153 FERC ¶ 61,044
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisville Gas and Electric Company
Kentucky Utilities Company

Docket No. EL15-92-000

ORDER DENYING PETITION FOR WAIVER

(Issued October 13, 2015)

1. On August 14, 2015, Louisville Gas and Electric Company (Louisville Gas) and Kentucky Utilities Company (Kentucky Utilities) (collectively, LG&E/KU), pursuant to Rule 207 of the Commission's Rules of Practice and Procedure[1] and section 35.14(a)(10) of the Commission's regulations,[2] submitted a petition for limited waiver of the Commission's accounting regulations in the Uniform System of Accounts for Public Utilities and Licensees (Uniform System of Accounts).[3] LG&E/KU seek the waiver in order to include certain fee income and tax costs associated with a proposed refined coal sale arrangement between LG&E/KU and Clean Coal Solutions LLC (Clean Coal Solutions) within Account 151, Fuel Stock, of the Uniform System of Accounts. Kentucky Utilities also requests waiver of the Commission's fuel adjustment clause (FAC) regulations at section 35.14[4] in order to pass on to its wholesale customers an allocable portion of fee income and tax costs associated with the refined coal sale arrangement. Further, LG&E/KU request confidential treatment for portions of the testimony submitted with the petition. In this order, we (1) deny the petition for waiver of the Commission's accounting and FAC regulations and (2) grant the request for confidential treatment.

[1] 18 C.F.R. § 385.207(a)(5) (2015).

[2] 18 C.F.R. § 35.14 (a)(10) (2015).

[3] 18 C.F.R. Pt. 101 (2015).

[4] 18 C.F.R. § 35.14 (2015).

I. LG&E/KU Filing

2. LG&E/KU state that Louisville Gas is a public utility that owns and operates electric generation, transmission, and distribution facilities in addition to natural gas distribution, transmission, and storage facilities in Kentucky and Indiana.[5] LG&E/KU state that Kentucky Utilities is a sister utility to Louisville Gas that owns and operates electric generation, transmission, and distribution facilities in Kentucky. They state that Kentucky Utilities provides wholesale requirements services to eleven municipal customers in Kentucky, and that each contract with the municipal customers includes a FAC.[6] LG&E/KU explain that Clean Coal Solutions owns and operates refined coal production facilities, and that the combustion of the refined coal produced by Clean Coal Solutions results in the reduction of nitrogen oxide and mercury emissions when compared to emissions from comparable coal.[7] LG&E/KU state that they have been in negotiations with Clean Coal Solutions regarding the installation and operation of refined coal production facilities at three generators owned by LG&E/KU, and they include with their petition a draft operation agreement that would serve as a template for up to three individual agreements between LG&E/KU and Clean Coal Solutions.

3. LG&E/KU state that, pursuant to the draft operation agreement, Clean Coal Solutions will install, operate, and maintain (at Clean Coal Solutions' expense) refined coal production facilities at three of LG&E/KU's generating stations.[8] LG&E/KU explain that they will sell coal to Clean Coal Solutions for refinement, and purchase the refined coal (or untreated coal, where the refinement equipment is not operating for any reason) back from Clean Coal Solutions for the same price at which Clean Coal Solutions purchased the unrefined coal from LG&E/KU. They state that, once Clean Coal Solutions' refined coal facilities are installed at LG&E/KU's generating stations, Clean Coal Solutions will pay fees to LG&E/KU for coal yard site licensing and coal yard services based upon the number of tons of refined coal produced at the facility. LG&E/KU state that Clean Coal Solutions benefits from this arrangement by receiving a Clean Coal Tax Credit on a per-ton basis.[9] LG&E/KU state that they expect Clean Coal

---

[5] Petition of Louisville Gas and Electric Company and Kentucky Utilities Company for Waiver, Request for Expedited Consideration, and Request for Confidential Treatment, Transmittal Letter at 5 (filed Aug. 14, 2015) (Petition for Waiver).

[6] *Id.* at 5-6.

[7] *Id.* at 6.

[8] *Id.* at 7.

[9] *Id.* at 2, 7 (referencing 26 U.S.C. § 45 (2013)).

Solutions to enter into a subsequent lease or sale of its refined coal production facilities to a tax equity investor, at which time LG&E/KU would enter into replacement, longer-term agreements memorializing duties and obligations similar to the draft operation agreement.[10] LG&E/KU expect all agreements to end December 31, 2021, the date that the Clean Coal Tax Credit expires, barring any extension of the credit.[11]

4. LG&E/KU ask the Commission for limited waiver of its accounting regulations in order to permit them to maintain the wholesale-allocable fees received from Clean Coal Solutions and any potential coal severance tax costs of the refined coal transaction in Account 151 of the Uniform System of Accounts, which will allow them to include these received fees and severance tax costs within the FAC.[12] LG&E/KU explain that they are also submitting petitions to their state regulators seeking permission to record these items in Account 151 and to pass them through to retail customers using Kentucky Utilities' retail FAC, and LG&E/KU argue that the requested waivers herein will permit them to maintain their federal accounting for these items on the same basis as their state accounting. LG&E/KU note that, absent a waiver, they would record the fees received from Clean Coal Solutions for coal yard services to a subaccount of Account 501, Fuel, the fees received from Clean Coal Solutions for coal yard site licensing services to Account 454, Rent from Electric Property, and any coal severance tax costs to Account 408.[13] They state that Accounts 408 and 501 are included in the municipal customers' formula rate, and would therefore be flowed through to the customers in the absence of a waiver; however, Account 454 is not included in the formula rate.[14] Thus, absent a waiver, LG&E/KU assert that the benefits of the site licensing service fees paid to LG&E/KU would not flow through to the municipal customers.

5. Kentucky Utilities requests waiver of section 35.14 of the Commission's regulations in order to pass on an allocable share of the benefits from the receipt of coal

[10] *Id.* at 8. LG&E/KU state that they do not expect the terms of the agreements to be materially altered from the terms between LG&E/KU and Clean Coal Solutions.

[11] *Id.* at 9.

[12] *Id.* LG&E/KU state that they are currently seeking confirmation from the Kentucky Department of Revenue that severance taxes should not be assessed based on the sale of coal to Clean Coal Solutions, but that if severance taxes are owed, LG&E/KU plan to include those taxes in Account 151. *Id.* n. 19.

[13] *Id.* at 10.

[14] *Id.* n. 23.

yard site licensing fees and coal yard service fees (estimated at $11.8 million annually for Kentucky Utilities) to its wholesale customers through its monthly wholesale FAC.[15] Kentucky Utilities also seeks waiver to pass through any coal severance tax costs associated with establishing and managing the refined coal arrangement.[16] Although Kentucky Utilities notes that it does have a forward-looking formula rate to calculate annual charges for its wholesale customers with costs taken from Kentucky Utilities' FERC Form No. 1, it asserts that the FAC is the most effective way to share the costs and benefits associated with the refined coal agreement with its customers, because the formula rate does not include a line item for the account where the coal yard site licensing fee income would be recorded.[17] Kentucky Utilities also notes that it may incur other costs associated with the refined coal arrangement that will not be passed through to customers, such as legal, administrative, operations and maintenance costs, which will be recorded in the appropriate accounts in the Uniform System of Accounts.[18] Kentucky Utilities states that, to the extent these costs are ultimately included in the formula used to calculate the demand and energy charges for its wholesale requirements customers, Kentucky Utilities expects that they will be outweighed by the benefits flowed through the FAC.[19]

6. Kentucky Utilities states that good cause exists to grant waiver of section 35.14 for two reasons. First, Kentucky Utilities states that the Commission has indicated that the FAC may be used as a mechanism to return savings to customers, and thus it is appropriate for Kentucky Utilities to pass on an allocable portion of the fees that it will receive from Clean Coal Solutions to its wholesale customers by way of the FAC.[20]

---

[15] *Id.* at 10. LG&E/KU state that Louisville Gas does not have a wholesale FAC; thus, only Kentucky Utilities is requesting this waiver. *Id.* at 2 n. 6.

[16] *Id.* at 10-11.

[17] *Id.* at 11.

[18] *Id.* at 11-12.

[19] *Id.* at 12. In testimony attached to the filing, Mr. Delbert D. Billiter estimates out-of-pocket incremental costs to be below $300,000 on a lifetime, per-facility basis, while income from the refined coal transactions is expected to be $19.7 million on an annual basis. *Id.*, Attachment 1 (Billiter Test.) at 8.

[20] *Id.*, Transmittal Letter at 13-15 (citing *Southern Co. Servs., Inc.*, Opinion No. 377-A, 64 FERC ¶ 61,033, at 61,330 n.4 (1993); *S. Carolina Elec. & Gas Co.*, 63 FERC ¶ 61,335, at 63,198 (1993) (granting waiver of section 35.14 of the Commission's regulations to permit South Carolina Electric and Gas Company to flow

(continued ...)

Second, Kentucky Utilities state that it will only include coal severance tax costs associated with the refined coal transactions in the FAC to the extent that they are outweighed by the fee income in a given month.[21] Kentucky Utilities states that the majority of the Commission's prior decisions relating to waiver of section 35.14 have granted such waiver where a public utility has sought to pass through initial costs to customers through the FAC in order to "buy-down" their existing fuel supply arrangements and enter into more economical arrangements, thereby reducing the long-term fuel costs charged to wholesale customers (i.e., buy-down cases).[22] Kentucky Utilities asserts that, in these cases, the Commission has closely scrutinized requests by utilities to pass on initial costs because the FAC can automatically pass through to customers increases or decreases in fuel costs without prior Commission approval.[23]

7. Kentucky Utilities states that, in a series of buy-down cases stemming from a 1988 decision in *Kentucky Utilities Company*,[24] the Commission articulated a four-part test for public utilities seeking a waiver of the FAC regulations, where the utility must: (1) demonstrate that the cost of the replacement fuel, plus the cost of the buy-down, is less than the cost that the public utility would have incurred had it continued to purchase fuel under the terminated agreement; (2) identify the specific contracts involved; (3) provide a detailed methodology used to calculate savings; and (4) verify that its customers have realized a savings each month prior to passing buy-down costs on to those customers.[25] Kentucky Utilities asserts that this four-part test essentially questions whether the ultimate savings that customers will receive justify the initial costs passed onto those customers through the FAC, and notes that the Commission has applied this

---

through to its customers, by way of the FAC, refunds received from the United States Department of Energy reflecting overpayments for spent nuclear fuel disposal costs) (*South Carolina*)).

[21] *Id.* at 12.

[22] *Id.* at 15 (citing *Wis. Elec. Power Co.*, 140 FERC ¶ 61,128, at P 13 (2012) (*Wisconsin Electric*); *Sw. Pub. Serv. Co.*, 76 FERC ¶ 61,295, at 62,482 (1996) (*Southwestern Public*)).

[23] *Id.* at 16 (citing *Ill. Power Co*., 52 FERC ¶ 61,162, at 61,621-22 (1990) (*Illinois Power*)).

[24] 45 FERC ¶ 61,409 (1988).

[25] Petition for Waiver, Transmittal Letter at 16-17 (citing *Ohio Power Co.*, 146 FERC ¶ 61,098, at P 11 (2014)).

concept in cases granting waiver of section 35.14 outside the context of buy-down cases.[26]

8. Kentucky Utilities states that it is seeking substantively the same outcome as that in the cases it cites, i.e., giving wholesale customers the benefit of reduced fuel costs through the FAC.[27] Kentucky Utilities asserts that it meets the four-part test for waiver of section 35.14. First, it states that because of the fees that Kentucky Utilities will be receiving from Clean Coal Solutions for site licensing and coal yard services, the overall customer cost of fuel included in the FAC (including the cost of any severance taxes) will be less than if Kentucky Utilities did not enter into the refined coal transactions. Second, Kentucky Utilities has attached the specific draft operation agreement that will establish the terms and conditions of the arrangement between Kentucky Utilities and Clean Coal Solutions. Third, Kentucky Utilities provides an explanation of the anticipated savings that customers will gain from the proposed arrangement. In testimony attached to the filing, Mr. Delbert D. Billiter estimates that LG&E/KU will annually earn up to $19.7 million in fees collected from Clean Coal Solutions, and expects to return to its wholesale customers approximately $1.0 million in fuel savings on an annual basis.[28] Fourth, Kentucky Utilities provides assurances that only net benefits from the transaction will flow through the FAC. In testimony attached to the filing, Mr. Christopher M. Garrett states that, in order to ensure that customers do not bear severance tax costs in excess of benefits under the refined coal sale arrangement in a given month, Kentucky Utilities will only include the tax costs in the FAC in a given month to the extent that they are exceeded by the benefits (i.e., fee income) to be included in that same month.[29] Additionally, Kentucky Utilities states that each of the bilateral agreements between Kentucky Utilities and its wholesale requirements customers contains rate review

---

[26] *Id.* at 17-18 (citing *Southwestern Public*, 76 FERC ¶ 61,295 at 62,482 (waiving section 35.14 to permit a public utility to recover from its wholesale customers the costs it incurred in litigation over a coal supply contract); *Entergy Servs., Inc.*, 76 FERC ¶ 61,093, at 61,497 (1996) (waiving section 35.14 to permit a public utility to recover from its wholesale customers the net cost associated with leases of steel railcars that will no longer be used to transport coal to two coal-fired generating stations)).

[27] *Id.* at 18.

[28] *Id.*, Attachment 1 (Billiter Test.) at 7.

[29] *Id.*, Attachment 2 (Garrett Test.) at 7.

protocols through which customers may review and verify that the costs of the refined coal sale arrangement do not exceed the benefits.[30]

9. LG&E/KU request that the Commission act on the petition for waiver and grant the relief requested by October 13, 2015, in order to commence the pass-through of benefits to customers as soon as possible.[31] They also assert that the operation agreements will not be executed with Clean Coal Solutions until they receive regulatory authorization for their proposed accounting and ratemaking treatment, and note that Clean Coal Solutions may pursue opportunities with other entities if the agreements are not executed in a reasonable timeframe.

10. LG&E/KU request confidential treatment for portions of Mr. Billiter's testimony related to the amount of compensation that Clean Coal Solutions will provide to LG&E/KU for site licenses and coal yard services, pursuant to section 388.112 of the Commission's regulations.[32] They state that the testimony contains commercially sensitive and non-public pricing information, and argue that disclosure of such information may cause substantial harm or result in competitive disadvantage to LG&E/KU, Clean Coal Solutions, or other parties. LG&E/KU attach a proposed form of protective agreement to their filing, in accordance with the Commission's regulations.[33]

II. Notice and Responsive Pleadings

11. Notice of LG&E/KU's filing was published in the *Federal Register*, 80 Fed. Reg. 51,546 (2015), with interventions and protests due on or before September 4, 2015. None was filed.

III. Discussion

A. Waiver Requests

12. We deny the request for waiver of the Commission's accounting regulations to permit LG&E/KU to record the fee income each receives from Clean Coal Solutions for the provision of coal yard services and site licensing services in Account 151, Fuel Stock,

---

[30] *Id.*, Transmittal Letter at 18-19.

[31] *Id.* at 19.

[32] *Id.* at 20 (citing 18 C.F.R. § 388.112 (2015)).

[33] *Id.*, Attachment 3.

of the Uniform System of Accounts. We also deny the request for waiver of the Commission's accounting regulations to permit LG&E/KU to record potential coal severance tax costs associated with the refined coal transaction with Clean Coal Solutions in Account 151. The Commission narrowly construes the costs that are recorded under Account 151 and that can be recovered through the FAC.[34] The Uniform System of Accounts requires a utility to include the book cost of fuel on hand in Account 151. Among the items listed in the instructions to Account 151 are the invoice price of fuel and other expenses directly assignable to the cost of fuel on hand. The Uniform System of Accounts does not permit a company to record the service fee income and tax costs described by LG&E/KU as a component of the inventory price of fuel recorded in Account 151, and we are not persuaded that waiver should be granted to allow these items to be recorded outside of their normal accounts, as we find that waiver would detract from the need to strictly observe accounting under Account 151. Therefore, we require LG&E/KU to record the fee income and tax costs in their appropriate accounts. Specifically, LG&E/KU note that, absent a waiver, they would normally record fees they receive for the provision of coal yard services to Account 501, Fuel, the fees they receive for the site licensing services to Account 454, Rent from Electric Property, and any potential coal severance taxes to Account 408.2, Taxes other than Income Taxes, other Income and Deductions.[35]

13. We deny the request for waiver of section 35.14 of the Commission's regulations to permit Kentucky Utilities to pass on an allocable share of the benefits from the receipt of coal yard site licensing fees and coal yard service fees, as well as any coal severance tax costs, to its wholesale customers through its monthly wholesale FAC. We find that waiver is not appropriate because Kentucky Utilities is entitled to flow through these costs and benefits to wholesale customers by way of its wholesale formula rates.[36] Like FACs, formula rates enable utilities to pass through increases or decreases in their fuel costs to ratepayers without the need to file formal rate changes.[37] LG&E/KU note that

---

[34] *Illinois Power*, 52 FERC ¶ 61,162 at 61,622.

[35] Petition for Waiver, Transmittal Letter at 10.

[36] We note that, although the Commission has previously allowed the FAC to be used as a mechanism to return savings to customers, there was no alternative mechanism (such as Kentucky Utilities' formula rates) by which the savings in those cases could be passed on to customers. *See South Carolina*, 63 FERC ¶ 61,335 at 63,198 (granting waiver of section 35.14 of the Commission's regulations to include in the FAC refunds reflecting overpayments for spent nuclear fuel disposal costs).

[37] *Wisconsin Electric*, 140 FERC ¶ 61,128 at P 13.

the fees received from Clean Coal Solutions for coal yard services would normally be recorded to an Account 501 subaccount, the fees received from Clean Coal Solutions for coal yard site licensing services would be recorded to Account 454, and any coal severance tax costs would be recorded to Account 408.[38] They state that Accounts 408 and 501 are included in the municipal customers' formula rate, and would therefore be flowed through to these customers in the absence of the requested waivers. Thus, absent a waiver of the accounting regulations allowing these fee incomes and costs to be recorded in Account 151, if the Commission permitted the benefits and costs recorded in Accounts 501 and 408 to be included in the FAC, they would flow through to Kentucky Utilities' municipal customers in both the FAC and the formula rates. This would result in the double-recovery of tax costs and the double-allocation of coal yard service fee income to wholesale customers. We find it more efficient and appropriate for Kentucky Utilities to make a separate filing under section 205 of the FPA that adjusts its formula rates to provide for the flow-through of the savings from the coal yard licensing fees recorded in Account 454.

B. Confidential Treatment of Testimony

14. LG&E/KU request confidential treatment for the price terms of the refined coal arrangement with Clean Coal Solutions, as reflected in the Billiter testimony submitted with the filing, which they argue is commercially sensitive information.[39] We grant the request for confidential treatment under 18 C.F.R. § 388.112 (2015). No party has contested the request; moreover, LG&E/KU have stated that they would incur substantive competitive harm if we do not grant the request for confidential treatment.

The Commission orders:

(A) LG&E/KU's request for waiver of the Commission's accounting regulations and section 35.14 of the Commission's regulations is hereby denied, as discussed in the body of this order.

---

[38] Petition for Waiver, Transmittal Letter at 10.

[39] *Id.* at 5, 20.

(B) LG&E/KU's request for privileged treatment is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.