154 FERC ¶ 61,144
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

East Kentucky Power Cooperative, Inc. Docket No. EL16-8-000

v.

Louisville Gas & Electric Company/Kentucky Utilities Company

ORDER DENYING COMPLAINT

(Issued February 26, 2016)

1. On November 2, 2015, East Kentucky Power Cooperative, Inc., (EKPC) filed a complaint against Louisville Gas & Electric Company (LG&E) and Kentucky Utilities Company (KU) (collectively, LG&E/KU), pursuant to sections 206, 211 and 306 of the Federal Power Act (FPA)[1] and Rule 206 of the Commission's regulations. The complaint alleges that LG&E/KU's failure to accept EKPC's designation of new Network Load[2] under EKPC's Network Integration Transmission Service Agreement (NITSA)[3] with LG&E/KU is contrary to the terms of the LG&E/KU Open Access

[1] 16 U.S.C. §§ 824e, 824j-l, and 825e (2012).

[2] EKPC submitted an amended NITSA as an attachment to the complaint that defines EKPC's new Network Load as the amount of Bluegrass Generating Station (Bluegrass station) output that exceeds EKPC's Network Load on the LG&E/KU system. *See* Attachment 1, Section 4.

[3] On December 21, 2015, LG&E/KU filed with the Commission an updated NITSA, adding the Bluegrass Generating Station as a Network Resource, currently pending in Docket No. ER16-598-000.

Transmission Tariff (Tariff)[4] and the Commission's policies concerning open access and transmission pricing. EKPC, which is in the process of acquiring the Bluegrass station, requested network service to allow EKPC to use the Bluegrass station output to serve native EKPC load on the EKPC system, in addition to EKPC load on the LG&E/KU system. EKPC requests that the Commission find that LG&E/KU's denial of network service is unjust and unreasonable as applied to EKPC. EKPC further seeks waiver of the LG&E/KU Tariff to adopt an amended NITSA as a non-conforming agreement to LG&E/KU's Tariff.

2. As discussed more fully below, we deny EKPC's complaint because EKPC has failed to support its request for a NITSA which differs significantly from the LG&E/KU Tariff and the Commission's policies on open access transmission. Moreover, we also find that EKPC has not shown, pursuant to section 206 of the FPA, that LG&E/KU's Tariff is unjust and unreasonable as it relates to EKPC. We also deny the requested waiver because, in the circumstances presented, EKPC has not shown that its waiver would be limited in scope or would not cause harm to third parties.

I. Background

3. EKPC, an exempt generation and transmission cooperative,[5] transferred functional control of its transmission facilities rated 100 kV and above to PJM Interconnection, L.L.C. (PJM) and is, therefore, a transmission owning member of PJM. EKPC owns and purchases 2,794 megawatts (MW) of net summer generating capability and 3,009 MW of net winter generating capability to service approximately 525,000 customers in 87 Kentucky counties through its 16 member distribution cooperatives. Most of EKPC's member load (3,000 MW, or approximately 80 percent) is physically connected to transmission facilities owned by EKPC. Because of EKPC's integration into PJM, this load is located within the PJM footprint in the EKPC Zone.

4. LG&E and KU are both public utilities. LG&E serves customers in Louisville, Kentucky and 16 surrounding counties and KU serves 77 Kentucky counties and five counties in the Commonwealth of Virginia. LG&E/KU operate under a combined

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[4] In this order, we use the term "Tariff" or "LG&E/KU Tariff" to represent LG&E/KU's Open Access Transmission Tariff (OATT) and "*pro forma* OATT" to represent the tariff promulgated by the Commission under Order Nos. 888 and 890. We also capitalize the terms "Network Load," "Point-to-Point," and "Network Resource" as those terms are capitalized and identified in LG&E/KU's Tariff.

[5] *See* 16 U.S.C. § 824(f) (2012).

Commission-approved Tariff based on the requirements of Order Nos. 888[6] and 890.[7] LG&E/KU are outside the PJM footprint and do not participate in a Regional Transmission Organization since their withdrawal from the Midcontinent Independent System Operator, Inc. (MISO) in 2006.[8]

5. The LG&E/KU and EKPC transmission systems and service territories are intertwined. LG&E/KU and EKPC share 66 interconnection points between their transmission systems. Each uses the other's facilities to serve a portion of their native-load customers through numerous load interconnection points. The small portion of EKPC's load that is physically connected to the LG&E/KU transmission system is pseudo-tied[9] to PJM and is treated as part of EKPC's internal zone load in PJM. The Commission approved these arrangements as part of its broader approval of the PJM and EKPC joint filing to integrate EKPC into PJM.[10]

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[6] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[7] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

[8] *See Louisville Gas and Electric Co*., 114 FERC ¶ 61,282 (2006).

[9] A pseudo-tied resource is a resource (i.e., generation unit or load) that is functionally transferred from the Balancing Authority (BA) in which the resource is physically located to another BA that has operational responsibility for the resource.

[10] PJM and EKPC's joint filing in connection with EKPC's integration into PJM accepted by delegated letter order issued May 22, 2013. *See East Kentucky Power Coop., Inc.*, Docket No. ER13-1177-000, *et al.* (May 22, 2013) (delegated letter order).

6. On June 26, 2015, EKPC executed an agreement with Bluegrass Generating Company, LLC to purchase the Bluegrass station, and the transaction was scheduled to close by December 31, 2015. The Bluegrass station is a 495-MW (summer capacity) natural gas-fired peaking facility, which is located within LG&E/KU's footprint. The Bluegrass station has three units: Bluegrass Unit 1, Bluegrass Unit 2, and Bluegrass Unit 3. Bluegrass Unit 3 is subject to a power purchase contract with LG&E/KU until May 1, 2019, so it will not be available to serve EKPC's load until after that date. The Bluegrass station is also subject to NO_x restrictions and can only run up to seven percent of the year's total hours. However, EKPC forecasts that the Bluegrass station will run less than six percent of the year's total hours.

II. Complaint

A. EKPC's Proposal to Integrate the Bluegrass station into EKPC's Network Load

7. In its complaint, EKPC states that it anticipates using the output from the Bluegrass station as a Network Resource to serve its member load. EKPC asserts that it will use output from the Bluegrass station chiefly to serve that portion of its load which is connected to LG&E/KU's transmission facilities.[11] However, EKPC states that there may be some hours during which the output of the Bluegrass station exceeds the amount of EKPC member load on the LG&E/KU system.[12] During these hours, EKPC asserts that it intends to deliver any Bluegrass station output that exceeds the amount of EKPC's Network Load connected to the LG&E/KU transmission facilities to EKPC's Network Load connected to the EKPC transmission facilities.

8. EKPC states that it intends to use its NITSA with LG&E/KU to integrate the Bluegrass station with EKPC's loads in the manner described above. Accordingly, EKPC asserts that it submitted a transmission service request to TranServ International, Inc. (TranServ) to designate the Bluegrass station as a Network Resource under EKPC's NITSA with LG&E/KU.[13] EKPC states that TranServ (in its capacity as LG&E/KU's Independent Transmission Organization) concluded that transmission service is available to deliver the Bluegrass station output to EKPC's Network Load on LG&E/KU's transmission system and LG&E/KU confirmed that EKPC may add the Bluegrass station as a new Network Resource under EKPC-LG&E/KU NITSA. EKPC states there is no

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[11] EKPC Complaint at 12.

[12] *Id*. at 7-8.

[13] *Id*. at 8.

dispute between the parties regarding the delivery of the Bluegrass station output to EKPC's Network Load on the LG&E/KU system. Rather, EKPC asserts the dispute is with regard to the charges LG&E/KU seek to impose for the delivery of the Bluegrass station output to EKPC's Network Load from LG&E/KU's transmission system to EKPC's system.[14]

9. EKPC asserts that it approached TranServ and LG&E/KU on several occasions to resolve the issues regarding delivery of the Bluegrass station output to EKPC's Network Loads and the compensation issue, but reached no resolution.[15] EKPC states that it had proposed, and proposes in its complaint, to modify its existing NITSA with LG&E/KU to deliver the output of the Bluegrass station that exceeds EKPC's member load connected to LG&E/KU's transmission facilities. EKPC states that the proposed amendments to the LG&E/KU-EKPC NITSA seek to: (1) establish the Point of Delivery as one or more points of interconnection between EKPC's system and LG&E/KU's system; and (2) designate a portion of EKPC's member load connected to EKPC's transmission facilities as new Network Load under the EKPC-LG&E/KU NITSA, with the amount of that load stated as the output of the Bluegrass station in any hour minus the aggregate EKPC member load served from the LG&E/KU transmission facilities.[16] EKPC asserts that, pursuant to its proposed amended NITSA, the sum of the delivery point requirements in each hour would be the basis for determining EKPC's monthly coincident peak on the LG&E/KU system, which is the demand used for billing for network service under the LG&E/KU Tariff.

10. EKPC states that LG&E/KU rejected the above proposed amendments. EKPC states LG&E/KU have instead advised EKPC that, if EKPC intends to deliver any of the Bluegrass station output to service EKPC's load on the EKPC transmission system, EKPC may purchase Point-to-Point service for the full amount of the Bluegrass station output, less the anticipated minimum load physically connected to the LG&E/KU system. EKPC asserts that LG&E/KU also suggested that EKPC could designate delivery points currently served from EKPC's own transmission system as delivery points under the LG&E/KU NITSA, in sufficient amounts so that EKPC's minimum load on LG&E's system would always be at least equal to the nominal nameplate rating of the Bluegrass station. EKPC argues that LG&E/KU's suggested arrangements would force EKPC to designate several hundred megawatts of load served by EKPC's own transmission facilities as Network Load on the LG&E/KU transmission system.

[14] *Id*. at 9.

[15] *Id*.

[16] *Id*.

11. EKPC asserts that it advised LG&E/KU that requiring EKPC to reserve 400 MW or more of Point-to-Point service or adding hundreds of megawatts of additional load as Network Load is unreasonable and expensive.[17] EKPC argues that LG&E/KU's suggestion would subject EKPC to duplicative charges as well as excessive charges for an amount of transmission service that LG&E/KU would not be providing. EKPC contends that its current payments to LG&E/KU for network service total approximately $7 million per year, but LG&E/KU's approach would increase these payments by $10 million, totaling approximately $17 million per year.[18]

B. Consistency With LG&E/KU's Tariff and Commission Policy

12. EKPC argues that its proposal is consistent with the flexibility provided for under section 31.3 of the *pro forma* OATT and the LG&E/KU Tariff.[19] EKPC asserts that section 31.3 of the *pro forma* OATT permits a network service customer to designate load that is not directly connected to the transmission provider as part of the customer's Network Load and the LG&E/KU Tariff adopts this provision essentially verbatim.[20] EKPC asserts section 31.3 of the LG&E/KU Tariff permits EKPC to designate, as part of its Network Load under a modified NITSA with LG&E/KU, its member load that is not directly connected to the LG&E/KU system. EKPC contends that the only condition for doing so is that EKPC must designate one or more Network Resources for that load, which EKPC has satisfied by identifying the Bluegrass station as that designated resource.

13. EKPC argues that the purpose underlying section 31.3 further confirms that LG&E/KU's refusal to accept EKPC's proposed amendments to the NITSA is unreasonable.[21] EKPC states that sections 31.3 and 1.25 defining "Network Load" must be read together. EKPC states that section 1.25 states, in relevant part, that a network customer may elect to designate less than its total load as Network Load but may not designate only part of the load at a discrete point of delivery.[22] EKPC states that

[17] *Id*. at 10.

[18] *Id*. at 11.

[19] *Id*. at 13.

[20] *Id*.

[21] *Id*. at 15.

[22] *Id*. at 15.

Network Load was defined in this manner in Order No. 888 to prevent customers from combining Network and Point-to-Point service at a single, discrete delivery point (e.g., a customer utilizing behind-the-meter generation).[23] EKPC contends that it is not a transmission-dependent wholesale customer with behind-the-meter generation because it is an interconnected utility. EKPC further contends that it is not seeking the proposed arrangements to avoid paying for network service because all of its load is subject to PJM's network service charges, and is not at all akin to load served from behind-the-meter generation that might escape paying for network service in the absence of this Tariff provision.

14. EKPC argues that its proposal is also consistent with Commission policy as expressed in Order No. 888-A.[24] EKPC asserts that, in Order No. 888-A, the Commission addressed pricing for transmission service to entities with load in multiple control areas. EKPC states that several commenters in that proceeding complained that, if a network service customer with resources and load in control area A also wished to serve Network Load in control area B, the customer would be required to include the control area B load as Network Load in both control areas, and that the customer would be exposed to the possibility of paying two network service charges for the control area B load. EKPC asserts that the Commission summarized the solution proposed by these commenters as:

> [T]hese entities propose that a network customer be allowed to use its network service to transmit power and energy from resources in control area A to serve load in control area B without designating the control area B load as network load for billing purposes. These entities suggest that no additional compensation should be required if such transfers to load in adjacent control areas plus other network transactions on behalf of the transmission customer in control area A do not exceed the customer's coincident demand in control area A.[25]

EKPC argues that the Commission rejected the argument that a customer receiving network service in control area A should be able to serve load in control area B without that load being designated as additional Network Load in control area A. EKPC asserts that the Commission stated that:

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[23] *Id.* (citing Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,260-61).

[24] *Id*. at 16.

[25] *Id.* at 17 (citing Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,254-55).

> [b]ecause the additional transmission service to non-designated network load outside of the transmission provider's control area is a service for which the transmission provider must separately plan and operate its system beyond what is required to provide service to the customer's designated network load, it is appropriate to have an additional charge associated with the additional service.[26]

15. EKPC argues that its proposed amended NITSA satisfies the Commission's concern about compensating the transmission provider for transmission planning and operations. EKPC asserts that the EKPC-connected load (the control area B load in the Commission's example) is designated as additional Network Load in the NITSA with LG&E/KU. EKPC contends that, whenever EKPC uses LG&E/KU's transmission service, the Network Load value for the amount of the Bluegrass station output delivered to the EKPC-connected load will be included in the determination of EKPC's coincident peak for billing under the parties' NITSA. By contrast, EKPC argues that LG&E/KU's refusal to provide flexibility would result in excessive overcharges inconsistent with the Commission's policy of encouraging transmission providers to design rates that avoid double recovery of transmission costs.[27]

16. EKPC asserts that the Commission's policy that transmission providers provide flexibility to address unique circumstances should not be lost on LG&E/KU.[28] EKPC contends that LG&E/KU are the beneficiary of the Commission's willingness to accept a NITSA with specific terms to address unusual circumstances. EKPC states that, when EKPC integrated into PJM, LG&E/KU were concerned that they would be subject to PJM charges in connection with service across EKPC's facilities to serve the LG&E/KU load that is physically connected to the EKPC system. EKPC states that the Commission accepted arrangements to treat LG&E/KU's load on the EKPC system as outside of PJM, notwithstanding EKPC's integration into PJM. Here, EPKC states that it is seeking an arrangement based on its use of LG&E/KU's system and the Commission's policies on transmission pricing.

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[26] *Id*. (citing Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,255).

[27] *Id*. at 18 (citing Order No. 888-B, 81 FERC ¶ 61,248 at 62,096. "Moreover, while we expect transmission providers to design rates that will avoid double recovery of such transmission costs or ancillary costs, we believe that this is a fact-specific issue that is appropriately addressed on a case-by-case basis").

[28] *Id*. at 20-21.

C. Consistency With Commission Precedent

17. EKPC contends that its proposed arrangements are consistent with other arrangements accepted for filing by the Commission. EKPC states that the Commission accepted for filing an amended NITSA between Southern Company Services (Southern) and Southern Mississippi Electric Power Association (SMEPA) which was similar to the circumstances here.[29] EKPC asserts that the SMEPA-Southern NITSA allows SMEPA's pseudo-tied loads to be served from various resources. EKPC states that SMEPA and Southern amended their NITSA to: (1) establish a new delivery point at the interchange point between the Southern system and the SMEPA system; and (2) calculate the Network Load at the new delivery point, which would be "a calculated value for flow into the SMEPA balancing authority area."[30] EKPC asserts that the value of the Network Load at the new delivery point would be calculated on an hourly basis similar to the energy generated by Network Resources located within the Southern balancing authority area that is not used to serve SMEPA's Network Load located within the Southern balancing authority area.

18. Next, EKPC argues the Commission accepted a similar filing between SMEPA and MISO in connection with SMEPA's integration into MISO.[31] EKPC asserts that MISO recognized the heavily intertwined systems of SMEPA, Southern and Entergy Mississippi. EKPC states that Southern is not a transmission-owning member of MISO, which meant that a portion of SMEPA's load and resources would be physically located outside the MISO region. EKPC asserts that SMEPA intended to serve that portion of SMEPA's load that is physically connected to the Southern system with resources internal to the SMEPA-MISO system and MISO did not require SMEPA to arrange for separate Point-to-Point service under the MISO Tariff to allow SMEPA to deliver its internal resources to SMEPA load on the Southern system. Instead, EKPC argues MISO patterned the SMEPA-MISO NITSA after the SMEPA-Southern NITSA and provided flexibility to SMEPA in its NITSA.

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[29] *Id*. at 20 (citing *Alabama Power Co*., Docket No. ER12-1724-000, (June 4, 2012) (delegated letter order) (SMEPA-Southern)).

[30] *Id*. (citing SMEPA filing letter at 2).

[31] *Id*. at 21 (citing *Midcontinent Indep. System Operator, Inc.*, 145 FERC ¶ 61,242 (2013) (MISO-SMEPA)).

19. EKPC contends that the approach embodied in the SMEPA-Southern NITSA and the subsequent SMEPA-MISO NITSA reflects an appropriate solution here. EKPC avers that it appropriately modeled its proposed amended NITSA with LG&E/KU after the SMEPA-Southern and SMEPA-MISO NITSAs.

D. Alternative Requests for Relief

20. EKPC argues that the Commission should find that its proposed amended NITSA is consistent with the LG&E/KU Tariff as well as the Commission's intent that transmission customers have flexibility when structuring arrangements to integrate their load and resources. However, if the Commission concludes otherwise, EKPC requests that the Commission find that the LG&E/KU Tariff is unjust and unreasonable as applied to EKPC.[32]

21. Additionally, to the extent necessary, EKPC seeks waiver of section 31.3 of the LG&E/KU Tariff to adopt the proposed amended NITSA as a non-conforming agreement. EKPC states that it meets the Commission's requirements for granting waiver requests: (1) the entity seeking the waiver acted in good faith; (2) the waiver is of limited scope; (3) a concrete problem exists that needs to be remedied; and (4) the waiver will not produce undesirable consequences.[33]

22. In this case, EKPC states it has identified a concrete problem for which a remedy is necessary. EKPC asserts that, until now, neither EKPC nor LG&E/KU had generating resources physically connected to the other's system and unless a remedy is adopted, EKPC will not be able to cost-effectively integrate its resources and loads (as network service is intended to achieve) and LG&E/KU will succeed in forcing EKPC to pay excessive and unreasonable charges for service that EKPC does not need.

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[32] *Id*. at 25.

[33] *Id*. (citing *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,069, at PP 8-9 (2011); *ISO New England Inc.*, 134 FERC ¶ 61,182, at P 8 (2011); *California Indep. Sys. Operator Corp.*,132 FERC ¶ 61,004, at P 10 (2010); *Hudson Transmission Partners, LLC*, 131 FERC ¶ 61,157, at P 10 (2010); *Pittsfield Generating Co., L.P.*, 130 FERC ¶ 61,182, at PP 9-10 (2010); *accord ISO New England Inc. EnerNOC*, 122 FERC ¶ 61,297, at P 13 (2008); *Central Vermont Public Service Corp.*, 121 FERC ¶ 61,225, at P 28 (2007); *Waterbury Generation LLC*, 120 FERC ¶ 61,007, at P 31 (2007); *Acushnet Co.*, 122 FERC ¶ 61,045, at P 14 (2008)).

23. EKPC argues that waiver of the section 31.3 of the LG&E/KU Tariff will not produce undesirable results because EKPC's proposed calculation for its new Network Load ensures that LG&E/KU will be properly compensated for EKPC's use of LG&E/KU's transmission system. Moreover, EKPC argues that the waiver is limited to the identification of EKPC's new Network Load under the LG&E/KU NITSA and the calculation of that load for purposes of arriving at the proper billing determinants.

24. Finally, EKPC states it acted in good faith by attempting to resolve this issue with TranServ and LG&E/KU but it was unable to obtain agreement concerning the proposed arrangements.

III. Notice of Filing and Responsive Pleadings

25. Notice of EKPC's complaint was published in the *Federal Register*, 80 Fed. Reg. 69,217 (2015), with answers, interventions, and protests due on or before November 23, 2015. A timely motion to intervene and answer was filed by TranServ.

26. LG&E/KU filed an answer to the complaint on November 23, 2015. On December 9, 2015, EKPC filed a motion for leave to answer and answer to LG&E/KU's answer and TranServ's answer. On December 22, 2015, LG&E/KU filed a motion for leave to answer and limited answer (December 22 answer).

A. LG&E/KU Answer

27. In their answer, LG&E/KU assert they have properly interpreted their Tariff consistent with Order No. 888. LG&E/KU state that there is no dispute between them and EKPC with respect to the designation of the Bluegrass station as a Network Resource to serve EKPC's discrete Network Load on LG&E/KU's transmission system.[34] However, LG&E/KU explain that EKPC is proposing to take any hourly positive energy imbalance on the LG&E/KU transmission system and deem it as load at the border between the LG&E/KU and EKPC systems.[35] LG&E/KU further explain that the Bluegrass station load output is not based on any physical customer demand for

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[34] In Docket No. ER16-598-000, in which LG&E/KU seek to amend their NITSA with EKPC to add the Bluegrass station as a Network Resource, LG&E/KU include the following statement authorized by EKPC:

> "…EKPC does not oppose this set of amendments to its NITSA in order to add the Bluegrass Units as Network Resources."

[35] LG&E/KU Answer at 11.

electricity but simply represents a positive imbalance between EKPC's Bluegrass station Network Resources and its physical Network Loads.[36]

28. LG&E/KU state that no customer should get preferential use of the transmission system. LG&E/KU explain that EKPC is seeking customer-specific transmission service that violates the requirements of the Tariff and would adversely impact the provision of non-discriminatory transmission service to other LG&E/KU transmission customers.[37] Therefore, LG&E/KU believe that they acted rationally in denying EKPC's proposed form of hybrid service.[38]

29. LG&E/KU contend that to be able to utilize network integration transmission service, the transmission customer must identify discrete Network Load at a point of delivery. Further, LG&E/KU contend that the customer does not have to identify its entire load, but must include the entire load associated with the point of delivery.[39] LG&E/KU argue that EKPC fails to meet both of these requirements.[40] LG&E/KU explain that energy imbalance located on an adjacent transmission system is not a discrete load in another transmission system.[41]

30. LG&E/KU maintain that they explained to EKPC its two options to deliver output of the Bluegrass station over and above the current amount of designated Network Load: (1) request and purchase Point-to-Point service in any desired amount sufficient to deliver the desired level of output of the Bluegrass station; or (2) designate any number of additional load points within EKPC's system as LG&E/KU Network Load to increase EKPC's minimum designated load to equal the desired level of output of the Bluegrass station, and be billed for that load under network integration transmission service. LG&E/KU explain that, even though EKPC and LG&E/KU may have heavily-integrated systems, it does not undermine the requirements of the Tariff.[42]

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[36] *Id*. at 12.

[37] *Id*.

[38] *Id*.

[39] *Id*. at 13.

[40] *Id*. at 14.

[41] *Id*. at 15.

[42] *Id.* at 16.

31. LG&E/KU state that EKPC's proposal is not consistent with the Commission's directives in Order Nos. 888, 888-A and 888-B. LG&E/KU state that, in a recently issued order, the Commission found the customer's "request to designate less than its entire load as network load violates" the *pro forma* OATT and Commission policy.[43] Moreover, LG&E/KU state that the Commission never intended load ratio share to be a measure of positive generation imbalance, but instead based on the requirements of the physical demand at discrete metered points.[44] LG&E/KU contend that EKPC's determination to be charged only based on generator imbalances within its control is the type of gaming that the Commission sought to prevent by requiring that all load at discrete points be designated.[45]

32. LG&E/KU contend that, aside from EKPC not identifying discrete portions of EKPC's load in PJM that would be identified as Network Load under the Tariff, there are also no proposed limitations that would prevent PJM from dispatching the Bluegrass station to serve demand elsewhere in PJM. In addition, LG&E/KU argue that there is no assurance that the winter peaking need identified by EKPC is consistent with PJM as a whole.[46]

33. LG&E/KU state that the Commission should deny any attempt to modify the Tariff to permit the proposed extremely inefficient use of the LG&E/KU transmission system.[47] LG&E/KU explain that EKPC's proposed service request would require

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[43] *Id*. at 19 (citing *Ariz. Pub. Serv. Co.*, 151 FERC ¶ 61,191, at P 26 (2015) (*Arizona Public Service*); *see also Fla. Municipal Power Agency v. Fla. Power & Light Co.*, 65 FERC ¶ 61,125, *reh'g dismissed*, 65 FERC ¶ 61,372 (1993), *final order*, 67 FERC ¶ 61,167 (1994), *clarified*, 74 FERC ¶ 61,006 (1996), *reh'g denied*, 96 FERC ¶ 61,130 (2001), *aff'd, sub nom. Fla. Municipal Power Agency v. FERC*, 315 F.3d 362 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 946 (2003); *Fla. Power & Light Co.*, 105 FERC ¶ 61,287 (2003), *order on reh'g*, 106 FERC ¶ 61,204 (2004), *remanded*, *Fla. Municipal Power Agency v. FERC*, 411 F.3d 287 (D.C. Cir. 2005), *order on remand*, 113 FERC ¶ 61,290 (2005), *order on reh'g*, 116 FERC ¶ 61,012 (2006); *Ameren Servs. Co. v. Prairieland Energy, Inc.*, 131 FERC ¶ 61,125 (2010); *Consumers Energy Co.*, 86 FERC ¶ 63,004, at 65,032 (1999), *aff'd*, Opinion No. 456, 98 FERC ¶ 61,333 (2002)).

[44] *Id*. at 17.

[45] *Id*. at 17-18.

[46] *Id*. at 20.

[47] *Id*. at 20-21.

LG&E/KU to set aside transmission capacity on the applicable flowgates and because EKPC is not designating load as required under the Tariff for network integration transmission service, a reliable load forecast will not be available for the proposed Bluegrass station delivery point.[48] Therefore, LG&E/KU contend that to ensure deliverability, prevent oversubscription of firm transmission service, and limit reliance on transmission loading relief procedures, this transmission capacity would be withheld from use by other potential customers even though, by EKPC's own admission, the Bluegrass station is environmentally restricted to run only seven percent of the hours in a year.[49] In addition, LG&E/KU state that, unlike physical load that is predicted on historical usage patterns and meteorological conditions, EKPC could vary the imbalance amounts exported off the LG&E/KU transmission system based on its use of its portfolio of Network Resources. Moreover, LG&E/KU argue that this variability compromises effective planning of the LG&E/KU system.[50]

34. LG&E/KU explain that EKPC proposes that its Bluegrass station delivery point deliveries would be calculated on an after-the-fact basis, which complicates the ability to release this predominately unused transmission capacity for non-firm use.[51] Further, LG&E/KU argue that there is no ability under the Tariff to use network integration transmission service to deliver excess energy not associated with identified, real Network Loads.[52] LG&E/KU also state that, while EKPC claims that it would be paying for service twice, the Commission determined in Order No. 888-A that when service across multiple control areas is implicated, it is appropriate to have an additional charge associated with the additional service.[53]

[48] *Id*. at 21.

[49] *Id*. at 21-22. For example, LG&E/KU state that EKPC's request would restrict transfer capacity from LG&E/KU to PJM by up to 283 MW and after May 2019, by up to 476 MW to support any potential positive energy imbalance EKPC would have between its Network Resources and Network Load in that hour.

[50] *Id*. at 23.

[51] *Id.* at 22.

[52] *Id*. at 26.

[53] *Id*. at 27.

35. LG&E/KU argue that EKPC's statements about its potential costs are unsupported and do not withstand scrutiny.[54] LG&E/KU state that it reviewed EKPC's actual load for the period July 1, 2014 to June 30, 2015 and identified the highest 600 hours of load across 64 unique days in the winter months – the periods most likely to require the services of a peaking resource such as the Bluegrass station. LG&E/KU then explain their calculations for different types of Point-to-Point service and that regardless of the exact calculations, the cost to EKPC for transmission service could be significantly less than the additional $10 million EKPC claims in its complaint.[55]

36. LG&E/KU contend that EKPC has not met its burden to show that LG&E/KU's Tariff is unjust and unreasonable. Moreover, LG&E/KU state that there is no Commission precedent that would warrant overturning the plain language of the Tariff.[56] Further, LG&E/KU argue that EKPC fails to identify the harms its preferential treatment would impose on other transmission customers and LG&E/KU as the non-discriminatory transmission provider.[57] In addition, LG&E/KU explain that EKPC's request would set a new precedent for transmission providers and other transmission customers whereby network integration transmission service could be used to support transactions outside of service to discrete Network Loads.[58]

37. LG&E/KU state that EKPC notes that, in 2012, the Commission accepted for filing the SMEPA-Southern NITSA by delegated authority. However, LG&E/KU note that delegated letter orders are not precedential.

38. Finally, LG&E/KU argue that EKPC has failed to meet the four requirements necessary to obtain a waiver. LG&E/KU explain that EKPC's request for a preferential, non-conforming NITSA would have a profound negative effect on other transmission customers and impair efficient utilization of the LG&E/KU transmission system.[59] Further, LG&E/KU contend that EKPC's preferential and improper use of a NITSA

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[54] *Id*. at 24.

[55] *Id*. at 25.

[56] *Id*. at 28.

[57] *Id*. at 23.

[58] *Id*. at 24.

[59] *Id*. at 30.

would negatively affect other customers through a reduction of transmission capacity.[60] LG&E/KU state that EKPC's request is also not limited in scope because the termination date of the agreement is 2026, and therefore, the waiver would be in effect for eleven years.[61] LG&E/KU state that the Commission should reject EKPC's complaint and request for waiver.

B. TranServ Answer

39. In its answer, TranServ states that it does not agree with EKPC that its request to include a new Network Load representing the difference between the output of the Bluegrass station and its LG&E/KU-connected load is consistent with the provisions of LG&E/KU's Tariff. TranServ asserts the relevant language in section 31.3 of LG&E/KU's Tariff (per the Commission's *pro forma* OATT) provides that a network customer wishing to designate Network Load that is not physically interconnected to the transmission owner's system may do so pursuant to two options: (1) including the entire load as Network Load and designating Network Resources in connection with such load; or (2) excluding the entire Network Load and purchasing Point-to-Point service to serve that load. TranServ argues that EKPC, however, seeks a third option which would define "Network Load" so as to include only that load on EKPC's system that is being served by the Bluegrass station during a particular hour.

40. TranServ states that, as acknowledged by EKPC, section 31.3 of the Tariff must be read in conjunction with the definition of Network Load in the Tariff. TranServ argues that, upon review, EKPC's proposal is plainly inconsistent with the language in the Tariff. Significantly, TranServ asserts that EKPC fails to identify Network Load at discrete "Point(s) of Delivery," which is defined as a point or points on the transmission system where capacity and energy transmitted will be made available to the receiving party.[62] TranServ states that, instead, EKPC proposes what amounts to a "virtual" point of delivery between the LG&E/KU and EKPC systems that represents the hourly difference (when positive) between the output of the Bluegrass station and the amount of EKPC load directly connected to the LG&E/KU system.[63]

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[60] *Id*. at 32.

[61] *Id*. at 31.

[62] TranServ Answer at 7 (citing LG&E/KU Tariff, Section 1.37, "Point(s) of Delivery").

[63] *Id*. at 7-8.

41. TranServ argues that, despite the inconsistencies between EKPC's proposal and the actual language of the LG&E/KU Tariff, EKPC contends that Commission policy and precedent supports a broader reading of section 31.3 and the definition of Network Load. TranServ claims, however, that none of the precedent cited by EKPC supports such a reading. First, TranServ asserts that EKPC argues that its proposal is consistent with the Commission's underlying purpose in defining Network Load so as to prohibit partial designation. TranServ states that EKPC claims that: (1) the Commission intended to prevent customers from combining Network and Point-to-Point service at a single, discrete delivery point, such as a customer using behind-the-meter generation, and (2) this limitation should not apply to EKPC because it is not a transmission-dependent wholesale customer with behind-the-meter generation. TranServ states that the Commission has never stated that the limit on partial designation only applies to "transmission-dependent wholesale customers" as opposed to "interconnected utilities." TranServ avers that the rule against partial designation of Network Load applies to EKPC in the same manner as it does to all other transmission customers.

42. Next, TranServ states EKPC argues that its proposal is consistent with section 31.3 because the Commission, in Order No. 888-A, stated that a customer receiving network service in control area A should be able to serve load in control area B for an "additional charge," and EKPC proposed to pay an "additional charge" for any difference between the Bluegrass station output and its LG&E/KU-connected load.[64] TranServ argues, however, it is clear from Order No. 888-A that the Commission used the term "additional charge" to specifically refer to the charge associated with a transmission customer obtaining Point-to-Point service to serve its external load, and not some alternative pricing option.[65] TranServ contends this approach is reflected in section 31.3 of the Tariff which provides transmission customers with only two options for obtaining service for an external load. As such, TranServ argues there is no merit to EKPC's suggestion that LG&E/KU should be compelled to, pursuant to its Tariff, provide EKPC transmission service on such terms.

43. Finally, TranServ states that EKPC points to two NITSAs accepted by the Commission which EKPC claims reflect the same solution that it is proposing to the Commission. TranServ argues that the SMEPA-Southern NITSA was accepted by the Commission in a delegated letter order so it cannot be used as binding precedent. TranServ states that the SMEPA-MISO NITSA did not address the type of arrangement

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[64] *Id*. at 9 (citing EKPC Complaint at 17-18).

[65] *Id*. (citing Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,255, finding that a transmission customer could exclude a discrete Network Load located in another control area "and to serve such load using point-to-point transmission service").

proposed by EKPC, but rather simply involved the Commission granting MISO's proposal to allow a customer to designate Network Load that is not physically connected with its transmission system, per section 31.3 of the *pro forma* OATT.

C. **EKPC Answer**

44. In its answer, EKPC states that its proposal seeks to integrate its resources and load, consistent with the LG&E/KU Tariff, not split its load. EKPC asserts that LG&E/KU argue as though: (1) EKPC is simply a load serving entity on the LG&E/KU system with behind-the-meter generation; (2) LG&E/KU perform balancing functions for EKPC; and (3) EKPC is attempting to construct arrangements that would enable it to avoid paying for service. EKPC maintains that all of these arguments are false. EKPC states that its reasonable legitimate request is consistent with LG&E/KU's Tariff and that it proffers a reasonable solution to the unique system configuration of EKPC and LG&E/KU.

45. EKPC argues that its proposed NITSA amendments will not create transmission planning complications for LG&E/KU. EKPC states that, while it is true that LG&E/KU must calculate and post available transmission capacity, release unscheduled firm transmission service for non-firm use, and plan their system to support the needs of Network Customers as well as Native Load, its request does not inhibit LG&E/KU's performance of any of these activities. EKPC also asserts that the data and information LG&E/KU claim to need is already available to them.[66]

46. EKPC claims that, contrary to LG&E/KU's arguments otherwise, it is not seeking to "game" network service or "split" its load. EKPC states LG&E/KU's answer is premised on the misapplication of policy designed to prevent customers from avoiding full payment obligations for network service. EKPC states that LG&E/KU cite to *Arizona Public Service* and other cases for their claim that EKPC's request violates long-standing Commission policy.[67] But, EKPC argues that every case relied on by

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[66] EKPC states that the Tennessee Valley Authority (TVA) is currently responsible for calculating the initial available flowgate capability (flow capabilities) for LG&E/KU and that TranServ uses the initial values calculated by TVA to determine final flow capabilities for the LG&E/KU system. EKPC asserts that TVA receives daily load forecast information from PJM for the EKPC system. Therefore, EKPC argues that TVA, on behalf of LG&E/KU, now receives each day an expected load forecast for EKPC for each hour of the next seven days, for the peak hour of each day for days eight through 31, and for the peak hour of each month for months two through 18.

[67] EKPC Answer at 15.

LG&E/KU in their answer involved a customer's effort to avoid network service charges. EKPC argues that all of EKPC's load (regardless of which system to which the load is connected) is covered under and pays for network service.

47. EKPC argues that its request is not, as suggested by LG&E/KU, an "imbalance service." EKPC states that the service requested by EKPC is neither premised upon nor involves "imbalance." Moreover, EKPC asserts that its request does not involve "fictitious" or "virtual" load or delivery points. EKPC states that it seeks to use the NITSA to integrate real Network Load and resources at real delivery points and that all of its resources are physically located in or pseudo-tied to a single balancing area (i.e., the PJM Balancing Area).

48. Finally, EKPC argues that it should only pay LG&E/KU for the network service they provide. EKPC states that the Commission's policies on transmission planning and pricing protect EKPC from overpaying LG&E/KU in this case. EKPC claims that LG&E/KU would have EKPC pay for hundreds of megawatts of duplicative charges for firm Network or Point-to-Point services that LG&E/KU would not be providing.

D. LG&E/KU December 22 Answer

49. In their December 22 answer, LG&E/KU state that the plain language of the Tariff warrants denial of EKPC's complaint because it is a longstanding principle of Commission jurisprudence that when a tariff is unambiguous, it is controlling.[68] LG&E/KU argue that, while EKPC alleges that its transmission service request is consistent with LG&E/KU's Tariff, TranServ (in its capacity as LG&E/KU's Independent Transmission Organization) does not agree with EKPC that its proposal is consistent with section 31.3 and section 1.25 of the Tariff. LG&E/KU argue that, for TranServ, the proposal to provide service in such a manner is plainly inconsistent with the terms of LG&E/KU's Tariff. Moreover, LG&E/KU argue that the Tariff should not be interpreted in such a manner that renders one of its terms meaningless. LG&E/KU assert that EKPC's complaint, which is premised on a violation of these fundamental principles, should be summarily rejected.

50. LG&E/KU argue that EKPC's proposal, if approved, would set an unwarranted precedent regarding the use of network integration transmission service and would allow EKPC to receive preferential treatment to address its specific circumstances. LG&E/KU argue that this would be contrary to the concept of non-discriminatory open access service. Moreover, LG&E/KU assert that network integration transmission service is a

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[68] LG&E/KU December 22 Answer at 4-5 (citing *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998) (*Koch Gateway*)).

demand-based service based on load-ratio shares; however, EKPC seeks to convert this to a hybrid demand and generation-based service. Therefore, LG&E/KU argue the Commission should reject EKPC's attempt to change the nature of its network integration transmission service.

IV. Discussion

A. Procedural Matters

51. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motion to intervene serves to make the entity that filed it a party to the proceeding.

52. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We accept EKPC's and LG&E/KU's answers because they have assisted us in our decision-making process.

B. Substantive Matters

53. As discussed below, we deny EKPC's complaint because EKPC has failed to support its request for an amended NITSA that differs significantly from LG&E/KU's Tariff. Moreover, we also find that EKPC has not shown, pursuant to section 206 of the FPA, that LG&E/KU's Tariff is unjust and unreasonable as it relates to EKPC. We also deny the requested waiver because, in the circumstances presented, EKPC has not shown that its waiver would be limited in scope or that it would not cause harm to third parties.

1. Consistency With LG&E/KU's Tariff and Commission Policy

54. EKPC asserts that its proposed amendment to the EKPC-LG&E/KU NITSA to designate new Network Load and identification of a new delivery point is consistent with section 31.3 of LG&E/KU's Tariff. EKPC further argues that LG&E/KU's refusal to accept the amended NITSA both violates section 31.3 of the Tariff and is contrary to Commission policy on open access transmission. We disagree. Based on our review of the language of the provisions at issue, we find that LG&E/KU's refusal to accept EKPC's proposed amended NITSA is consistent with the LG&E/KU Tariff and is consistent with Commission policy.

55. Section 31.3 of LG&E/KU's Tariff provides:

> This section applies to both initial designation pursuant to Section 31.1 and the subsequent addition of new Network Load not physically interconnected with the Transmission Owner. To the extent that the Network Customer desires to obtain transmission service for a load outside the Transmission Owner's Transmission System, the Network Customer

> shall have the option of (1) electing to include the entire load as Network Load for all purposes under Part III of the Tariff and designating Network Resources in connection with such additional Network Load, or (2) excluding that entire load from its Network Load and purchasing Point-to-Point Transmission Service under Part II of the Tariff. To the extent that the Network Customer gives notice of its intent to add a new Network Load as part of its Network Load pursuant to this section the request must be made through a modification of service pursuant to a new Application.[69]

56. In interpreting section 31.3, EKPC is correct that it must be read together with section 1.25 defining "Network Load." Specifically, section 1.25 of the LG&E/KU Tariff defines Network Load as:

> The load that a Network Customer designates for Network Integration Transmission Service under Part III of the Tariff. The Network Customer's Network Load shall include all load served by the output of any Network Resources designated by the Network Customer. A Network Customer may elect to designate less than its total load as Network Load but *may not designate only part of the load at a discrete Point of Delivery*. Where an Eligible Customer has elected *not to designate a particular load at discrete points of delivery as Network Load, the Eligible Customer is responsible for making separate arrangements under Part II of the Tariff for any Point-to-Point Transmission Service* that may be necessary for such non-designated load.[70]

Reading the two sections together, as suggested by EKPC, confirms that a customer may designate its entire load as Network Load and designate Network Resources to serve that load or the customer may exclude the entire load and purchase Point-to-Point service to serve that load. In its proposal, EKPC suggests creating a Point or Points of Delivery between the LG&E/KU and EKPC transmission systems that represent the hourly difference between the output of the Bluegrass station and the amount of EKPC's load directly connected to the LG&E/KU system when that load is less than the output of the Bluegrass station. This proposal is not contemplated under the language of the Tariff which requires EKPC to either designate its entire load (LG&E/KU load plus individual delivery points inside its own network) as Network Load in all hours, or arrange for

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[69] Louisville Gas & Electric Tariff Part III_31, Part III_31 Designation of Network Load, 1.0.0.

[70] Louisville Gas & Electric Tariff Part 1_01, Part 1_01 Definitions, 1.0.0 (emphasis added).

alternative transmission service. Instead, EKPC argues that it has a right to designate Network Load that is not based on the entire load served at discrete points of delivery but instead reflects its use of the LG&E/KU system on a sporadic basis to deliver excess generation from the Bluegrass facility to the point of delivery between the LG&E/KU and EKPC transmission systems. This type of load designation is not contemplated by the Tariff or Commission policy, and as such, EKPC is not allowed to split its load in the manner proposed.

57. By seeking to split its load on a sporadic basis, EKPC would limit its payment for network service while requiring LG&E/KU to hold transmission service in reserve for EKPC to accommodate its maximum potential delivery of excess generation from the Bluegrass facility to the EKPC transmission system. EKPC proposes to designate a portion of the load on its own transmission system as LG&E/KU Network Load based upon the output of the Bluegrass station in any hour minus the EKPC load on the LG&E/KU transmission system. EKPC would, therefore, limit its transmission payments based on its hourly use for such deliveries. At the same time, since LG&E/KU would have difficulty predicting in advance the amount of transmission that EKPC would use for such deliveries in any hour, it would have to hold transmission service for EKPC for which it may not receive compensation. We do not read section 31.3 of the Tariff as requiring LG&E/KU to permit a customer to purchase network service solely on such a basis. Under section 31.3, EKPC would have the option of designating Network Load based upon the entire load served at discrete points of delivery or purchasing firm or non-firm Point- to-Point service. Either option would ensure that EKPC pays for the transmission service that LG&E/KU must hold for EKPC's potential use of the LG&E/KU system.

58. EKPC further contends that its interpretation of section 31.3 and section 1.25 (i.e., Network Load) is consistent with Commission policy, as expressed in the *pro forma* OATT and Order Nos. 888 and 888-A. Specifically, EKPC avers that, since it is not a transmission-dependent wholesale customer utilizing behind-the-meter generation, the restrictions on the amount of load that may be designated as Network Load at discrete points of delivery do not apply to EKPC. We do not find EKPC's argument to be persuasive. There is nothing in sections 31.3 or 1.25 of the Tariff (which adopts the *pro forma* OATT almost verbatim) or Order Nos. 888 and 888-A that requires LG&E/KU to permit partial designation of Network Load. Moreover, nothing in Order Nos. 888,

888-A and the *pro forma* OATT suggests that transmission customers such as EKPC would be specifically exempt from the limitation against partial designation.[71]

59. In Order No. 888, the Commission addressed the issue of designating only a portion of a transmission customer's Network Load:

> [W]e have stated that if a customer wishes to exclude a particular load at discrete points of delivery from its load ratio share of the allocated cost of the transmission provider's integrated system, it may do so. Customers that elect to do so, however, must seek alternative transmission service for any such load that has not been designated as network load for network service. This option is also available to customers with load served by "behind the meter" generation that seek to eliminate the load from their network load ratio calculation.[72]

60. In Order No. 888-A, in clarifying its definition of Network Load, the Commission stated that, "[t]he bottom line is that all potential transmission customers, including those with generation behind the meter, must choose between network integration transmission service and point-to-point transmission service."[73] Moreover, the Commission stated:

> The concept of allowing a "split system" or splitting a discrete load is antithetical to the concept of network service. A request for network service is a request for the integration of a customer's resources and loads. Quite simply, a load at a discrete point of delivery cannot be partially integrated—it is either fully integrated or not integrated. Furthermore, such a split system creates the potential for a customer to "game the system" thereby evading some or all of its load-ratio cost responsibility for network services.[74]

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[71] *See also Duke Power Co.*, 81 FERC ¶ 61,010 (1997) (where the Commission acknowledges that "order Nos. 888 and 888-A do not permit a network customer to take a combination of both network and point-to-point transmission service to serve the same discrete load.").

[72] Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,736.

[73] Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,260.

[74] *Id.* at 30,259.

This language shows that the Commission used the "behind-meter-generation" language as an example of transmission customers subject to the provision but it did not explicitly exclude, as suggested by EKPC, other transmission customers from this provision. Finally, the Commission asserted that it would allow network customers to either designate all of a discrete load as Network Load under network integration transmission service or exclude the entirety of a discrete load from network service and serve such load with the customer's "behind-the-meter" generation and/or through any Point-to-Point service.[75]

61. Next, EKPC argues that Commission precedent favors its interpretation of the definition of Network Load and section 31.3 because the Commission has accepted similar arrangements from other entities. However, the cases cited by EKPC do not support its arguments that LG&E/KU is required to accept EKPC's proposal to add the Bluegrass station. *SMEPA-Southern*, cited by EKPC, involved an amendment to the parties' NITSA that was accepted by delegated letter order and therefore does not reflect binding Commission precedent.[76]

62. MISO-SMEPA, also cited by EKPC, involves the Commission's acceptance of a non-conforming NITSA between MISO and SMEPA that allowed SMEPA to designate load not physically connected with its MISO's transmission system as Network Load. At the time of the filing, section 31.3 of MISO's Tariff required all Network Load to be physically interconnected to the MISO transmission system.[77] The MISO provision was an approved deviation from the *pro forma* OATT which provides option of designating Network Load not physically interconnected with the transmission provider's system. Section 31.3 of LG&E/KU's Tariff already has a provision allowing this. However, as it concerns EKPC's proposal in this proceeding, the facts in MISO-SMEPA are not similar to facts at issue here because SMEPA did not request to designate less than its entire load at discrete points of delivery.

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[75] *Id.* at 30,260-30,261.

[76] *See Gas Transmission Northwest Corporation v. FERC*, 504 F.3d 1318, 1320 (D.C. Cir. 2007) ("FERC's acceptance of a pipeline's tariff sheets does not turn every provision of the tariff into 'policy' or 'precedent'"); *Wolverine Power Supply Coop., Inc.*, 135 FERC ¶ 61,165, at P 15 & n.22 (2011) (actions taken by Commission pursuant to delegated authority do not constitute Commission precedent).

[77] *See* MISO-SMEPA, 145 FERC ¶ 61,242 at 4 (MISO's Tariff section 31.3 provides "all Network Load must be physically interconnected with a Transmission Owner or ITC within the geographic area in which facilities subject to the Tariff are located").

63. Therefore, based on the foregoing, we find it reasonable for LG&E/KU to interpret the LG&E/KU Tariff as preventing the designation of part of the load at discrete points of delivery on the EKPC transmission system as Network Load. The alternatives for providing customers transmission service for such external load are spelled out in section 31.3 of LG&E/KU's Tariff.

64. EKPC also argues that, if the Commission determines that its proposal to add the Bluegrass facility is not consistent with the provisions of the LG&E/KU Tariff, then the Commission should find that LG&E/KU's Tariff is unjust and unreasonable as applied to EKPC. As the complainant, EKPC bears the burden of showing under FPA section 206 that LG&E/KU's Tariff is unjust and unreasonable.[78] We find that EKPC has not met its burden. As stated previously, section 31.3 and the definition of Network Load in LG&E/KU's Tariff mirrors the language in the Commission's *pro forma* OATT. The Commission created the *pro forma* OATT as a model for utilities to provide open access transmission service to customers. The Commission has also stated that "we did not intend for each and every customer of a transmission provider to have the opportunity to demand that the transmission provider create alternative services which benefit that particular customer."[79] EKPC apparently seeks a determination that LG&E/KU's Tariff should not apply to EKPC based on what it suggests are the unusual circumstances associated with its use of the LG&E/KU system and the accommodations we provided LG&E/KU in the past.[80] However, we find no basis for making such a finding here because EKPC has not justified why such a departure from the *pro forma* OATT and the LG&E/KU Tariff is necessary due to its situation.

[78] *See* 16 U.S.C. § 824e(b) (2012).

[79] *Fla. Power & Light Co.*, 113 FERC ¶ 61,290, at P 6 (2005).

[80] *See Fla. Power & Light Co.*, 116 FERC ¶ 61,012, at P 14 (2006) ("Order No. 888 and its *pro forma* transmission tariff provide for network integration and point-to-point transmission service. It is one thing for a transmission provider to propose to offer an additional service to its customers. It is another, very different matter for each individual transmission customer to seek transmission services uniquely tailored to its particular needs. Allowing services and rates unique to every customer would undercut the primary goal of Order No. 888 of providing for non-discriminatory open access transmission.").

2. **Alternative Request for Relief**

65. Next, EKPC states that, if the Commission concludes that EKPC's suggested relief is not consistent with the LG&E/KU Tariff, it requests a waiver of section 31.3 in order to adopt the amended NITSA as a non-conforming agreement. The Commission has previously granted waivers of tariff provisions when: (1) the entity seeking the waiver acted in good faith; (2) the waiver is of limited scope; (3) a concrete problem needed to be remedied; and (4) the waiver does not have undesirable consequences, such as harming third parties.[81] EKPC argues that its request for waiver meets these criteria. We disagree.

66. Specifically, we find that EKPC has failed to demonstrate that its requested waiver would not have undesirable consequences, such as harming third parties. We are persuaded by LG&E/KU's argument that EKPC's request for a non-conforming NITSA could have a negative effect on other transmission customers through a reduction of transmission capacity and could impair efficient utilization of the LG&E/KU transmission system. Accordingly, we deny EKPC's requested waiver.

The Commission orders:

EKPC's complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[81] *See Clean Energy Future – Lordstown, LLC*, 152 FERC ¶ 61,076 (2015), *see also Air Energy TCI Inc.*, 143 FERC ¶ 61,172 (2013)*; Aragonne Wind, LLC*, 145 FERC ¶ 61,106 (2013); *WM Renewable Energy, L.L.C.*, 134 FERC ¶ 61,022 (2011). *Central Vermont Pub. Serv. Corp.*, 121 FERC ¶ 61,225 (2007); *Waterbury Generation LLC*, 120 FERC ¶ 61,007 (2007); *Acushnet Co.*, 122 FERC ¶ 61,045 (2008).