145 FERC ¶ 61,161
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Kentucky Utilities Company — Docket Nos. ER13-2428-000

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

v. — EL14-5-000

Kentucky Utilities Company — (Consolidated)

ORDER ON COMPLAINT, ACCEPTING AND SUSPENDING PROPOSED REVISIONS TO SERVICE AGREEMENTS, CONSOLIDATING PROCEEDINGS, AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued November 22, 2013)

1. In this order, we accept for filing unexecuted Second Amended and Restated Contracts for Electric Service (Revised Agreements) filed by Kentucky Utilities Company (KU), in Docket No. ER13-2428-000, for each of 12 municipal customers (Municipal Customers),[1] and suspend them for a five-month period, to become effective on April 23, 2014, subject to refund. In addition, we consolidate Docket No. ER13-2428-000 with a complaint challenging the Revised Agreements filed by the Municipal Customers in Docket No. EL14-5-000, establish a refund effective date of March 17, 2014, and establish hearing and settlement judge procedures.

[1] The Municipal Customers are: Frankfort Electric and Water Plant Board, and the Cities of Barbourville, Bardstown, Bardwell, Benham, Berea, Corbin, Falmouth, Madisonville, Nicholasville, Paris, and Providence, Kentucky.

I. Background

2. KU currently provides requirements service for the Municipal Customers under the terms of rate schedules (Existing Agreements) on file with the Commission. Prior to 2008, each of the Existing Agreements contained a stated rate, pursuant to which KU calculated the Municipal Customers' demand and energy charges. In 2008, KU filed with the Commission to switch to a formula rate that would update yearly based on KU's FERC Form No. 1 submission. On November 2, 2009, pursuant to the terms of a settlement, the Commission approved KU's rates.[2]

A. KU Filing

3. On September 23, 2013, pursuant to section 205 of the Federal Power Act (FPA),[3] KU submitted the Revised Agreements, proposing to: (1) transition all of its Municipal Customers from a backwards-looking formula rate to a forward-looking formula rate with a true-up mechanism, with the estimated cost-of-service calculation based on its most recent FERC Form No. 1 submission;[4] (2) reduce its return on equity (ROE) from 11.0 percent to 10.7 percent;[5] (3) revise its formula rate to begin recovery from the Municipal Customers of their allocable portion of the Exit Fee[6] KU incurred for exiting the Midwest Independent Transmission System Operator, Inc.[7] (MISO) in 2006, amortized for recovery (without a carrying charge) over a three-year period;[8] (4) create a line item in its revised formula rates to allow recovery of uncollectible revenues captured in Account No. 904, which KU states is for uncollectible past-due amounts from its

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[2] *Kentucky Utilities Co.*, 129 FERC ¶ 61,099 (2009).

[3] 16 U.S.C. § 824d (2012).

[4] KU Transmittal at 9-11.

[5] *Id.* at 11.

[6] The net Exit Fee for KU and Louisville Gas and Electric (LG&E) is $26.8 million. The Municipal Customers' allocable portion of the MISO Exit Fee is $1.45 million.

[7] Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

[8] *Id.* at 11-13.

wholesale requirements customers that it deems unlikely to be recovered;[9] (5) update its depreciation rates using its most recent depreciation study completed in 2012, and begin using the new depreciation rates in January 2014, with the rates then reflected in the Estimated Unit Charges that KU calculates for the 2014 true-up[10] and for the Rate Year beginning July 1, 2015;[11] (6) increase, based upon a recent loss study, the transmission and distribution loss factors that KU will use in its formula at the transmission and distribution levels;[12] (7) update the inputs for the base fuel component included in the Fuel Adjustment Clause and the fixed Direct Assignment Charges, and make several clarifying changes to the formula;[13] (8) update Falmouth's agreement to reflect that Eastern Kentucky Power Cooperative's transmission system is now controlled by PJM Interconnection, LLC (PJM) and that KU, when it takes service of Eastern Kentucky Power Cooperative's system, will be charged PJM's transmission rates, a portion of which will then be allocated to Falmouth;[14] (9) revise the agreements' termination provisions to extend the notice that a party must provide to terminate an agreement from five to 10 years,[15] and give the non-terminating party 60 days after such notice is provided to determine whether to contest the termination;[16] (10) modify its treatment of

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[9] *Id.* at 14.

[10] Based on the requested effective date of November 23, 2013, the first true-up calculation will be made in May 2014 but will only reflect the difference between the amounts billed to the Municipal Customers for part of November and December 2013. The first full true-up will not occur until May 2015. *Id.* at 10.

[11] *Id.* at 14-15.

[12] *Id.* at 15-16. Specifically, KU would increase the demand loss factor for transmission delivery from 1.02200 to 1.02670, and the demand loss factor for primary or distribution-level delivery from 1.02670 to 1.03390. For energy, KU would increase the transmission loss factor from 1.02200 to 1.02271 and decrease the primary loss factor from 1.03240 to 1.02823.

[13] *Id.* at 16-18.

[14] *Id.* at 18-19.

[15] KU states this will allow it to better plan its generation resources with the assurance that Municipal Customers will utilize the assets for some period of time once they are in service and allow KU to avoid making unneeded investments. KU also states this will allow Municipal Customers more time to find replacement services and will reduce the potential of reliability impacts for either party.

[16] *Id.* at 19-20.

Construction Work in Progress (CWIP) in the event of a full or partial termination of a Revised Agreement,[17] which KU states will eliminate the risk to KU if the customer's service does not actually terminate;[18] (11) clarify that the Dispute Resolution procedures will not apply to disputes related to a right to terminate a Revised Agreement or disputes related to a failure to pay, and that any disputes under the Dispute Resolution procedures will not delay or otherwise affect KU's rights to provide notice of an Event of Default for non-payment or terminate a Revised Agreement;[19] (12) require that the Municipal Customers maintain 120 days of historical retail electric revenues in cash or bank lines of credit and provide such evidence on a quarterly basis;[20] (13) remove all terms related to the Southeastern Power Administration Power Supply Contracts which have expired and are no longer effective;[21] and (14) clarify several provisions of the Revised Agreements regarding the data that Municipal Customers provide to support their Thirteen Year Forecast information, the information a Municipal Customer must provide regarding "Unanticipated Load" and the customer's obligation to serve that load in the event KU is unable, and the customer's obligation to notify KU regarding any energy and capacity that may be provided to the customer from a "Non-Seller Source."[22]

4. Finally, KU proposes to terminate its interruption rights under Paris' Revised Agreement and the related capacity credit. Paris possesses seven diesel generators with an aggregate generating capability of 12 MW. Currently, KU retains the right to interrupt up to 12 MW of service to Paris for up to 400 hours per year, not to exceed 1000 hours in any five consecutive years, with KU then providing Paris a credit against its monthly charges for any interruption in service. KU has determined that the capacity credit KU provides for the right to interrupt Paris' service exceeds the benefits to KU's customers

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[17] In the event of termination, instead of amending a customer's rate to remove CWIP for the remaining term of the agreement, KU proposes to calculate the amount of CWIP that the customer paid during the five years of service prior to termination and refund this amount (plus interest calculated at the FERC rate).

[18] *Id.* at 21.

[19] *Id.*

[20] *Id.* at 22-23 (citing LG&E/KU Open Access Transmission Tariff (OATT), Attachment L § 3.2).

[21] *Id.* at 23.

[22] *Id.* at 23-24.

and, going forward, KU proposes to allow Paris to partially terminate its service from KU to use its own generation on a non-interruptible basis as a "Non-Seller Source."[23]

5. KU also requests waiver of sections 35.13(d) and, to the extent necessary, 35.13(e) and 35.13(h) of the Commission's regulations. KU requests an effective date of November 23, 2013, 60 days after filing.

B. Municipal Customers' Complaint

6. On October 17, 2013, in Docket No. EL14-5-000, Municipal Customers filed, pursuant to section 206 of the FPA,[24] a complaint challenging the Revised Agreements and requesting that the Commission consolidate the two proceedings and provide the relief requested in its protest of KU's filing, including setting the proceedings for settlement and hearing judge procedures.

II. Notice, Interventions, and Responsive Pleadings

7. Notice of KU's filing was published in the *Federal Register*, 78 Fed. Reg. 60,269 (2013), with interventions and protests due on or before October 14, 2013. Municipal Customers filed a timely motion to intervene, and on October 17, 2013 filed a protest.

8. Notice of Municipal Customers' complaint was published in the *Federal Register*, 78 Fed. Reg. 64,493 (2013), with interventions and answers due on or before November 6, 2013. On October 30, 2013, KU submitted a joint answer in response to both Municipal Customers' protest and Municipal Customers' complaint. On November 13, 2013, Municipal Customers submitted a motion for leave to reply and reply to KU's answer. On November 15, 2013, KU filed an answer to Municipal Customers' motion for leave to reply and reply.

9. On November 8, 2013, Municipal Customers filed a motion for emergency relief. On November 12, 2013, KU filed an answer to the motion.

A. Protest and Complaint

10. Municipal Customers state that KU has not shown that the changes proposed in its filing are just, reasonable, and non-discriminatory and allege that the proposed changes

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[23] *Id.* at 24.

[24] 16 U.S.C. § 824e (2012).

are patently unreasonable, anticompetitive, and contrary to both statute and contract.[25] As a result, Municipal Customers request that the Commission respond to KU's filing with the following actions or alternative actions: (1) summarily modify the proposed terms and conditions, and summarily modify the proposed formula so as to make its rate treatments just and reasonable; (2) summarily reject what is effectively a proposed termination of KU's longstanding Interchange Agreement with Paris;[26] (3) impose a maximum suspension of five months from the date on which the rate would otherwise go into effect, to April 23, 2014; or (4) set KU's filing for trial-type evidentiary hearing, but hold that hearing in abeyance to allow for settlement judge mediation.[27] In addition, in their complaint Municipal Customers request a refund effective date of October 17, 2013 (i.e., the date of the filing of the complaint) and that the Commission consolidate the two proceedings for settlement and hearing.[28]

11. Municipal Customers state that KU's proposed ROE of 10.7 percent is highly excessive and unsupported by the filing.[29] Municipal Customers argue that KU's Discounted Cash Flow analysis only supports an ROE of 8.3 percent.[30] Municipal Customers also challenge KU's proposal to transition to a forward-looking formula rate and accompanying true-up procedure, which they argue would result in a substantial rate increase that warrants a five-month suspension.[31] Municipal Customers further argue that KU has not justified imposing any of the MISO Exit Fee on its requirements customers, as any attempt to begin recovering the full balance amounts to retroactive

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[25] Because the substance of the protest and complaint is essentially the same, we summarize Municipal Customers' arguments together. Where Municipal Customers' complaint addresses issues beyond those included in their protest, we summarize those issues separately and cite to the complaint.

[26] The Interchange Agreement serves as the contract between KU and Paris for establishing the rates, terms, and conditions for electrical service provided to Paris by KU. The Interchange Agreement provides for, among other things, the purchase of electricity by Paris and the payment of a capacity credit to Paris by KU.

[27] Municipal Customers Protest at 1.

[28] Complaint at 1-2.

[29] Municipal Customers Protest at 3.

[30] *Id.* at 3-12.

[31] *Id.* at 30-34 (citing *West Texas Utils. Co.*, 18 FERC ¶ 61,189, at 61,374 (1982) (*West Texas*)).

ratemaking and would improperly recover the Exit Fee from Municipal Customers, notwithstanding that they had no decision-making authority in KU's decision to exit MISO.[32]

12. Municipal Customers argue that KU failed to support the proposed increased transmission system demand and energy loss factors for deliveries at the transmission level and at the primary substation level.[33] In addition, Municipal Customers state that KU's proposed formula rate fails to include all production-related revenue credits, which may result in over-charging ratepayers and over-recovery by KU.[34] Furthermore, Municipal Customers argue that KU's proposed formula rate includes all amounts booked to Administrative & General (A&G) expenses in FERC Account No. 930.2 – Miscellaneous General Expenses, but that, because this account contains costs that cannot be recovered from cost-based wholesale customers under Commission policy, KU should modify the formula to exclude those precluded costs.[35] Municipal Customers also state that several proposed adjustments to KU's Schedule A-19[36] may not be appropriate, or may be arithmetically incorrect.[37]

13. Municipal Customers state that KU may have a significant amount of unfunded reserves that are not included as credits to rate base in the proposed formula rate, and argue that additional review and discovery is required.[38] They assert that KU fails to properly handle the Allowance for Funds Used During Construction (AFUDC) on CWIP included in rate base in its proposed revisions, and, although KU proposes changes to account for its inadvertent inclusion of AFUDC capitalization, KU fails to address how it intends to remedy the past over-recovery from Municipal Customers. In addition, Municipal Customers claim that it is unclear that KU's proposed revisions totally account

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[32] *Id.* at 34-37.

[33] *Id*. at 37-39.

[34] *Id.* at 39-40.

[35] *Id.* at 41 (citing *South Carolina Elec. & Gas Corp*., 63 FERC ¶ 61,218, at 62,600 (1993)).

[36] Schedule A-19 (Source Data) aggregates the data from Schedules A-1 through A-18 and performs calculations that are then fed into Schedule A-20 (Monthly Rate Base Calculations).

[37] *Id.* at 40-42.

[38] *Id*. at 42-43.

for the improper AFUDC and that the Commission should order KU to remove all AFUDC on CWIP included in rate base from the plant balances in the proposed formula.[39]

14. Municipal Customers claim that several other elements in the proposed revisions require further review, including whether: (1) the proposed new depreciation rates are just and reasonable; (2) the revised direct assignment charges for local facilities are adequately supported; (3) KU's formula rate properly complies with the Commission's prohibition against changing the Post-Employment Benefits Other than Pensions (PBOP) amounts flowed through a formula rate without a section 205 filing; (4) the protocols for review of annual formula rate updates require revisions to extend certain of the stated deadlines to allow adequate review and opportunity to challenge implementation of the more complicated proposed new rate formula; (5) proposed inclusion of CWIP in its rate base is properly allocated to customers on the basis of forward-looking allocation ratios reflecting the anticipated average annual use the wholesale customers will make of the system over the estimated service life of the project; and (6) the formula rate is internally consistent.[40]

15. Municipal Customers also protest several non-rate related contract terms and conditions. Municipal Customers argue that KU's proposed revision to the interruptible service that KU provides to Paris would impermissibly terminate the agreement under which the interruptible service is provided without proper notice and without adequate justification.[41] In addition, Municipal Customers argue that KU's proposed revisions to the Revised Agreements' termination provisions are unjust and unreasonable and impose an undue restraint on competition,[42] and that KU's proposed revisions to the minimum liquidity requirements are unjustified, discriminatory, and unduly burdensome.[43] Municipal Customers argue that KU's proposal to require the remainder of the Municipal Customers to guarantee KU's recovery of any uncollectible amounts should one of the

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[39] *Id*. at 43-44.

[40] *Id*. at 44-45.

[41] *Id*. at 46-54.

[42] *Id*. at 55-58. In their November 8, 2013 motion for emergency relief, Municipal Customers request that the Commission rule that the existing notice periods for terminations be preserved for at least one year in order to provide customers enough time to perform the necessary studies to evaluate whether to exercise their existing rights to terminate.

[43] *Id.* at 58-63.

Municipal Customers fail to pay its bills is unsupported and a poor solution to a problem that does not exist. Municipal Customers state that KU's proposal would effectively alter the contractual relationships of the individual Municipal Customers with KU to that of a joint municipal agency, in regards to financial obligations, but not to the other associated legal rights and obligations that would come from forming a joint municipal agency.[44]

16. In support of their request for a full five-month suspension of the Revised Agreements, Municipal Customers argue first that KU's proposed increase is substantially excessive under *West Texas*[45] on account of KU's proposed ROE of 10.7 percent, and second, that the radical proposed changes in the existing contractual relationship between KU and each of the Municipal Customers requires time for the customers to be able to respond in a prudent manner even to the possibility that the Commission might approve the changes. Municipal Customers state that the *West Texas* test for maximum suspension is satisfied here because, as supported by the testimony attached by the Municipal Customers to their protest, a more reasonable ROE of 8.3 percent would reduce KU's claimed revenue requirement from the Municipal Customers by $5.1 million per year, far in excess of $930,000, which is 10 percent of the estimated rate increase in KU's filing attributable to KU's proposed introduction of a forward-looking formula rate.[46] Finally, Municipal Customers argue that KU's proposal to extend the length of notice of termination provision from three or five years to 10-plus years will require that the customers consider, while the existing notice periods remain in effect, whether to terminate their agreements with KU. They maintain that granting the full five-month extension will ensure that Municipal Customers are not forced to make this major decision in a compressed and unmanageable schedule prior to November 23, 2013. They further assert that Paris would, if KU's proposal to effectively terminate the city's Interchange Agreement is not promptly rejected, be required to completely reevaluate its investment strategy and operation of its existing generation units, an evaluation which cannot reasonably be completed in 60 days.[47]

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[44] *Id*. at 63-64.

[45] *West Texas*, 18 FERC ¶ 61,189 at 61,375 (finding that rates are "substantially excessive," and calling for maximum suspension, where it appears that at least 10 percent of the proposed increase is excessive).

[46] Municipal Customers further argue that, even if the projected median ROE of 9.4 percent that is presented by KU's own witness is used instead of Municipal Customers' proposed 8.3 percent ROE, the annual revenue requirement would decrease by $2.8 million. Municipal Customers Protest at 68.

[47] *Id.* at 67-71.

B. KU Answer

17. KU disputes Municipal Customers' characterization of the proposed forward-looking formula rate with a true-up mechanism as a general, base rate increase, similar to a rate increase that KU would obtain under a stated rate, and reiterates that the difference between KU's current formula rate and the proposed formula rate is a shift in the timing of cost recovery. KU argues that the transition from a backwards-looking formula rate to a forward-looking formula rate with a true-up mechanism will ensure that KU can in fact recover its cost-of-service.[48]

18. With respect to its ROE, KU argues that its proposed ROE was properly calculated, while Municipal Customers' proposed ROE of 8.3 percent is insufficient to promote investment in electric utility infrastructure or to maintain KU's ability to maintain credit and attract capital. Furthermore, KU posits that Municipal Customers' analysis ignores the implications of KU's capital expenditure program, and that it violates accepted regulatory and economic standards. Additionally, KU states that there are numerous shortcomings with the analysis and recommendations put forth by Municipal Customers, including: (1) a failure to consider the financial challenges facing KU; (2) reliance on the median while ignoring the ROE range of reasonableness; and (3) the characterization of current conditions in the capital markets.[49]

19. KU argues that it is not barred from seeking to recover an allocable portion of the MISO Exit Fee from Municipal Customers, and KU states that its current formula rate proposal now includes a mechanism to recover the allocable portion of the MISO Exit Fee from Municipal Customers that it has been carrying as a regulatory asset without passing on any of the associated carrying charges to Municipal Customers.[50] Additionally, KU argues that, contrary to Municipal Customers' assertion, it provided notice to Municipal Customers in August 2008 of its proposal to recover a portion of the MISO Exit Fee from retail customers,[51] and demonstrated the benefits associated with its

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[48] KU Answer at 6-10.

[49] *Id.* at 10-19.

[50] *Id.* at 19-20.

[51] *Id.* at 20-21 (citing to Attachment 1 of KU's Answer (email from Elizabeth Cocanougher to Thomas Trauger and Mark Hegedus dated Aug. 21, 2008)).

withdrawal from MISO at the time of the withdrawal.[52] With respect to its loss factor proposal, KU asserts that it has provided the Commission with sufficient information, including transmission and distribution loss studies, to determine that the proposed loss factors are just and reasonable.[53] KU also argues that Municipal Customers' request that the Commission "order KU to refund [Municipal Customers] the amount of the past over-recovery associated with its AFUDC on the included CWIP" would be an impermissible retroactive rate, as, even if the Commission were to determine that the collection of AFUDC on CWIP was improper, the Commission can only order changes to a formula rate on a prospective basis through a section 206 proceeding.[54]

20. KU also states that Municipal Customers take issue with other elements of the formula rate, which KU is not proposing to change and were agreed to by the parties in settlement and accepted by the Commission.[55] KU further states that Municipal Customers have not shown that KU's formula rate is not just and reasonable with respect to the collection of production-related revenues associated with FERC Account Nos. 451, 454, and 456.[56] KU disputes Municipal Customers' argument that certain A&G expenses found in FERC Account No. 930.2 should be removed from the formula rate, as KU argues that Municipal Customers misconstrue relevant Commission precedent.[57] KU also defends certain non-FERC jurisdictional adjustments regarding depreciation,[58] and KU states that its proposed formula rate is just and reasonable with regard to unfunded reserves.[59]

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[52] *Id.* at 21 (citing Louisville Gas and Electric Co., *et al*., Application to Withdraw from MISO, Exhibit C, Testimony of Mathew J. Morey at 24, Docket Nos. ER06-20-000 and EC06-4-000 (October 7, 2005)).

[53] *Id.* at 21-23.

[54] *Id.* at 24.

[55] *Id.* at 23-25.

[56] *Id.* at 25.

[57] *Id.* at 26.

[58] *Id.* at 27.

[59] *Id.* at 27-28.

21. With respect to CWIP, KU states that it has not proposed any changes to its current treatment of CWIP allocation ratios and asserts that it is unclear to KU that the forward-looking allocation ratios discussed in section 35.25(c)(4) of the Commission's regulations[60] apply to its proposed formula rate; however, to the extent necessary, KU requests waiver of the regulation as part of its general waiver request included in its filing.[61] KU also avers that it ensures that Municipal Customers who have paid for facilities through inclusion of CWIP in rate base but ultimately do not benefit from the facility will be refunded their costs with interest.[62]

22. KU acknowledges that it should have used the stated amount of PBOPs from Schedule A-19 in the A&G expenses that flow through to Schedule A-9,[63] and states that, on compliance, it will correct this information and set PBOPs to the levels approved in the company's last rate case.[64] In response to Municipal Customers' argument that KU proposes inappropriate limitations on the protocols for review of KU's annual implementation of the formula rate, KU states that it has not proposed to change the protocols themselves, but rather has only made changes to apply the protocols both to the annual formula rate update and to the calculation of the annual true-up.[65]

23. With respect to its agreement with Paris, while Municipal Customers argue that KU should be required to give three-years notice prior to fully or partially terminating service, KU states that under the current agreement KU has the right to change the rates, terms, and conditions of service by making a section 205 filing, and KU reiterates that it is exercising this right in this proceeding. KU also reiterates that it does not propose to terminate Paris' service, and therefore that the requirement in the Paris agreement to provide a notice of termination does not apply. Rather, according to KU, it has relegated to Paris the right to determine whether KU will continue serving all of Paris' load or will only serve part of Paris' load. Thus, avers KU, the question of whether and to what extent KU's service to Paris will terminate rests with Paris, not KU. With respect to

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[60] 18 C.F.R. § 35.25(c)(4) (2013).

[61] KU Answer at 28.

[62] *Id*.

[63] Schedule A-9 (Production-Related Administrative and General Expense Allocation) aggregates A&G expenses related to wages and salaries that will be recovered as part of the monthly rate base.

[64] *Id.* at 29.

[65] *Id.*

challenges to its analysis of the capacity credit, KU states that its use of an average monthly credit of 11 MW is correct because that is the actual amount that Paris would receive each month assuming that it does not fail to interrupt its load when called upon and thereby losing its capacity credit for a certain period of time, as called for under the current agreement.[66] Notwithstanding KU's right to interrupt service to Paris, KU states that it must still plan to serve that load in the event that Paris is unable to serve the load itself. KU states that by eliminating the interruptibility provisions, Paris will be served on the same basis as all KU's other customers and that it will pay for the capacity that KU provides to its load.[67]

24. KU justifies its proposed changes to the termination provisions by citing to significant capital expenditures it must undertake to serve its load under pending environmental regulations. KU asserts that it cannot be faced with the scenario of incurring significant expenditures in order to be able to still serve Municipal Customers, only to have Municipal Customers terminate service with five-years notice, which would saddle KU's retail customers with an unreasonable portion of the expenditures. KU argues that it is merely seeking to better match the investment made in its system to serve all load with the time required to recover the capital costs associated with that investment, while still recognizing both parties' right to exit the agreement at some point in the future.[68] With respect to its treatment of CWIP, KU argues that Municipal Customers are confusing KU's proposal to refund the last five years of CWIP charges once termination is effective with the currently-effective agreements that require KU to make a section 205 filing to remove CWIP from the customer's rates for the remainder of the term.[69]

25. Regarding changes to its credit worthiness provisions, KU reiterates that its proposal only requires a customer to provide performance assurance if it fails to meet the liquidity requirement in two consecutive quarters. Additionally, KU states that, if the customer can demonstrate that it meets the liquidity metric by the next calendar quarter,

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[66] *Id.* at 29-32.

[67] *Id.* at 32.

[68] *Id.* at 33-37. In its November 12, 2013 answer to Municipal Customers' motion for emergency relief, KU argues that Municipal Customers have provided no basis or authority for the Commission to impose a 12-month suspension of the notice periods for terminations and therefore request that the Commission deny Municipal Customer's motion.

[69] *Id.* at 37-38.

KU cannot ask for performance assurance based on the liquidity metrics. KU asserts that its proposal is simply a way to provide KU assurance that a customer is able to pay its bills and will continue to be able to pay its bills in the near term.[70] KU reiterates that its proposed credit worthiness requirements are based in part upon the credit provisions contained in the LG&E/KU OATT, which does not preclude evaluating credit worthiness at least annually.[71] KU rejects Municipal Customers' suggestion that KU should adopt MISO's more sophisticated and detailed process for determining credit worthiness, as KU is not running a large, regional market with the same complexity or scope as MISO, and such sophistication is not necessary to evaluate whether a customer can pay its KU bills.[72]

26. KU states that, due to the challenges that it has faced in attempting to terminate service to a customer for defaulting, it is reasonable for KU to be concerned that it may continue to be required to provide service even if the customer does not pay. Thus, KU has proposed to assess uncollectible costs associated with a particular customer to all of Municipal Customers.[73]

27. Finally, KU argues that it has supported its request to modify other provisions of the agreements. With respect to its clarification of the terms related to "Unanticipated Load," KU states that it will continue to serve Unanticipated Load "to the extent it is able to do so from its own resources or by purchasing power without impairing its ability to provide adequate service to other customers, and subject to transmission availability." KU states that its proposed revisions merely clarify that, if KU is unable to serve the Unanticipated Load consistent with that standard, the customer will be responsible for serving such load.[74] KU also argues that it has supported its modification that customers will be required to provide KU with information to support the customer's 13-year forecasts, stating that the more information KU has regarding the customer's anticipated load growth and underlying assumptions, the more accurate KU can be in its system planning. With respect to its modifications regarding non-payment, default, and dispute resolution, KU argues that, if a customer fails to pay its bills or otherwise enters an Event of Default, there is no question or interpretation of application of the contract that would

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[70] *Id.* at 38-39.

[71] *Id.* at 40.

[72] *Id.* at 41-42.

[73] *Id.* at 42-43.

[74] *Id.* at 43-44 (quoting Barbourville Existing Agreement § 3.6.3.2).

require arbitration. KU concludes that it has also harmonized the term "Renewable Resource" through the agreements, as the agreements previously inadvertently used the lower case term "renewable resource" when referring to Municipal Customers' right to terminate in favor of such resources.[75]

C. Municipal Customers' Reply

28. In response to KU's answer, Municipal Customers reiterate arguments raised in their protest and their complaint. Municipal Customers reassert that KU's forward-looking formula rate will cause a substantial rate increase that justifies a five-month suspension and that KU has failed to justify its 10.7 percent ROE.[76] Municipal Customers, while acknowledging that KU provided them notice of its MISO Exit Fee filing before the Kentucky Public Service Commission in 2008, reiterate that KU's proposed recovery of the MISO Exit Fee is impermissible retroactive ratemaking.[77] Municipal Customers also assert that KU's answer fails to provide any new support for a number of its proposed changes and mischaracterizes certain of Municipal Customers' arguments.[78] Municipal Customers reaffirm their request that the Commission summarily reject KU's proposed elimination of interruptible service to Paris and KU's proposed lengthening of the notice of termination provisions.[79] Finally, Municipal Customers argues that KU identifies no industry standard or other legitimate reason for its proposed new liquidity requirements, and that KU's proposal to substitute a defined term for "Renewable Resources" for the generic term in certain sections of the Revised Agreements is contradicted by the plain language and logic of the agreements.[80]

D. KU Answer

29. KU argues that, contrary to Municipal Customers' assertions, it was fully within its rights under section 205 of the FPA to propose modifications to the rates, terms, and conditions under which it provides service to Municipal Customers. KU also reasserts that Municipal Customers impermissibly seek, without legal or contractual basis,

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[75] *Id.* at 44.

[76] Municipal Customers Reply at 2-15.

[77] *Id.* at 15-16.

[78] *Id.* at 17-22.

[79] *Id.* at 22-27.

[80] *Id.* at 28-31.

12 months' notice before KU can make a section 205 filing to change the terms of its agreements with Municipal Customers.[81]

III. Discussion

A. Procedural Matters

30. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serve to make the entities who filed them parties to this proceeding.

31. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest or an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that assisted us in our decision-making process.

B. Commission Determination

32. Our preliminary analysis indicates that KU's proposed rates have not been shown to be just and reasonable and may be unjust and unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept KU's proposed rates for filing, suspend them, make them effective subject to refund, and set them for hearing and settlement judge procedures, as directed below.

33. We agree with Municipal Customers that KU's proposed rates raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing ordered below. Accordingly, we will accept the Revised Agreements for filing, suspend them for a five-month period, to become effective on April 23, 2014, subject to refund, and set them for hearing and settlement judge procedures. Furthermore, in light of the common issues of law and fact presented in Docket Nos. ER13-2428-000 and EL14-5-000, we will consolidate the two proceedings for purposes of settlement, hearing, and decision.

34. In *West Texas*, we explained that, where extraordinary factors indicate that wholesale customers may suffer irreparable harm absent a five-month suspension, we may impose a maximum suspension.[82] Here, our preliminary analysis indicates that, in the absence of a five-month suspension, Municipal Customers may be irreparably harmed by certain of the proposed non-rate terms and conditions, particularly KU's proposal to

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[81] KU Answer to Municipal Customers Reply at 1-8.

[82] *West Texas*, 18 FERC ¶ 61,189 at 61,375.

extend the required notice of termination period. Accordingly, we will accept the Revised Agreements for filing, suspend them for the maximum five-month period, to become effective on April 23, 2014, subject to refund, and set them for hearing and settlement judge procedures.

35. KU also requests waiver of the requirement to submit full cost of service information, and, to the extent not provided in its witnesses' testimony, waiver of the requirements of sections 35.13(e) (testimony and exhibits) and 35.13(h) (cost of service statements).[83] The Commission has granted waivers of the requirements to provide such data previously in a series of cases involving transmission formula rates.[84] Thus, we will grant the requested waivers. Nonetheless, to the extent that parties at the hearing ordered below can show the relevance of additional information needed to evaluate this proposal, the presiding judge can provide for appropriate discovery of such information, consistent with our orders in other similar cases.

36. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before the 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.[85] 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.[86] The settlement judge 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. Should the settlement judge ultimately determine

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[83] KU Transmittal at 27.

[84] *E.g. Commonwealth Edison Co.*, 119 FERC ¶ 61,238, at P 94 (2007); *Allegheny Power Sys. Operating Cos*., 111 FERC ¶ 61,308, at PP 55-56 (2005), *reh'g denied*, 115 FERC ¶ 61,156 (2006).

[85] 18 C.F.R. § 385.603 (2013).

[86] 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 (5) days of the date of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (http://www.ferc.gov/legal/adr/avail-judge.asp).

that a hearing is warranted, KU shall file a full case in chief pursuant to the Commission's regulations to support its proposed rate structure at hearing.

37. In cases where, as here, the Commission institutes an investigation 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 date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers,[87] we will set March 17, 2014 as the refund effective date, in order to align it as closely as possible with the ordered effective date.

38. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, 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 decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of hearing procedures, or, if the case were to go to hearing immediately, by August 31, 2014. Thus, we estimate that if the case were to go to hearing immediately, we would be able to issue our decision within approximately six months of the filing of briefs on and opposing exceptions, or by April 30, 2015.

The Commission orders:

(A) KU's proposed rates are hereby accepted for filing and suspended for a five-month period, to become effective on April 23, 2014, subject to refund, and subject to hearing and settlement judge procedures, as discussed in the body of this order.

(B) 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 section 205 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 in Docket No. ER13-2428-000 concerning the justness and reasonableness of KU's proposed rates, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (E) and (F) below.

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[87] *See, e.g.*, *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

(C) 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 FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held in Docket No. EL14-5-000 concerning the Municipal Customers' complaint. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (E) and (F) below.

(D) The refund effective date established in Docket No. EL14-5-000 pursuant to section 206(b) of the Federal Power Act will be March 17, 2014.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2013), 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.

(F) 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.

(G) 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, NE, 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.

(H) Docket Nos. ER13-2428-000 and EL14-5-000 are hereby consolidated for the purposes of settlement, hearing, and decision.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.