

148 FERC ¶ 61,225
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Kentucky Utilities Company

Docket Nos. ER14-2505-000
EL14-102-000

ORDER ACCEPTING AND SUSPENDING FILING, INSTITUTING SECTION 206
PROCEEDING, AND ESTABLISHING HEARING AND SETTLEMENT JUDGE
PROCEDURES

(Issued September 23, 2014)

1. In this order, we accept for filing proposed modifications to the Construction Work In Progress (CWIP) costs portion of Kentucky Utilities Company's (Kentucky Utilities) formula rate wholesale requirements contracts with Frankfort Electric and Water Plant Board and the Cities of Barbourville, Bardwell, Berea, Corbin, Falmouth, Madisonville, Paris, and Providence, Kentucky (collectively, the Departing Municipals), suspend the modifications for a nominal period, effective June 20, 2014, subject to refund. We also establish hearing and settlement judge procedures. Finally, we institute a Federal Power Act (FPA) section 206¹ proceeding in Docket No. EL14-102-000 and establish a refund effective date.

I. Background

2. Kentucky Utilities is a regulated electric utility that owns and operates electric generation, transmission, and distribution facilities in Kentucky and Virginia, serving customers in seventy-seven Kentucky counties and five counties in Virginia. Kentucky Utilities and its sister utility, Louisville Gas and Electric Company (Louisville), are wholly-owned subsidiaries of PPL Corporation (PPL). Louisville provides retail electric service to customers in a service area that includes metropolitan Louisville, Kentucky and 16 surrounding counties. PPL, which is headquartered in Allentown, Pennsylvania, controls about 19,000 MW of generation in Pennsylvania, Montana, and Kentucky. It

¹ 16 U.S.C. § 824e (2012).

delivers electricity to 1.4 million customers in Pennsylvania and 7.7 million in the United Kingdom.²

3. On September 29, 2008, Kentucky Utilities filed updates to its wholesale requirements agreements with its municipal customers, including the Departing Municipals, to switch from a stated rate to a formula rate which would update yearly based on Kentucky Utilities FERC Form No. 1 submission. The Commission accepted these modifications, suspended them for five months, and set them for hearing and settlement judge procedures.³ On November 2, 2009, pursuant to the terms of the settlement, the Commission approved Kentucky Utilities' rates for its municipal customers, which permit Kentucky Utilities to recover 100 percent of its environmental CWIP and 50 percent of its non-environmental CWIP (2009 Contracts).⁴ Section 4.1.3.4 of the 2009 Contracts provides that:

If either Party exercises its right to fully or partially terminate service under this Agreement, within sixty (60) days after the terminating Party has provided its notice of termination, Seller will make a Section 205 filing with the Commission to modify the rate formula for Buyer and request approval to cease collecting CWIP from the Buyer for that portion of Seller's Load Obligation which is being terminated. Such filing(s) will request that they be made effective as of the filing date.⁵

4. On September 23, 2013, Kentucky Utilities filed in Docket No. ER13-2428-000 to modify the formula rates, terms, and conditions applicable to its provision of wholesale requirements service. These modifications included, among other things, a proposal to change the notice of termination period from five to ten years, deletion of the CWIP filing requirement in section 4.1.3.4, and the substitution of a new CWIP provision in proposed section 2.3.4.⁶ The Departing Municipals and the Cities of Bardstown,

² Kentucky Utilities Filing at 2 (Filing).

³ *Kentucky Utils. Co.*, 125 FERC ¶ 61,242 (2008).

⁴ *Kentucky Utils. Co.*, 129 FERC ¶ 61,099 (2009).

⁵ *See, e.g.*, *Kentucky Utils.*, Rate Schedule No. 184 (1.2.0), § 4.1.3.4.

⁶ The proposed section 2.3.4 provides that:

Within thirty (30) Days of a FERC-approved termination date, the Seller shall re-calculate, for that portion of Seller's Load Obligation which was terminated, the Estimated Demand Charge, Estimated

(continued...)

Nicholasville, and Benham, Kentucky protested this proposal, arguing that the extension of the notice period would be anticompetitive. On November 22, 2013, the Commission accepted this rate filing, suspended it for five months to be effective on April 23, 2014, and set the matter for hearing and settlement judge procedures. On April 15, 2014, Kentucky Utilities submitted a motion for interim rates and requested that the effective date for the 10-year notice provision be extended from April 23, 2014 to June 12, 2014 to assist the parties in achieving settlement.⁷ This proceeding is still ongoing.

5. Kentucky Utilities states that, on April 21, 2014, the day before the Commission approved Kentucky Utilities' motion for interim rates, i.e., while the 2009 Contracts were still in effect, the Departing Municipals provided notice of their intent to terminate their wholesale requirements contracts, effective April 30, 2019.⁸ Kentucky Utilities states that it accepted these notices and informed the Departing Municipals of the steps it would take "towards a smooth transition," including making the instant filing pursuant to section 205 of the FPA.⁹

II. The Filing

6. On July 25, 2014, Kentucky Utilities filed to modify the formula rate under the Departing Municipals' contracts to remove CWIP costs related to projects that Kentucky

Energy Charge, and Annual True-up by removing CWIP from the Estimated Formula and Actual Formula applicable to the period beginning five (5) years preceding the termination date and ending on the effective date of termination. Any difference between the amounts originally billed to Buyer and the amounts calculated in the preceding sentence will be refunded to Buyer, together with interest calculated at the Interest Rate; provided, however, that Buyer has timely fulfilled all its obligations in accordance with Section 13.12. If Buyer has not fully completed such obligations in a timely fashion, Seller may deduct and retain for Seller's account such amounts as are owed to Seller hereunder before refunding the balance of CWIP to Buyer.

⁷ Filing at 3.

⁸ The Departing Municipals state that the termination notice period for the Paris contract is three years. Consequently, Paris' termination date is April 30, 2017. Departing Municipals Protest at n. 1 (Protest).

⁹ Filing at 3 (citing 16 U.S.C. § 824d (2012)).

Utilities does not anticipate to be in service before the Departing Municipals' termination of service. Kentucky Utilities states that, pursuant to section 4.1.3.4 of its contracts with the Departing Municipals, within 60 days of the provision of termination notice, Kentucky Utilities must make an FPA section 205 filing to modify the rate formula for the terminating customer's charges and request approval "to cease collecting CWIP from the customer for that portion of service that is being terminated."¹⁰ It argues that this approach is appropriate to ensure that the Departing Municipals "will not pay costs associated with facilities not yet in service before their contracts terminate, but will pay costs of facilities that are in fact used to serve them."¹¹

7. Kentucky Utilities further states that it has not begun incurring CWIP costs for projects that will go into service after April 30, 2019. For this reason, Kentucky Utilities states that its proposed modifications will only affect City of Paris' current rates because City of Paris' service will terminate two years before the other Departing Municipals. Kentucky Utilities also states that one of its proposed modifications is the addition of a CWIP Credit to the Departing Municipals' monthly invoices, which Kentucky Utilities will update annually and which will credit the actual CWIP costs to the Departing Municipals for projects that will not be in service until after April 30, 2017 and April 30, 2019.¹² Kentucky Utilities states that it has therefore modified the terms of Departing Municipals' agreements to include the CWIP Credit as a monthly invoice component and to remove section 2.3.4, which contains a previously proposed CWIP refund mechanism.¹³

8. Finally, Kentucky Utilities requests waiver of the 60-day prior notice requirement to permit the proposed modifications to take effect on June 20, 2014. It argues that good cause exists to allow this waiver, as the Departing Municipals have consented to this requested effective date because this date would be consistent with the requirements of section 4.1.3.4 of their contracts.¹⁴

¹⁰ *Id.* at 4.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 5.

¹⁴ *Id.*

III. Notice of Filing, Intervention, and Protest

9. Notice of Kentucky Utilities' filing was published in the Federal Register, 79 Fed. Reg. 44,760-61 (2014), with interventions and protests due on or before August 15, 2014. The Departing Municipals filed a timely motion to intervene and protest. On August 27, 2014, Kentucky Utilities filed an answer and a motion to consolidate. On September 11, 2014, the Departing Municipals filed an answer to Kentucky Utilities' answer.

IV. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motion to intervene serves to make the Departing Municipals parties to this proceeding.

11. Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that has assisted us in our decision-making process.

B. Substantive Matters

1. Protest

12. The Departing Municipals argue that, because the 2009 Contracts were in effect when they gave notice of their intent to terminate service, Kentucky Utilities should be complying with these contracts by removing all CWIP costs from the Departing Municipals' rates, not filing to limit the amount of CWIP that it will remove. In support, the Departing Municipals note that the language of section 4.1.3.4 of the 2009 Contracts unambiguously requires Kentucky Utilities to "make a Section 205 filing . . . to modify the rate formula for Buyer and request approval to cease collecting CWIP from Buyer."¹⁵ Departing Municipals interpret this section to mean that Kentucky Utilities must cease collecting CWIP entirely. They argue that nothing in section 4.1.3.4 allows Kentucky Utilities to remove CWIP for only certain construction projects and not others. They further argue that the substance of this particular section was the product of a comprehensive settlement among the parties that established the 2009 Contracts.¹⁶

¹⁵ Protest at 9.

¹⁶ *Id.* at 10.

Furthermore, the Departing Municipals state that Kentucky Utilities' own application of section 4.1.3.4 after delivering the notice of termination to another the City of Benham (Benham) is consistent with the Departing Municipals' arguments.¹⁷

13. The Departing Municipals also argue that Kentucky Utilities concedes that their termination notices trigger its obligations pursuant to section 4.1.3.4 of the 2009 Contracts.¹⁸ Moreover, they argue that Kentucky Utilities' proposal to not comply with that section's requirements and to create a new section 4.8 to limit CWIP removal to "the revenue requirements related to CWIP that are associated with generation capital projects that will not be used to serve that portion of Seller's Load Obligation which will be terminated" is unjust, unreasonable, and unduly discriminatory.¹⁹ The Departing Municipals also argue that it is too late for Kentucky Utilities to "retroactively seek to impose new and different termination provisions" for the Departing Municipals' contracts.²⁰

14. The Departing Municipals state that they do not object to the addition of a CWIP Credit in their monthly invoices "in principle," so long "as they are assured that the impact on their rates will be identical" to removing CWIP directly from the formulas as of June 20, 2014.²¹ They move for "summary disposition that Kentucky Utilities must comply with the requirement, in Section 4.1.3.4 of the 2009 [C]ontracts that were in effect at the time" they provided termination notice.²² They also ask the Commission to direct Kentucky Utilities to: (1) fully remove CWIP from their rates, effective June 20, 2014; (2) condition any approval of Kentucky Utilities' proposed alternative mechanism for implementing CWIP removal upon a requirement that the CWIP credit have an identical impact on the Departing Municipals' monthly charges as direct removal; (3) grant their motion for summary disposition; and (4) if summary disposition is not granted, set the matter for hearing and settlement procedures.

¹⁷ *Id.* at 10-11.

¹⁸ *Id.* at 12.

¹⁹ *Id.* at 13-14.

²⁰ *Id.* at 14.

²¹ *Id.* at 16.

²² *Id.* at 16-17.

2. Kentucky Utilities' Answer

15. Kentucky Utilities argues that section 4.1.3.4 is ambiguous. Therefore, Kentucky Utilities argues that the Commission should interpret this provision consistently with the rest of the contract and maintains that its interpretation, unlike the Departing Municipals', conforms to this requirement.²³ To support this claim, Kentucky Utilities argues, for example, that section 2.4 of the 2009 Contracts specifies that, in the event of termination, "neither party will be relieved of any of its obligations which arose prior to the effective date of termination."²⁴ It claims that the CWIP costs are obligations that arose prior to termination. Additionally, Kentucky Utilities argues that the Departing Municipals have inappropriately relied upon a settlement agreement with the Benham to support their argument that Kentucky Utilities' own application of section 4.1.3.4 supports the Departing Municipals' interpretation. On this point, Kentucky Utilities contends that the settlement agreement states that "it is not to be relied upon as precedent."²⁵ Kentucky Utilities further argues that the Departing Municipals' interpretation is inconsistent with system planning and cost causation principles, which dictate, among other things, that a "customer is expected to pay the costs the utility incurs in providing service to that customer."²⁶ Based on these principles, it contends that it is not appropriate for the Departing Municipals to evade the costs of facilities planned and partially built to serve their future needs.

16. Kentucky Utilities also takes issue with the Departing Municipals' claim that Kentucky Utilities' application of section 4.1.3.4 is retroactive and unduly discriminatory. With regard to the accusation of retroactive application, Kentucky Utilities states that it is applying the terms of section 4.1.3.4 to the power it will sell to the Departing Municipals through the date of termination, not for completed sales. Additionally, Kentucky Utilities states that it has not applied section 4.1.3.4 in an unduly discriminatory manner, because that section only applies to those parties that have provided notices of termination, a step that the non-Departing Municipals subject to the 2009 Contracts have not taken. Furthermore, it argues that, if the Departing Municipals' position prevails, the remaining municipal utilities would have to pay those CWIP costs that the Departing Municipals would avoid.

²³ Kentucky Utilities August 27, 2014 Answer at 10-12 (Kentucky Utilities Answer).

²⁴ *Id.* at 10.

²⁵ *Id.* at 17-18.

²⁶ *Id.* at 12.

17. Additionally, Kentucky Utilities requests that the Commission deny the Departing Municipals' request for summary disposition because the Departing Municipals have not met the burden of proof in Rule 217 of the Commission's Rules of Practice and Procedure.²⁷ Finally, if the Commission sets this matter for hearing, Kentucky Utilities moves to consolidate this proceeding with Kentucky Utilities' ongoing rate case proceeding in Docket Nos. ER13-2428-000 and EL14-5-000, which also involves "a common nucleus of operative facts regarding CWIP costs and [its] contracts with the Departing Municipals."²⁸

3. Departing Municipals' Answer

18. In reply, the Departing Municipals argue that section 4.1.3.4 unambiguously requires Kentucky Utilities to cease collecting CWIP from the terminating customers. Additionally, the Departing Municipals dispute Kentucky Utilities' claim that the Departing Municipals have inappropriately relied on the terms of a settlement agreement between Kentucky Utilities and Benham. They contend that the CWIP issue resolved in the Benham settlement only pertained to when to remove CWIP, not the portion of CWIP that Kentucky Utilities must remove. They also point out that, in Kentucky Utilities' initial pleadings in that proceeding, Kentucky Utilities clearly stated its intent to "ensur[e] that *all* CWIP paid by Benham is refunded with interest."²⁹

19. Also the Departing Municipals argue that Kentucky Utilities' reliance on section 2.4 of the 2009 Contracts rests on the "faulty assumption" that the Departing Municipals have an "obligation" to pay CWIP that should survive the effective date of termination.³⁰ They contend that, according to this view, the removal of CWIP from their rates would not occur until the effective date of termination of 2019 or 2017.

20. Regarding Kentucky Utilities' assertion that its interpretation is consistent with system planning and cost causation principles, the Departing Municipals assert that the

²⁷ *Id.* at 19 (citing 18 C.F.R. § 385.217 (2014)).

²⁸ *Id.* at 21. On August 29, 2014, the settlement judge in Docket Nos. ER13-2428-000 and EL14-5-000 certified an offer of settlement between Kentucky Utilities and Cities of Nicholasville and Bardstown, Kentucky resolving "the issues set for hearing by the Commission." *Kentucky Utils. Co.*, 148 FERC ¶ 63,013 (2014).

²⁹ Departing Municipals Answer at 5-6 (citing Kentucky Utilities Answer at 25 (emphasis added by the Departing Municipals)).

³⁰ *Id.* at 8.

key issue is what the parties agreed to in 2009 regarding section 4.1.3.4. They argue that the parties agreed that Kentucky Utilities would cease collecting CWIP entirely. Finally, the Departing Municipals object to consolidation, stating that “there is no overlap in the issues between this case and the ongoing rate case.”³¹

4. Commission Determination

21. Kentucky Utilities’ proposed modifications 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.

22. Our preliminary analysis indicates that Kentucky Utilities’ proposed modifications 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 its proposed modifications, suspend them for a nominal period, to become effective June 20, 2014, as requested,³² subject to refund, and set them for hearing and settlement judge procedures. In addition, we will leave it to the discretion of the Chief Administrative Law Judge to determine whether, when, and to what extent consolidation of the proceedings in Docket Nos. ER13-2428-000, EL14-5-000, and ER14-2505-000 may be appropriate.³³

23. In addition, while Kentucky Utilities is proposing a rate decrease, it is possible that a further decrease may be warranted. Accordingly, we will also institute a section 206 investigation in Docket No. EL14-102-000 with respect to the justness and reasonableness of Kentucky Utilities’ rate decrease.

24. In cases where, as here, the Commission institutes an investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than publication of the notice of the Commission’s initiation of its investigation in the *Federal Register* and no later than five months after the publication date. We will establish the refund effective date at the earliest date

³¹ *Id.* at 10.

³² *Central Hudson Gas and Electric Corp.*, 60 FERC ¶ 61,106, at 61,338, *order on reh’g*, 61 FERC ¶ 61,089 (1992) (“We will generally grant waiver of the 60-day prior notice requirement in the following instances: . . . filings that reduce rates and charges. . .”).

³³ *See* 18 C.F.R. § 385.503 (2014).

possible, i.e., the date the notice of the initiation of the investigation in Docket No. EL14-102-000 is published in the *Federal Register*.

25. Section 206(b) also requires that, if no final decision is rendered by conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to FPA section 206, the Commission shall state the reason 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 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 June 30, 2015. 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 February 29, 2016.

26. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes 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.³⁴ 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.³⁵ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order 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.

The Commission orders:

(A) Kentucky Utilities' proposed rate modifications are hereby accepted for filing and suspended for a nominal period, to become effective June 20, 2014, as requested, subject to refund, as discussed in the body of this order.

³⁴ 18 C.F.R. § 385.603 (2014).

³⁵ 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 and a summary of their background and experience (<http://www.ferc.gov/legal/adr/availjudge.asp>).

(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 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' proposed contract modifications schedule, 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 (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2014), 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.

(D) Within 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.

(E) 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.

(F) The Secretary shall promptly publish in the *Federal Register*, a notice of the Commission's initiation of section 206 proceedings in Docket No. EL14-102-000.

(G) The refund effective date established pursuant to section 206(b) of the FPA will be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (F).

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.