

125 FERC ¶ 61,242
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.

Kentucky Utilities Company

Docket No. ER08-1588-000

Frankfort Electric and Water Plant Board
City of Barbourville, Kentucky
City of Bardstown, Kentucky
City of Bardwell, Kentucky
City of Benham, Kentucky
City of Berea, Kentucky
City of Corbin, Kentucky
City of Falmouth, Kentucky
City of Madisonville, Kentucky
City of Nicholasville, Kentucky
City of Paris, Kentucky
City of Providence, Kentucky
Complainants

Docket No. EL09-6-000

v.

Kentucky Utilities Co.
Respondent

ORDER ON COMPLAINT AND ACCEPTING AND SUSPENDING AMENDED
CONTRACTS AND NOTICES OF CANCELLATION, ESTABLISHING HEARING
AND SETTLEMENT JUDGE PROCEDURES AND CONSOLIDATING
PROCEEDINGS

(Issued November 26, 2008)

1. On September 29, 2008, Kentucky Utilities Company (Kentucky Utilities) submitted eleven unexecuted Amended and Restated Contracts for Electric Service for

eleven municipal customers and one unexecuted revised interchange agreement with the City of Paris, Kentucky (collectively referred to as Amended Contracts).¹ Kentucky Utilities requests that the Commission accept the Amended Contracts for filing, as well as the notices of cancellation for the existing contracts, effective December 1, 2008. On October 27, 2008, Kentucky Municipals filed a complaint related to Kentucky Utilities' filing. In this order, the Commission will accept the Amended Contracts and notices of cancellation for filing, suspend them for a five-month period to become effective May 1, 2009, subject to refund. We also establish hearing and settlement judge procedures. Further, we establish a refund effective date of October 27, 2008, set the complaint for hearing and settlement judge procedures, and consolidate the two proceedings.

I. Background

2. Kentucky Utilities states that each of the Amended Contracts is designed to replace the rate schedules currently on file under which Kentucky Utilities provides requirements electric service to each of the Kentucky Municipals. Kentucky Utilities seeks to replace the current stated bundled rates with separate demand and energy charges, fuel adjustment charges, transmission charges, and directly assigned charges. Also, Kentucky Utilities states that all charges, except for the directly assigned charges, will be determined annually pursuant to rate formulae with inputs that reflect historical costs from the company's FERC Form No. 1 (Form 1) data. Kentucky Utilities states that the changes to the formula rate align with the Commission's policy directive emphasizing transparency in wholesale power markets. Kentucky Utilities notes that the inputs to the base generation formula and the transmission formula rate are based on historical and publicly available Form 1 data. Kentucky Utilities wishes to commence service under the Amended Contracts on December 1, 2008.

II. Kentucky Utilities Filing (Docket No. ER08-1588-000)

3. Under the existing contracts, Kentucky Utilities currently provides bundled requirements service to Kentucky Municipals. The base rates under the existing contracts have not been raised since such rates became effective in 1983. Kentucky Utilities states that it is filing the revised agreements to: (1) adjust the prices under the existing contracts, which were set over twenty years ago; (2) establish formula rates so that future changes in costs are reflected as soon as possible, without regulatory lag; (3) increase rate transparency; and (4) clarify the terms of the existing contracts, which are not entirely

¹ The eleven municipal customers are: the Frankfort Electric and Water Plant Board, and the Cities of Barbourville, Bardstown, Bardwell, Benham, Berea, Corbin, Falmouth, Madisonville, Nicholasville, and Providence, Kentucky. Collectively, with the City of Paris, Kentucky, referred to as Kentucky Municipals.

consistent with current standard industry contract terms. Kentucky Utilities states that despite its best efforts, it has been unable to obtain Kentucky Municipals' consent.

4. More specifically, Kentucky Utilities states that the Amended Contracts will include: (1) a base generation rate formula, which establishes the demand charge and energy charge; (2) a fuel adjustment clause, which is similar to the fuel clause included in the existing contracts with the exception of several added provisions; and (3) a transmission formula rate.²

5. Kentucky Utilities states that inputs to the formula will be updated on May 1 of each year based on filed Form 1 data for the prior calendar year, and will become effective on July 1 of each year. Kentucky Utilities will make an annual informational filing to the Commission containing the annual update. Kentucky Utilities states that the Amended Contracts contain protocols for reviewing and challenging the annual updates to the formula. Specifically, Kentucky Utilities notes that the protocols include: (1) timelines for Kentucky Municipals to serve information requests on Kentucky Utilities and Kentucky Utilities to respond; (2) procedures for the resolution of any challenges to the annual updates; and (3) the procedures for implementing any changes made to the formula inputs.

III. Complaint (Docket No. EL09-6-000)

6. On October 27, 2008, in Docket No. EL09-6-000, Kentucky Municipals filed a complaint against Kentucky Utilities. Kentucky Municipals seek an investigation of the proposed rates, request a refund effective date under section 206 of the Federal Power Act (FPA),³ and ask that this proceeding be consolidated with Docket No. ER08-1588-000, because both dockets involve a common nucleus of operative facts.

7. Kentucky Municipals state that it is highly likely that at least some of the charges for the service that are at issue in Docket No. ER08-1588-000 will, when reset to the updated just and reasonable level, turn out to fall below the level that was accepted in

² Kentucky Municipals argue that Kentucky Utilities' present filing amounts to termination of an existing partial requirements service option. Kentucky Utilities states in its answer that it believes the amended contracts provide the municipals with a more beneficial option to reduce service than under the existing contracts. However, Kentucky Utilities states that it is willing to change the contracts to reflect the notice provisions in the existing contracts if this is what the municipals want.

³ 16 U.S.C. § 824(e) (2006).

1983.⁴ Kentucky Municipals argue that this is not just theoretical because, under Kentucky Utilities' existing rates, Kentucky Municipals would pay approximately \$90 million per year, but after accounting for the adjustments identified in their protest in Docket No. ER08-1588-000, Kentucky Municipals assert that they should only be charged \$82 million per year. However, Kentucky Municipals assert, under the "last clean rate" doctrine, the existing 1983 rates may set a floor under the potential outcome of a proceeding that is conducted solely under section 205 of the FPA.⁵ Thus, they maintain, a related proceeding under section 206 is appropriate. Kentucky Municipals request that the Commission establish a refund effective date of October 27, 2008, to provide maximum customer protection.

IV. Notices of Filing and Responsive Pleadings

A. Docket No. ER08-1588-000

8. Notice of Kentucky Utilities' initial filing was published in the *Federal Register*, 73 Fed. Reg. 58,948 (2008), with interventions and protests due on or before October 20, 2008. A timely motion to intervene and protest was filed by Kentucky Municipals. Kentucky Utilities filed an answer on October 30, 2008. Kentucky Municipals filed an answer on November 14, 2008.

9. In their protest, Kentucky Municipals raise numerous issues with respect to cost of service matters. Among others, Kentucky Municipals raise issues with respect to Kentucky Utilities': (1) cancellation of their partial requirements service option; (2) withholding capacity credits for future purchases of Southeastern Power Administration capacity; (3) denying Kentucky Municipals of their reservation priority for future use of the transmission capacity that is used to deliver Kentucky Utilities' sales to Kentucky Municipals; (4) unreasonable Construction Work in Progress and Pensions and Post-Employment Benefits Other than Pensions; (5) failure to meet filing requirements; (6) formula provisions that mismatch a year-end rate base with a rate divisor based on a year-long average load; (7) excessive return on equity that appears to be 210 basis points too high; (8) attempt to flow-through green-power credits; and (9) unreasonably tight time period for reviewing Kentucky Utilities' application of the rate formula.

10. In response, Kentucky Utilities disputes the factual issues raised by Kentucky Municipals. In reciprocal fashion, Kentucky Utilities responds that it: (1) is providing Kentucky Municipals with a more beneficial option to reduce service than in the existing

⁴ *Kentucky Utilities Co.*, 24 FERC ¶ 61,338 (1983) (Kentucky Utilities' last rate update for requirements service with Kentucky Municipals).

⁵ 16 U.S.C. § 824(d) (2006).

contracts; (2) will provide Kentucky Municipals with a capacity credit for Southeastern Power Administration costs if Kentucky Municipals demonstrate that they have delivered a physically firm product to their loads; (3) does not object to Kentucky Municipals becoming unbundled transmission customers; (4) is correctly collecting Construction Work In Progress costs and Post-Employment Benefits Other than Pensions; (5) has adequately supported its rate filing consistent with Commission precedent; (6) appropriately uses a year-end approach for calculating rate base because Kentucky Utilities has proposed a formula rate based on lagging inputs; (7) has an appropriate return on equity; (8) will credit Kentucky Municipals the allocable monetary proceeds from liquidation of green-power credits through the proposed formula rates; and (9) has proposed a timeline for challenging formula inputs that is reasonable.

11. In their answer, Kentucky Municipals state that they are heartened by Kentucky Utilities' apparent willingness to revisit its proposed terms and conditions. Kentucky Municipals state, however, that while Kentucky Utilities' answer does not by itself resolve the issues Kentucky Municipals have raised, it does indicate that the parties may not be so far apart in negotiation. Kentucky Municipals state, though, that Kentucky Utilities' filing remains highly unreasonable.

B. Docket No. EL09-6-000

12. Notice of Kentucky Municipals' complaint was published in the *Federal Register*, 73 Fed. Reg. 65,598 (2008) with comments due on or before November 17, 2008. Kentucky Utilities filed its answer on November 14, 2008.

13. Kentucky Utilities argues that Kentucky Municipals raise vague allegations and no specific evidence that Kentucky Utilities' current rates are unreasonable. Kentucky Utilities asserts that the complainants have failed to meet their burden of proof. Kentucky Utilities states that when either the Commission or a complainant institutes a section 206 proceeding to change an existing rate, the burden rests on the Commission or the complainant to demonstrate that the existing rate is unjust, unreasonable, unduly discriminatory, or preferential. Kentucky Utilities states that although Kentucky Municipals have filed their complaint as a companion piece to Kentucky Utilities' section 205 rate proceeding implementing the Amended Contracts, this does not mean that the evidentiary burdens established under section 206 may be ignored. Further, Kentucky Utilities states that the complaint itself includes no specific allegations, and the limited calculations submitted in Kentucky Municipals' protest to the Amended Contracts are wholly without support or verification. Accordingly, Kentucky Utilities argues that Kentucky Municipals have not provided any credible evidence that Kentucky Utilities' existing rates are unjust, unreasonable, unduly discriminatory or preferential.

V. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), Kentucky Municipals' timely, unopposed motion to intervene serves to make them a party to this proceeding.

15. Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2008), prohibits an answer to a protest or to an answer, unless otherwise ordered by the decisional authority. We will accept Kentucky Utilities' and Kentucky Municipals' answers because they have provided information that assisted us in our decision-making process.

B. Commission Determination

1. Hearing and Settlement Judge Procedures

16. Kentucky Utilities' Amended Contracts and notices of cancellation raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

17. Our preliminary analysis indicates that Kentucky Utilities' Amended Contracts and notices of cancellation have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Kentucky Utilities' Amended Contracts and notices of cancellation for filing, suspend them for a five-month period, make them effective May 1, 2009, subject to refund, and set them for hearing and settlement judge procedures.

18. In *West Texas Utilities Company*,⁶ the Commission explained that when its preliminary analysis indicates that the proposed rates may be unjust and unreasonable, and substantially excessive, as defined in *West Texas*, the Commission will generally impose a maximum suspension (i.e., five months). In this case, our preliminary analysis indicates that Kentucky Utilities' proposed rates may be substantially excessive. Accordingly, we will accept Kentucky Utilities' Amended Contracts and notices of cancellation, suspend them for five months to be effective May 1, 2009, subject to refund, and establish hearing and settlement judge procedures.⁷

⁶ 18 FERC ¶ 61,189, at 61,374-75 (1982) (*West Texas*).

⁷ Kentucky Utilities' reliance on *PPL Electric Utilities Co.*, 125 FERC ¶ 61,121, at P 28 (2008) (*PPL*) to support a nominal suspension period in this case is misplaced. The
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19. We find that the complaint likewise presents issues of material fact that cannot be resolved based on the record before us. Accordingly, we will establish a trial-type evidentiary hearing, under section 206 of the FPA.

20. In cases where, as here, the Commission institutes a proceeding on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the filing of the complaint, but no later than five months subsequent. Consistent with our general policy of providing maximum protection to customers,⁸ we will set the refund effective date at October 27, 2008.

21. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. Based on our review of the filings, we expect that, if this case does not settle, the presiding judge should be able to render a decision within 12 months of the commencement of hearing procedures or, if the case were to go to hearing immediately, by November 30, 2009. We estimate that we would be able to issue our decision within approximately five months of the filing of briefs on exceptions and briefs opposing exceptions, or if the case were to go to hearing immediately, by June 30, 2010.

22. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁹ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁰ The settlement judge

Commission, in *PPL*, determined the appropriate suspension period based on the facts of that case. Where, as here, our preliminary analysis indicates that proposed rates may be substantially excessive, a five-month suspension is appropriate.

⁸ See, e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Co.*, 65 FERC 61,413, at 63,139 (1993); *Canal Electric Co.*, 46 FERC 61,153 at 61,539, *reh'g denied*, 47 FERC 61,275 (1989).

⁹ 18 C.F.R. § 385.603 (2008).

¹⁰ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order.

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shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

23. Here, as there are common issues of law and fact, we will consolidate Docket No. ER08-1588-000 and Docket No. EL09-6-000 for the purposes of settlement, hearing and decision.

The Commission orders:

(A) Kentucky Utilities' Amended Contracts and notices of cancellation are hereby accepted for filing and suspended for five months, to become effective May 1, 2008, subject to refund, as discussed in the body of this order.

(B) The refund effective date established in Docket No. EL09-6-000 pursuant to section 206(b) of the Federal Power Act is October 27, 2008.

(C) Docket No. EL09-6-000 and Docket No. ER08-1588-000 are hereby consolidated for the purposes of settlement, hearing and decision.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the consolidated proceedings, as discussed in the body of this order.

(E) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning Kentucky Utilities' Amended Contracts and notices of cancellation. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (F) and (G) below.

The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

(F) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(G) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(H) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.