claims that it cannot serve the Interconnection Agreement and Transmission Agreement loads from purchases within the Midwest ISO footprint using the transmission service defined in the Agreements. For service beyond that specified in the Agreements, East Kentucky must serve such loads under the Midwest ISO OATT.

22. LG&E/KU argues that East Kentucky's and Trial Staff's refund proposal amounts to an expansion of service under the Agreements, contrary to the directives of the December 2004 Order. LG&E/KU also states that it would be unreasonable for the Commission to accept East Kentucky's proposal on a going-forward basis when it previously in the December 2004 Order found that such would be unjust and unreasonable. LG&E/KU also continue to dispute that East Kentucky is subject to inappropriate rate pancaking. LG&E/KU also submit that East Kentucky did not provide any evidence that it ever used energy purchased from the Midwest ISO to serve the load under the Agreements. Finally, LG&E/KU assert that allocating the Midwest ISO Schedule 10 charges to the loads under the Agreements is consistent with Commission precedent and is appropriate.

23. East Kentucky, in turn, states that it opposes each of LG&E/KU's exceptions. (Gallatin adopts and supports East Kentucky's Brief Opposing Exceptions.) East Kentucky believes that LG&E/KU has asked the Commission to ignore the rate pancaking that their filing created. East Kentucky reiterates that it is not seeking to expand the scope of service under the Agreements, but to avoid paying two sets of Midwest ISO rates. East Kentucky believes that the Presiding Judge properly determined that the rates under the Agreements need some adjustment to reflect the service provided; however, they also believe that the Presiding Judge's adjustment is too limited. East Kentucky disputes LG&E/KU's interpretation of the Commission's precedent regarding rate pancaking and grandfathered agreements.

24. East Kentucky further asserts that becoming a Midwest ISO customer will not remedy the rate pancaking without further adjustments to the rates, in contrast to LG&E/KU's claim that East Kentucky could avoid the pancaking issue by becoming a Midwest ISO customer for service now provided under the Agreements. East Kentucky submits in this regard that LG&E/KU's witness Johnson conceded that further rate adjustments are necessary to avoid paying two sets of rates. East Kentucky argues that it is paying a Midwest ISO rate to the Midwest ISO and then again to LG&E/KU.

25. East Kentucky also disputes LG&E/KU's contention that the rates they propose to charge East Kentucky are no higher than they would have been if LG&E/KU did not participate in the Midwest ISO and the rates are not for multi-zonal service. East Kentucky notes that the rates LG&E/KU propose to charge are identical to those charged to Midwest ISO OATT customers, which cover service over the entire Midwest ISO footprint. East Kentucky also argues that LG&E/KU raises these points too late in the proceeding and also notes that LG&E/KU have filed to withdraw from the Midwest ISO citing the prohibitive costs associated with membership.

26. Trial Staff opposes certain exceptions taken by the other parties and agree with certain positions taken by the Presiding Judge. Trial Staff agrees with the Presiding Judge that East Kentucky should pay Midwest ISO Schedule 10 charges. Trial Staff also agrees with the Presiding Judge that East Kentucky has been subject to inappropriate rate pancaking, and that East Kentucky may use its own generation or Midwest ISO purchases to serve its load on the LG&E/KU system (referred to as the "partial service proposal").

27. Trial Staff notes that LG&E/KU draw a distinction between purchasing from the Midwest ISO and taking service under the Midwest ISO OATT, but do not explain what that difference is. Trial Staff encourages the Commission to ignore this distinction drawn by LG&E/KU and eliminate inappropriate rate pancaking. Trial Staff also notes that LG&E/KU's witness Johnson eventually conceded in his testimony that East Kentucky could use a partial service whereby LG&E/KU would only bill East Kentucky under the Agreements for load served under the Agreements (provided the Midwest ISO also agreed). In the Remand Decision, Trial Staff notes, the Presiding Judge found that LG&E/KU never offered East Kentucky a meaningful opportunity to implement partial service, witness Johnson's concession was a firm one and LG&E/KU should be held to its partial service offer. Trial Staff states that the Commission should affirm the Presiding Judge on all of his partial service findings.

28. Trial Staff disputes LG&E/KU's contention that the Presiding Judge ignored a substantial number of factual and legal issues raised by the company. Trial Staff does not agree that Commission rules and precedent require the Presiding Judge to address each item on a party's list of proposed findings of fact or law. Trial Staff also notes that only

one issue was remanded to the Presiding Judge for further proceedings and the Remand Decision addressed that issue adequately.

B. Discussion

29. The issue remanded back to the Presiding Judge was the question of the necessary adjustment to the proposed rates so that the rates correspond to the service provided. Therefore, we will limit our discussion to that issue, *i.e.*, the sole issue remaining from the December 2004 Order, the proper rate adjustment.¹⁵ For those issues where the Commission has previously affirmed or otherwise addressed the Presiding Judge (and then denied rehearing) with or without discussion, we view those issues as settled and will not revisit them.

30. We find that the Remand Decision is well-reasoned, and we affirm and adopt all of the Presiding Judge's findings and conclusions.¹⁶ LG&E/KU must adjust their rate as proposed by the Presiding Judge, and refund to East Kentucky the resulting difference, with interest.¹⁷ The right of customers under the Midwest ISO OATT to transmission service at non-pancaked rates is a right not possessed by East Kentucky under its Agreements, and, therefore, that right should not be reflected in the rates being charged under these Agreements. The rates under the Agreements should instead reflect the single-zone service being provided. To the extent that LG&E/KU is unwilling or unable (due to lack of sufficient data) to implement their proposed rate with the required adjustment, we find the proposed rate is unjust and unreasonable and is therefore rejected. If the proposed rate is rejected, service under the contracts would be provided under the Agreements' pre-existing rates.¹⁸

31. Specifically, LG&E/KU must adjust their proposed formula rate to add to the denominator the number of megawatts that are not now included (*i.e.*, any transactions that are not assessed a LG&E/KU zonal rate under the Midwest ISO OATT but that receive service on the LG&E/KU transmission system and that are currently not included in the denominator). We find that this is a reasonable basis to adjust the proposed rate so that East Kentucky pays a rate that corresponds to the single-system service that it receives. LG&E/KU also must recalculate the rate from the effective date of the

¹⁵ See December 2004 Order at P 32.

¹⁶ See Remand Decision at P 98.

¹⁷ See *Id.* P 98, subpart 7.

¹⁸ *Id.* P 79; see 16 U.S.C. § 824d (2000).

proposed rate and East Kentucky is due refunds in the amount of the difference between what was charged pursuant to the proposed rate (subject to refund) and what it should have been charged under the adjusted rate, with interest.

32. We recognize that neither East Kentucky nor LG&E/KU support the Presiding Judge's proposed adjustment. For instance, East Kentucky continues to argue that it should receive refunds equal to the amount it paid for service over the Midwest ISO (*i.e.*, effectively that it should receive service over the entire Midwest ISO system under the Agreements). However, the Commission made clear in the December 2004 Order that the *scope* of services provided under the Agreements should *not* be expanded; rather, the *rates* should be adjusted to reflect the service provided under those Agreements.¹⁹ East Kentucky's assertion that refunds for the Midwest ISO service it paid for is not an expansion or service but only an "adjustment" to its rates is disingenuous. It is simply a different characterization of its original request to receive RTO-wide service under the Agreements. However, the issue of whether East Kentucky should receive expanded service under the Agreements has already been considered and rejected. The only issue here is how the rate proposed by LG&E/KU for service under the Agreements needs to be adjusted to reflect the single-system service East Kentucky receives, not whether East Kentucky should receive refunds for service that was provided by and for rates that were charged by the Midwest ISO.

33. For its part, LG&E/KU maintain that the proposed rate needs no adjustment. LG&E/KU also contend that there are problems with the Presiding Judge's proposal. For instance, they assert that if we were to accept the Presiding Judge's proposal to increase the denominator (*i.e.*, the units of service in the rate calculation), then an additional change needs to be made to the numerator (*i.e.*, to the revenue requirement) to eliminate revenue credits. According to LG&E/KU, with this further adjustment not proposed by the Presiding Judge, East Kentucky's rates would actually be *higher* if they calculated the rate to account for transactions that are no longer considered in the denominator. This is because LG&E/KU receive revenue credits from the Midwest ISO in an amount greater than the corresponding reduction caused by the increase in the denominator. In this regard, LG&E/KU are essentially arguing that if it calculated the rate as if it had not joined the Midwest ISO, then customers would pay a higher rate than they do now.

34. We are not persuaded by LG&E/KU's assertions that the Presiding Judge's proposed adjustment is improper or that a further adjustment to the numerator of the formula is needed. LG&E/KU did not, at hearing, present any evidence to demonstrate the consequences of an adjustment such as the Presiding Judge proposed and their

¹⁹ See December 2004 Order at P 32.

witness, Johnson, noted that it is unlikely documentation is available to perform the adjustment.²⁰ LG&E/KU cannot persuasively assert that they lack the data necessary to make the Presiding Judge's proposed adjustment while at the same time claiming that such an adjustment, coupled with the further adjustment to the formula described above, would result in increased rates for EKPC.²¹ LG&E/KU effectively concede that there is no record to support LG&E/KU's claims regarding the proposed adjustment, and, at this late stage, it would be inappropriate to allow LG&E/KU a further opportunity to make such a showing. The burden was and is on LG&E/KU to demonstrate that the rate they proposed is just and reasonable.²² We find in this order that the adjustment adopted by the Presiding Judge is necessary to make the rate just and reasonable. To the extent that LG&E/KU is unable or unwilling to make that adjustment, LG&E/KU has not met its burden and therefore the rate must revert back to the pre-existing contract rates.

35. We also disagree with LG&E/KU's assertion that the Presiding Judge erred by not addressing each of their findings individually. He addressed all the material issues of fact and law and thoroughly explained his reasoning in accordance with Rule 703.²³ He was not required to do more. Rather, the Commission remanded one issue back to the Presiding Judge for further proceedings. The Presiding Judge addressed this issue.

36. East Kentucky asks that, if the Commission accepts the Presiding Judge's rate adjustment, that it clarify certain prior determinations. In regard to the inclusion of the Virginia facilities, the Initial Decision determined that LG&E/KU must eliminate the costs of the Virginia facilities from the proposed formula rate charged under the Agreements and that finding in the Initial Decision was affirmed by the Commission without discussion.²⁴ Therefore, LG&E/KU must exclude these facilities when recalculating the rate per the Presiding Judge's instructions. However, we clarify that if LG&E/KU does not make the required adjustment, then, as explained above, the

²⁰ See Remand Decision at P 75 – 79.

²¹ LG&E/KU do not suggest that rates would be higher under the Presiding Judge's proposed adjustment absent the further adjustment they propose.

²² See 16 U.S.C. § 824d (2000).

²³ See 18 C.F.R. § 385.703 (2006).

²⁴ See December 2004 Order at P 9.

proposed formula rate is rejected and the rate reverts back to the pre-existing rate, with no further adjustment.²⁵

37. In addition, the Commission already found that LG&E/KU may assess ancillary services charges under the Agreements for service above base load amounts.²⁶ On this issue, however, if LG&E/KU does not make the required adjustment to its formula rate, we clarify that LG&E/KU may still assess the separate ancillary services charges that the Commission already approved. In contrast to the requirement to exclude the Virginia facilities in the calculation of the proposed formula rate, which would not apply if the proposed formula rate is rejected and reverts back to the pre-existing rate, the proposed ancillary services charges are separate from the proposed formula rate and can still be implemented. Therefore, the Commission's findings regarding ancillary services for service above base load amounts under the Agreements still apply and the accepted rate for these services continues to be just and reasonable.

38. Finally, we find that it is well-established that East Kentucky should pay the Midwest ISO Schedule 10 charges on both base-load amounts and amounts above base-load.²⁷

The Commission orders:

(A) The Remand Decision is hereby affirmed, as discussed in the body of this order.

(B) LG&E/KU are directed to make a compliance filing to adjust their proposed formula rate, as directed in the body of this order and more fully explained in the Remand Decision, within 30 days of the date of issuance of this order. LG&E/KU are directed to refund to East Kentucky the difference, with interest, between what was charged under the formula rate as proposed and what should have been charged under the formula rate as adjusted by the Presiding Judge. LG&E/KU must file with the Commission a refund report outlining these refunds within 30 days of the date of issuance of this order.

²⁵ If East Kentucky believed that its previous rate was unjust and unreasonable (*i.e.*, it needed to be adjusted to remove the Virginia facilities), it was required to file a complaint under section 206 of the FPA making that case.

²⁶ *See* December 2004 Order at P 21-29.

²⁷ *Id.* P 97. *See also* Trial Staff's Brief Opposing Exceptions at 4.

(C) If LG&E/KU is unable to or chooses not to adjust the proposed rate as discussed in the body of this order, the proposed rate is hereby rejected as unjust and unreasonable and LG&E/KU must refund to East Kentucky the difference, with interest, between what was charged under the formula rate, as proposed, and what would have been charged under the pre-existing contract rates. LG&E/KU must file with the Commission a refund report outlining these refunds within 30 days of the date of issuance of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.