

168 FERC ¶ 61,152
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Louisville Gas and Electric Company
Kentucky Utilities Company

Docket Nos. EC98-2-002
ER18-2162-001

ORDER DENYING REHEARING
AND GRANTING CLARIFICATION

(Issued September 10, 2019)

1. On April 22, 2019, American Municipal Power, Inc. (AMP), the Kentucky Municipals,¹ and KMPA² each filed requests for rehearing and clarification (Requests for Rehearing) of a March 21, 2019 order.³ In that order, the Commission conditionally granted a request filed by Louisville Gas and Electric Company (LG&E) and Kentucky Utilities Company (KU) (together, LG&E/KU) pursuant to section 203(b) of the Federal Power Act (FPA)⁴ to remove a market power mitigation measure imposed to

¹ Kentucky Municipals are the Kentucky Municipal Energy Agency and each of its members; the Kentucky Municipal Power Agency and its two members, the Electric Plant Board of the City of Paducah (Paducah) and the Princeton Electric Plant Board (Princeton) (collectively, KMPA); and Duck River Electric Membership Corporation of Shelbyville, Tennessee (Duck River). The Kentucky Municipal Energy Agency's members are the Frankfort Electric and Water Plant Board (Frankfort); Berea College (Berea); the Cities of Barbourville, Bardwell, Benham, Corbin, Falmouth, Madisonville, Paris, and Providence, Kentucky; and Owensboro Municipal Utilities (Owensboro). *Louisville Gas and Elec. Co.*, 166 FERC ¶ 61,206, at P 14 n.30 (2019) (March Order).

² KMPA joins Kentucky Municipals' request for rehearing and clarification. KMPA Request for Rehearing at 1.

³ March Order, 166 FERC ¶ 61,206.

⁴ 16 U.S.C. § 824b(b) (2018).

resolve horizontal market power concerns originating from LG&E/KU's merger in 1998 (Merger) and from LG&E/KU's subsequent withdrawal from the Midcontinent Independent System Operator, Inc. (MISO) in 2006. For the reasons discussed below, we deny rehearing but grant clarification.

I. Background

A. The Merger

2. In 1998, the Commission approved the Merger subject to several conditions. At the time, LG&E/KU's analysis indicated that the Merger would increase market concentration beyond the thresholds specified in the Merger Policy Statement.⁵ The increase in market concentration was due to customers in the KU destination market (KU Destination Market)⁶ losing LG&E as a viable competitor to KU as a result of the Merger. To address this concern, LG&E/KU committed to mitigate the potential for increased horizontal market power in the KU Destination Market through several mitigation measures and ratepayer protection mechanisms.⁷

3. The Commission concluded that LG&E/KU's proposed measures, including its participation in the then-newly formed MISO, would ensure that the Merger would not

⁵ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, at 30,129 (1996) (cross-referenced at 77 FERC ¶ 61,263) (Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997).

⁶ At the time of the Merger, the KU Destination Market was comprised of a group of 12 customers that had requirements contracts with KU (KU Requirements Customers). The KU Requirements Customers included the Cities of Barbourville, Bardstown, Bardwell, Benham, Corbin, Falmouth, Madisonville, Nicholasville, Paris, Providence, Frankfort, and Berea. *Louisville Gas and Elec. Co.*, 82 FERC ¶ 61,308, at 62,215 n.7 (1998) (Merger Order).

⁷ Specifically, LG&E/KU proposed its joint membership in MISO together with selling energy through a trust intended to prevent LG&E/KU from withholding supply to drive prices above competitive levels in the KU Destination Market until 2005 and reducing the base rates of the KU Requirements Customers. *Id.* at 62,222. In addition, LG&E/KU filed for approval to transfer operational control over its transmission facilities to MISO, which was known as the Midwest Independent System Operator, Inc. at the time.

adversely affect competition.⁸ The Commission explained that independent system operators like MISO could improve market competition by ensuring the expansion of geographic markets by eliminating pancaked transmission rates in regions. The Commission found that, through the availability of transmission service at a single rate, the number of suppliers able to reach markets, such as the KU Destination Market, would increase, thereby lowering market concentration.⁹ The Commission noted, however, that it would evaluate any subsequent request by LG&E/KU to withdraw from MISO in relation to its effect on competition in the KU Destination Market, and that it would use its authority under FPA section 203(b) to address any additional concerns that such a request would raise. The Commission stated:

Our approval of the merger is based on [LG&E/KU's] continued participation in [MISO]. If [LG&E/KU] seek[s] permission to withdraw from [MISO] proceedings or the ISO once it is operating, we will evaluate that request in light of its impact on competition in the [KU Destination Market], use our authority under Section 203(b) of the FPA to address any concerns, and order further procedures as appropriate. We find that the combination of [LG&E/KU's] commitments and [its] continued participation in [MISO] satisfies our concerns regarding the merger's impact on competition. Thus, we believe there is no reason to investigate competitive issues further.¹⁰

B. LG&E/KU's Withdrawal from MISO

4. In 2005, after consummating the Merger and joining MISO, LG&E/KU filed a proposal to withdraw its transmission facilities from MISO. In evaluating the proposal, the Commission noted that, among other things, the proposal must satisfy the concerns

⁸ *Id.* at 62,214. The Commission also found that, with additional commitments not relevant here, the Merger would not affect vertical competition, rates, or regulation. *Id.* at 62,224-25.

⁹ *Id.* at 62,222.

¹⁰ *Id.* at 62,222-23.

underlying the conditions established by the Commission in connection with the Merger, “particularly those relating to . . . rate de-pancaking.”¹¹

5. As part of its proposal, LG&E/KU proposed to maintain de-pancaked transmission rates in its stand-alone open access transmission tariff (LG&E Tariff). Specifically, LG&E/KU proposed that transmission rates for new service into and through its system from MISO would remain de-pancaked, subject to certain exceptions and reciprocal treatment from MISO.¹² LG&E/KU claimed that maintaining de-pancaked rates would address the horizontal market power issues identified by the Commission in the Merger Order.

6. The Commission agreed with LG&E/KU, finding that, with some revisions, and submission of the anticipated reciprocity arrangement with MISO, LG&E/KU’s de-pancaking proposal would maintain de-pancaked rates between its system and MISO, thereby establishing mitigation comparable to that provided by membership in MISO.¹³ The Commission clarified, however, that, in the event LG&E/KU was unable to secure a commitment from MISO, it must have in place an alternative proposal to address the horizontal market power concerns identified in the Merger Order. Therefore, the Commission stated that:

[W]e condition our section 203 approval of [LG&E/KU’s] withdrawal on [LG&E/KU’s] willingness and ability to shield its [KU Requirements Customers] from any re-pancaking of rates for transmission service between [LG&E/KU’s] transmission system and the remaining members of [MISO].¹⁴

The Commission suggested that one way LG&E/KU could mitigate the re-pancaking of rates for KU Requirements Customers was to “reimburse [KU Requirements Customers] for all additional costs incurred by such customers that are due to re-pancaking of transmission and ancillary service rates and that occur as a result of [LG&E/KU’s]

¹¹ *Louisville Gas and Elec. Co.*, 114 FERC ¶ 61,282, at P 3 (2006) (MISO Withdrawal Order).

¹² *Id.* PP 99-100. LG&E/KU also proposed to maintain de-pancaked rates for new service into and through its system from PJM Interconnection L.L.C. (PJM), subject to reciprocal treatment from PJM.

¹³ *Id.* PP 108-110.

¹⁴ *Id.* P 112.

withdrawal.”¹⁵ The Commission clarified that “[LG&E/KU] could set up a mechanism under [the LG&E/KU Tariff] that grants a credit to [KU Requirements Customers] for any re-pancaked charges those customers pay to [MISO].”¹⁶

C. The Merger Mitigation De-pancaking Mechanism

7. The Commission ultimately accepted an LG&E/KU transmission rate de-pancaking mechanism, implemented in LG&E/KU First Revised Rate Schedule No. 402 (Rate Schedule No. 402).¹⁷ Specifically, Rate Schedule No. 402 establishes the Merger Mitigation De-pancaking mechanism (De-pancaking Mitigation) to shield the “MMD Parties,” comprised of the KU Municipals,¹⁸ the TVA Distributor Group,¹⁹ and any future Requirements Customers²⁰ (together, Rate Schedule No. 402 Customers) “from any

¹⁵ *Id.* P 113.

¹⁶ *Id.* at n.70.

¹⁷ *E.ON U.S., LLC*, Docket No. ER06-1279-001 (Nov. 9, 2006) (delegated order). The transmission rate de-pancaking mechanism went through several iterations before it was finalized in Rate Schedule No. 402 and accepted.

¹⁸ Rate Schedule No. 402 defines “KU Municipals” as Berea, Frankfort, Owensboro, and the Cities of Barbourville, Bardstown, Bardwell, Benham, Corbin, Falmouth, Madisonville, Nicholasville, Paris, and Providence. Rate Schedule No. 402, First Revised Sheet No. 1, Definitions. Except for Owensboro, these same entities were and some are still KU Requirements Customers.

¹⁹ Rate Schedule No. 402 defines “TVA Distributor Group” as Paducah, Princeton, the Glasgow Electric Plant Board, and the Hopkinsville Electric Plant Board, which are all located in Kentucky. Also included in the “TVA Distributor Group” is Duck River. Rate Schedule No. 402, First Revised Sheet No. 2, Definitions. None of these entities were KU Requirements Customers.

²⁰ Rate Schedule No. 402 defines “Requirements Customer” as “transmission customers in the KU destination market (as that term is used and defined in certain Commission orders, 82 FERC ¶ 61,308, 114 FERC ¶ 61,282, and 116 FERC ¶ 61,019) who purchase requirements electric service from LG&E/KU.” Rate Schedule No. 402, First Revised Sheet No. 2, Definitions.

re-pancaking of rates for transmission service between [LG&E/KU's] transmission system and the remaining members of [MISO].”²¹

8. Section 1 of Rate Schedule No. 402 specifies that, for De-pancaking Mitigation transactions where a Rate Schedule No. 402 Customer purchases electricity from a source in MISO for delivery to such customer's load interconnected with the LG&E/KU transmission system: (1) LG&E/KU will credit that Rate Schedule No. 402 Customer's transmission and ancillary service charges by an amount equal to the MISO transmission and ancillary service charges that Rate Schedule No. 402 Customer incurs to deliver such purchased electricity to the MISO-LG&E/KU interface;²² and (2) the Rate Schedule No. 402 Customer shall continue to be responsible for the LG&E/KU transmission and ancillary service charges incurred to deliver such electricity to its loads on the LG&E/KU system.²³ For De-pancaking Mitigation transactions in which a Rate Schedule No. 402 Customer sells electricity generated with a source in LG&E/KU's control area and a sink in MISO: (1) LG&E/KU shall waive the LG&E/KU transmission and ancillary service charges that a Rate Schedule No. 402 Customer would have incurred to transmit the electricity to the MISO-LG&E/KU interface; and (2) the Rate Schedule No. 402 Customer shall continue to be responsible for all MISO transmission and ancillary service charges to deliver such electricity to any point within the MISO system beyond the MISO-LG&E-KU interface.²⁴ Rate Schedule No. 402 also provides that:

The [De-pancaking Mitigation] . . . is intended to implement the Section 203 mitigation requirements ordered by the Commission in *Louisville Gas and Electric Co.*, 82 FERC ¶ 61,308 (1998), as modified by *Louisville Gas and Electric Co.*, 114 FERC ¶ 61,282, and *E.ON U.S., LLC*, 116 FERC ¶ 61,019 (2006). Any proposed changes to these requirements are governed by Section 203 of the FPA.²⁵

²¹ Rate Schedule No. 402, First Revised Sheet No. 1, Definitions (quoting MISO Withdrawal Order, 114 FERC ¶ 61,282 at P 112).

²² However, no credit shall be applied for any MISO charge for service that is not provided and charged by LG&E/KU, i.e., where there would be no pancaked charge. Rate Schedule No. 402, § 1.a.i.

²³ *Id.*

²⁴ *Id.* § 1.a.ii.

²⁵ *Id.* § 1.a.v.

D. March Order

9. In August 2018, LG&E/KU requested that the Commission find under FPA section 203 that LG&E/KU may remove the De-pancaking Mitigation provisions from Rate Schedule No. 402.²⁶ LG&E/KU argued that 20 years of market development and the addition of new sources of supply illustrate that the De-pancaking Mitigation is no longer necessary to mitigate the horizontal market power concerns raised by the Merger. LG&E/KU proffered evidence that over 100 suppliers could reach the KU Destination Market and provided a Delivered Price Test to demonstrate the effect of removing the De-pancaking Mitigation on market size and market concentration levels.

10. In the March Order, the Commission conditionally granted LG&E/KU's request to terminate the De-pancaking Mitigation. Among other things, the Commission concluded that the Merger continues to be consistent with the public interest without the De-pancaking Mitigation because the record shows that loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers after the mitigation is removed.²⁷ However, to ensure that certain customers that have already provided notice and acted in reliance on the De-pancaking Mitigation retain access to alternative competitive supply arrangements entered into before the Commission granted LG&E/KU's request, the Commission required LG&E/KU to provide a transition mechanism for those customers (Transition Mechanism).²⁸

II. Requests for Rehearing and Clarification

11. AMP, Kentucky Municipals, and KMPA request rehearing of the Commission's decision to allow LG&E/KU to terminate the De-pancaking Mitigation. Kentucky Municipals argue that the Commission erred in developing the standard of review under FPA section 203(b), and AMP, Kentucky Municipals, and KMPA each raise concerns regarding the Commission's finding that loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers after the De-pancaking Mitigation is removed. In addition, KMPA argues that the Commission

²⁶ Louisville Gas and Electric Company and Kentucky Utilities Company, Joint Application under FPA Section 203 and Section 205, Docket Nos. EC98-2-001 and ER18-2162-000, at Ex. LG&E/KU-2.3 (filed Aug. 3, 2018) (LG&E/KU Filing).

²⁷ March Order, 166 FERC ¶ 61,206 at PP 45, 67-73.

²⁸ *Id.* PP 45, 74-82. On July 12, 2019, LG&E/KU submitted its filing to implement the Transition Mechanism. Concurrently with this order, we reject LG&E/KU's Transition Mechanism filing without prejudice to LG&E/KU resubmitting a filing that complies with the Commission's directives in that order. *Louisville Gas and Elec. Co.*, 168 FERC ¶ 61,151 (2019).

failed to respond to certain arguments in the record, and Kentucky Municipals argue that the Commission erred in dismissing their request for a hearing. AMP, Kentucky Municipals, and KMPA each also request clarification as to various aspects of the Transition Mechanism.

12. On May 3, 2019, LG&E/KU filed a motion for leave to answer and answer to the Requests for Rehearing. On May 20, 2019, KMPA filed a motion for leave to answer and answer to LG&E/KU's answer.

III. Discussion

A. Procedural Matters

13. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing.²⁹ Therefore, we deny LG&E/KU's motion for leave to answer and answer. For the same reason, we deny KMPA's motion for leave to answer and answer to LG&E/KU.

B. Substantive Matters

14. We deny the requests for rehearing. In particular, as discussed below, we deny rehearing as to the standard of review under FPA section 203(b), the Commission's findings regarding the need for the De-pancaking Mitigation, and the Commission's response to certain arguments in the record and the request for a hearing. However, we grant the requests for clarification as to various aspects of the Transition Mechanism.

1. Issues on Rehearing

a. Standard of Review

i. March Order

15. In the March Order, the Commission explained that FPA section 203(b) provides, in relevant part: "The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate."³⁰ The Commission also noted that FPA section 203(b) requests to

²⁹ 18 C.F.R. § 385.713(d)(1) (2019).

³⁰ March Order, 166 FERC ¶ 61,206 at P 38 (quoting 16 U.S.C. § 824b(b)).

terminate or amend mitigation previously ordered are unique and that, as a result, the Commission has applied a fact-specific evaluation to these requests.³¹

16. For example, the Commission referenced *Westar Energy, Inc.*, in which the Commission described the FPA section 203(b) standard as follows:

Under section 203 of the FPA, the Commission is required to ensure that a proposed transaction is consistent with the public interest, which includes finding that the transaction does not adversely impact competition. Accordingly, for purposes of section 203(b), the appropriate standard to apply here is *whether to continue to find that Westar's acquisition of the Facility is consistent with the public interest if the mitigation measures and reporting requirements previously required are removed.*³²

The Commission explained that other FPA section 203(b) cases describe the standard of review similarly.³³

17. The Commission next explained that the De-pancaking Mitigation existed because the Merger was originally conditioned on LG&E/KU's membership in MISO in order to mitigate the Merger's effect on horizontal competition in the KU Destination Market.

³¹ *Id.* P 39 (citing *Westar Energy, Inc.*, 164 FERC ¶ 61,060 (2018) (*Westar*); *PPL Corp.*, 153 FERC ¶ 61,257 (2015) (*PPL*); *Louisville Gas and Elec. Co.*, 137 FERC ¶ 61,195 (2011); *Pub. Serv. Co. of New Mexico*, 135 FERC ¶ 61,230 (2011) (*PSNM*); *MidAmerican Energy Holdings, Co.*, 131 FERC ¶ 61,004 (2010) (*MidAmerican*)).

³² *Id.* P 40 (quoting *Westar*, 164 FERC ¶ 61,060 at P 15 (emphasis added) (citations omitted)).

³³ *Id.* (citing *PPL*, 153 FERC ¶ 61,257 at P 33 (“[T]he proposed modification will continue to ensure that the transaction has no adverse effect on horizontal market power and is consistent with the public interest.”); *Louisville Gas and Elec. Co.*, 137 FERC ¶ 61,195 at P 39 (“Applicants’ proposal continues to satisfy the Commission’s concerns with regard to horizontal competition.”); *PSNM*, 135 FERC ¶ 61,230 (accepting *PSNM*’s contention that “circumstances have changed since the 2005 Authorization Order that demonstrate that the Market Monitor and the Semi-Annual Planning Reports are no longer necessary.”); *MidAmerican*, 131 FERC ¶ 61,004 at P 16 (“[T]he question is whether the Commission can continue to find that *MidAmerican Holdings*’ acquisition of *PacifiCorp* is consistent with the public interest if the independent market monitor is terminated.”)).

The Commission noted that, when the Commission addressed LG&E/KU's withdrawal from MISO, the Commission found that the De-pancaking Mitigation would maintain de-pancaked rates between the LG&E/KU market and the MISO footprint.³⁴ Accordingly, the Commission concluded in Paragraph 42 of the March Order:

[C]onsistent with the Commission's prior findings, the Commission may find that the Merger continues to be consistent with the public interest without the De-pancaking Mitigation if LG&E/KU has demonstrated that loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers after the mitigation is removed.³⁵

18. In addition, the Commission found that, because the De-pancaking Mitigation was implemented to remedy a horizontal market power concern, it would solely consider the effect of terminating the De-pancaking Mitigation on horizontal competition and would not consider the effects of termination on the other public interest issues that the Commission also evaluates under FPA section 203(a) (i.e., vertical competition, rates, regulation, and cross-subsidization).³⁶

ii. Request for Rehearing

19. Kentucky Municipals argue that the Commission committed harmless error in stating the applicable legal standard for approving changes to the De-pancaking Mitigation. Kentucky Municipals state that, in the March Order, the Commission explained that its task here was "an evaluation of the competitive effects of removing the De-pancaking Mitigation."³⁷ Kentucky Municipals argue that this is the correct standard of review and that, consequently, the standard of review in Paragraph 42 of the March Order was harmless error.³⁸

³⁴ *Id.* P 41.

³⁵ *Id.* P 42.

³⁶ *Id.* P 44.

³⁷ Kentucky Municipals Request for Rehearing at 23-24 (referencing March Order, 166 FERC ¶ 61,206 at P 70).

³⁸ *Id.* at 24.

20. Kentucky Municipals assert that, if the standard of review in Paragraph 42 were applied to frame this case as turning on whether the specific market power concerns identified in 1998 remain problematic today, the Commission would have committed error. According to Kentucky Municipals, the issue is whether re-pancaking will make future competition (or rates) worse than if the De-pancaking Mitigation remains in effect, as is required by the forward-looking public interest standard of review, which LG&E/KU agreed to in 2006 in Rate Schedule No. 402, by the present Commission's public interest responsibilities, and by the forward-looking perspective the Commission applied in 2006.³⁹

21. In addition, Kentucky Municipals argue that the Commission erred by failing to consider the rate impact of removing the De-pancaking Mitigation. According to Kentucky Municipals, FPA section 203(b) requires that the Commission consider the public interest, and this standard was memorialized in Rate Schedule No. 402 to govern any changes to the De-pancaking Mitigation. Kentucky Municipals contend that the Commission has long interpreted the public interest standard to require a finding that a transaction will, among other things, have no adverse impact on rates and that even the LG&E/KU Filing referenced the effect on rates factor.⁴⁰

22. Kentucky Municipals argue that, here, however, the Commission chose not to consider the rate impact of removing the De-pancaking Mitigation. According to Kentucky Municipals, none of the reasons provided by the Commission for doing so support acting contrary to its own policy. Specifically, Kentucky Municipals argue that the Commission's explanation that it did not need to consider whether removing the De-pancaking Mitigation would have an effect on rates because the mitigation was implemented to remedy horizontal market power concerns is based on a false factual premise. Kentucky Municipals contend that the MISO Withdrawal Order raised many concerns, not limited to horizontal market power, and that Rate Schedule No. 402 Customers agreed to forego further litigation on all issues, including rate impact issues, in exchange for (1) the De-pancaking Mitigation and (2) a restriction that any attempt to eliminate that mitigation must satisfy the Commission's public interest standard. Kentucky Municipals assert that, as such, the Commission cannot assume that the mitigation from a black-box settlement was tied solely to the Commission's horizontal market power concerns.⁴¹

³⁹ *Id.* at 24-26.

⁴⁰ *Id.* at 5-6.

⁴¹ *Id.* at 6.

23. Kentucky Municipals also contend that the Commission was incorrect to rely on the cases it did to support its decision to ignore the rate impacts.⁴² Kentucky Municipals assert that none of the cases cited by the Commission stated that the Commission was permitted to forego a rate impact analysis, nor did they even acknowledge a departure from precedent. Kentucky Municipals suggest, rather, that these cases reached a conclusion about modifying a merger condition without addressing the rate impacts because rate impacts were not at issue in those proceedings. Kentucky Municipals contend that the rate impacts in this proceeding, in contrast, are indisputable because everyone agrees that Kentucky Municipals will pay higher transmission charges after the De-pancaking Mitigation is removed. Kentucky Municipals argue, however, that the Commission sidestepped this issue by incorrectly relying on precedent.⁴³

24. Kentucky Municipals suggest that the Commission's most relevant precedent indicates that it should have considered rate impacts because that is what happened when LG&E/KU previously requested to modify a merger mitigation condition imposed in the MISO Withdrawal Order. Kentucky Municipals explain that, in that proceeding, when LG&E/KU requested permission to replace Southwest Power Pool, Inc. with TranServ International as its independent transmission organization (ITO), the Commission assessed whether LG&E/KU's proposal satisfied all three prongs of the public interest standard despite its acknowledgement that the ITO mitigation obligation was imposed to address competitive concerns. Kentucky Municipals thus contend that the Commission departed from both its general policy and its case-specific precedent regarding evaluating the effect on rates factor under the public interest standard.⁴⁴

iii. Commission Determination

25. We deny rehearing on the issue of the proper standard of review to be applied by the Commission in this proceeding. As an initial matter, Kentucky Municipals are incorrect when they assert that the Commission described a different standard of review in Paragraph 70 of the March Order than in Paragraph 42.⁴⁵ The "evaluation of competitive effects" described in Paragraph 70 was not used to describe a standard of review, but was simply a description of the analysis that led to the Commission's conclusion in Paragraph 73 "that loads located in the LG&E/KU market will continue to

⁴² *Id.* at 6-7; see also *Westar*, 164 FERC ¶ 61,060; *PPL*, 153 FERC ¶ 61,257; *MidAmerican*, 131 FERC ¶ 61,004.

⁴³ Kentucky Municipals Request for Rehearing at 6-7.

⁴⁴ *Id.* at 8-9 (citing *Louisville Gas and Elec. Co.*, 137 FERC ¶ 61,195 at PP 6-7).

⁴⁵ *Id.* at 23-24.

have access to a sufficient number of competitive suppliers after the De-pancaking Mitigation is removed.”⁴⁶ This conclusion was based on the standard of review described by the Commission in Paragraph 42.

26. In essence, Kentucky Municipals argue that the Commission must treat the termination of the De-pancaking Mitigation as a new, separate jurisdictional event that must be reviewed independent of the Merger under the Commission’s section 203(a) public interest standard. Even if the circumstances that led to the imposition of the mitigation condition no longer exist, Kentucky Municipals would have the Commission reject the termination if such termination, viewed as a separate, new transaction, would be inconsistent with the factors the Commission applies under FPA section 203(a). While we agree that our section 203(b) review also requires consideration of the public interest, we disagree that it is appropriate to treat an application to modify a merger condition under section 203(b) as if it were a new transaction to be reviewed pursuant to section 203(a).

27. Rather, consistent with our precedent, in conducting our public interest review under section 203(b) we referred back to the circumstances that led to the implementation of the merger condition in the first place to determine whether mitigation continued to be required. In developing the standard of review that it applied in this proceeding, the Commission relied on its section 203(b) precedent.⁴⁷ Because LG&E/KU’s request was submitted as a section 203(b) filing to remove mitigation previously required by the Commission, the Commission was correct to rely on its section 203(b) precedent for evaluating the termination of the De-pancaking Mitigation.

28. Kentucky Municipals cite to no contrary precedent supporting their preferred standard of review, but instead refer to the standard for modification of the De-pancaking Mitigation set forth in Rate Schedule No. 402.⁴⁸ However, Kentucky Municipals fail to support their assertion that this standard requires proposed changes to the De-pancaking Mitigation to be evaluated in the way they suggest. As noted above, the relevant section of Rate Schedule No. 402 provides as follows:

Changes to MMD: The MMD described under this Section I is intended to implement the Section 203 mitigation requirements ordered by the Commission in *Louisville Gas and Electric Co.*, 82 FERC ¶ 61,308 (1998), as modified by

⁴⁶ March Order, 166 FERC ¶ 61,206 at P 73.

⁴⁷ *Id.* PP 40, 42; *see supra* notes 31-33.

⁴⁸ Kentucky Municipals Request for Rehearing at 24-26.

Louisville Gas & Electric Co., et al., 114 FERC ¶ 61,282 (2006), and *E.ON U.S., LLC*, 116 FERC ¶61,019 (2006). Any proposed changes to these requirements are governed by Section 203 of the FPA.⁴⁹

Nothing in this section of Rate Schedule No. 402 requires the Commission to subject the termination of the De-pancaking Mitigation as if it were a new transaction subject to all of the factors of our analysis under section 203(a).

29. Equally unpersuasive is Kentucky Municipals' contention that the Commission erred by not considering whether terminating the De-pancaking Mitigation would have an effect on rates. Although the Commission considers the effect on rates as part of its analysis under FPA section 203(a), the Commission's determination that the effect on rates standard does not necessarily apply to its consideration of requests under section 203(b) to modify a horizontal competition-related merger condition was supported by applicable precedent applying section 203(b).⁵⁰

30. Based on the purpose of the De-pancaking Mitigation, which is to mitigate horizontal market power, the Commission correctly concluded that it was appropriate to limit the scope of its section 203(b) evaluation of the termination of this mitigation to the horizontal competition concerns that caused the condition to be imposed in the first place. The Commission is not required to consider each of its section 203(a) factors in its section 203(b) analysis; rather, the Commission's analysis under section 203(b) appropriately is limited to the concerns that prompted the mitigation at the outset.

31. Kentucky Municipals' additional contention that the modification provision of Rate Schedule No. 402 requires consideration of rate effects also is not correct. As quoted above, the modification provision makes clear that the purpose of the De-pancaking Mitigation was "to implement the Section 203 mitigation requirements ordered by the Commission" in the Merger Order, the MISO Withdrawal Order, and *E.ON U.S.*

⁴⁹ Rate Schedule No. 402, § 1.a.v. Kentucky Municipals refer to Section 10.b as containing the applicable standard for modifications of the De-pancaking Mitigation, Kentucky Municipals Request for Rehearing at 25 n.65, but that section merely cross-references Section 1.a.v.

⁵⁰ March Order, 166 FERC ¶ 61,206 at P 44 (citing *Westar*, 164 FERC ¶ 61,060 at PP 15-16 (limiting analysis of FPA section 203(b) request to effect on competition prong where mitigation was established to address adverse effects on competition); *PPL*, 153 FERC ¶ 61,257 at PP 28-33 (same); *MidAmerican*, 131 FERC ¶ 61,004 at PP 15-18 (same)).

LLC.⁵¹ Nothing in any of these orders suggests that the De-pancaking Mitigation was intended to address rate concerns. The Commission’s application of its section 203(b) precedent to limit its evaluation to the competition effects referenced in section 1.a.v of Rate Schedule No. 402 was consistent with that section’s requirement that proposed modifications be evaluated in accordance with section 203.

32. Kentucky Municipals assert that the MISO Withdrawal Order “raised multiple concerns, not limited to horizontal market power” and therefore the Commission’s analysis here should not be limited to an evaluation of horizontal market power effects.⁵² While this is a correct characterization of the MISO Withdrawal Order as a general matter, that order addressed numerous issues regarding LG&E/KU’s withdrawal from MISO unrelated to the imposition of the De-pancaking Mitigation. Kentucky Municipals cite to nothing in the MISO Withdrawal Order indicating that the concerns addressed by the De-pancaking Mitigation included any concern about the effect on rates. To the contrary, the Commission explained in that order that rate de-pancaking would “address [its] concerns regarding horizontal market power.”⁵³

33. Nor does *Louisville Gas and Electric Co.* represent contrary precedent, as Kentucky Municipals assert.⁵⁴ The mitigation at issue in that case—LG&E/KU’s use of an independent third party as its ITO and Reliability Coordinator—addressed horizontal and vertical market power concerns.⁵⁵ Although Kentucky Municipals are correct that, in its order, the Commission did briefly discuss certain aspects of the Commission’s public interest analysis (i.e., rates and regulation) in addition to horizontal and vertical

⁵¹ 116 FERC ¶ 61,019 (2006).

⁵² Kentucky Municipals Request for Rehearing at 6.

⁵³ MISO Withdrawal Order, 114 FERC ¶ 61,282 at P 108. *See id.* P 110 (noting that Applicants’ commitment to join MISO addressed the Commission’s horizontal market power concerns, the Commission stated: “Here, we find that Applicants’ de-pancaking proposal, with some revisions discussed below, will maintain rate de-pancaking between Applicants’ system and the footprint of the remaining [MISO] membership and thereby provide mitigation comparable to that achieved by their [MISO] membership. As such, Applicants’ proposal, if implemented in compliance with the conditions discussed below, will satisfy Applicants’ Merger Conditions.”).

⁵⁴ Kentucky Municipals Request for Rehearing at 8-9.

⁵⁵ *Louisville Gas and Elec. Co.*, 137 FERC ¶ 61,195 at P 6.

competition, that is because LG&E/KU raised those factors in its modification request.⁵⁶ The standard of review under FPA section 203(b) and scope of the Commission's review (i.e., which public interest factors to consider) was not in dispute in that case. Further, in addressing LG&E/KU's arguments in support of its request, the Commission made no finding that consideration of rate and regulation effects was required.

34. We also note that the Commission specifically found that “[LG&E/KU's] proposed change to the entity serving as ITO and certain of the ITO functions in no way implicate [LG&E/KU's] Commission approved rate de-pancaking arrangement.”⁵⁷ Consequently, regardless of whether the Commission analyzed other public interest factors, the analysis was ultimately immaterial to the outcome of the Commission's decision regarding the De-pancaking Mitigation.

35. To the extent that the Commission's consideration of additional public interest factors in *Louisville Gas and Electric Co.* could be read as being inconsistent with the Commission's other section 203(b) precedent, we clarify that our evaluation of section 203(b) requests to modify merger conditions is limited to addressing the effect of the modification on the public interest factor that led the Commission to impose the condition in its order approving the transaction. Therefore, we deny Kentucky Municipals' request for rehearing on the standard of review applied by the Commission in evaluating LG&E/KU's request to terminate the De-pancaking Mitigation.

b. Need for Mitigation

i. March Order

36. In the March Order, the Commission found that the Merger continues to be consistent with the public interest without the De-pancaking Mitigation because the record shows that loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers after the mitigation is removed.

37. As an initial matter, the Commission stated that LG&E/KU's Delivered Price Test, as corrected to account for TVA imports and certain generating facility retirements, showed that terminating the De-pancaking Mitigation would result in screen failures in three periods—the Winter Peak, Winter Off-Peak, and Shoulder Off-Peak periods—under the base case when the market was moderately and highly concentrated. The Commission explained that these screen failures indicated that terminating the De-pancaking Mitigation would reduce the number of competitive suppliers in the

⁵⁶ *Id.* PP 9-10.

⁵⁷ *Id.* P 39.

LG&E/KU market in those periods. But because screen failures are not the end of the Commission's analysis, the Commission considered the alternative factors proposed by LG&E/KU as support for its contention that the De-pancaking Mitigation is no longer necessary.⁵⁸

38. In considering these alternative factors, the Commission found that the Merger continues to be consistent with the public interest because loads located in the LG&E/KU market would continue to have access to a sufficient number of competitive suppliers after the De-pancaking Mitigation is removed. First, the Commission agreed with LG&E/KU that the record showed there was actual competition among suppliers to make sales in the LG&E/KU market. The Commission explained that, as shown through four Requests for Proposals conducted by the Kentucky Municipal Energy Agency, there were between 38 and 59 separate suppliers who actually competed to make sales in the LG&E/KU market in the recent past.⁵⁹

39. Next, the Commission referenced LG&E/KU's analysis, which estimated that, even without the De-pancaking Mitigation, suppliers located in MISO that offered into the Requests for Proposals could deliver to Kentucky Municipals at a cost that is, on average, 7.8 percent less than the cost-based requirements service then provided by LG&E/KU to Kentucky Municipals. Although Kentucky Municipals contested LG&E/KU's assumptions regarding costs, the Commission explained that it considers supply that can be delivered into a market at a price that is no more than five percent above the price in the market to be competitive in that market. Thus, the Commission concluded that, even accepting Kentucky Municipals' estimate that removing the De-pancaking Mitigation would cause supply originating from MISO to be, on average, 2.5 percent higher than LG&E/KU requirements service, competing supply would be

⁵⁸ March Order, 166 FERC ¶ 61,206 at P 67; *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111, at 31,879 (2000) (cross-referenced at 93 FERC ¶ 61,164), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001); *Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109, at P 38 (2012); Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,112 ("For mergers that do not pass the market power screen, we will engage in a more detailed analysis."); *Transactions Subject to FPA Section 203*, Order No. 669, 113 FERC ¶ 61,315, at P 65 (2005) ("If the screen is failed, then . . . the Commission examines the factors that could affect competition in the relevant market."), *order on reh'g*, Order No. 669-A, 115 FERC ¶ 61,097, *order on reh'g*, Order No. 669-B, 116 FERC ¶ 61,076 (2006).

⁵⁹ March Order, 166 FERC ¶ 61,206 at P 68.

available should the market price increase by five percent and, thus, would remain economic in the Commission's analysis.⁶⁰

40. The Commission further referenced the Kentucky Municipal Energy Agency's transmission reservations, which indicated that 65 percent of the capacity selected to serve their members' load is located outside of MISO. The Commission explained that, because (1) the De-pancaking Mitigation applies only to transmission from resources located in MISO and (2) its termination would have no effect on whether suppliers located in other markets would remain competitive, the record showed that a majority of resources selected through the Kentucky Municipal Energy Agency's Requests for Proposals did not depend on the De-pancaking Mitigation to offer competitively into the LG&E/KU market.⁶¹

41. The Commission also referred to the results of LG&E/KU's Delivered Price Test, which showed that, even after termination of the De-pancaking Mitigation, at least 100 entities with Available Economic Capacity would remain able to supply the LG&E/KU market in each period analyzed. The Commission declined to rely on Kentucky Municipals' alternative Delivered Price Test results because that analysis purported to account for opportunity costs, which are not required to be considered under the Commission's regulations. For this reason, as well as other flaws in the alternative Delivered Price Test, the analysis appeared on its face to be flawed (e.g., the Delivered Price Test showed that certain suppliers had no Available Economic Capacity even though those suppliers had submitted bids in response to the Requests for Proposals).⁶²

42. Lastly, the Commission explained that competitive conditions have changed significantly since the time of the Merger. The Commission concluded that, based on the changes in competitive conditions in the region since 1998 and the evidence regarding potential competitive suppliers, loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers after the De-pancaking Mitigation is removed. As such, the Commission determined that the Merger continued to be consistent with the public interest without the mitigation.⁶³

⁶⁰ *Id.* PP 69-70 (citing 18 C.F.R. § 33.3(c)(4) (2019)).

⁶¹ *Id.* P 71.

⁶² *Id.* P 72 & n.118.

⁶³ *Id.* P 73. The Commission declined to address other arguments advanced by LG&E/KU in support of its request because it was able to base its finding on the evidence in the record. *Id.*

ii. **Requests for Rehearing**

43. Both Kentucky Municipals and AMP argue that the Commission erred in finding that loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers without the De-pancaking Mitigation. Kentucky Municipals specifically assert that this factual finding is unsupported and fails to consider material facts in the record.⁶⁴

44. Kentucky Municipals point to the finding in the March Order that LG&E/KU's Delivered Price Test showed that eliminating the De-pancaking Mitigation would result in screen failures in three periods, which could potentially raise competitive concerns. Kentucky Municipals argue that, based on these screen failures, the Commission must presume that eliminating the De-pancaking Mitigation is likely to create or enhance market power and that the sufficiency of any alternative factors considered by the Commission must be evaluated against this fact. Kentucky Municipals thus contend that the Commission can find that eliminating the De-pancaking Mitigation is in the public interest only if a preponderance of alternative evidence rebuts the presumption of competitive harm.⁶⁵

45. Kentucky Municipals argue that none of the alternative factors relied upon by the Commission meet this requirement. Kentucky Municipals first take issue with the Commission's reliance on the numerous responses to the Kentucky Municipal Energy Agency's Requests for Proposals to support the finding that the record shows that there is actual competition among suppliers to make sales in the LG&E/KU market. Kentucky Municipals assert that the four Requests for Proposals had advised bidders that the De-pancaking Mitigation was in place; absent the De-pancaking Mitigation, Kentucky Municipals contend that it would be impossible to know how and at what price bidders would have responded to the Requests for Proposals because every bidder would have evaluated that economic landscape differently. Kentucky Municipals thus contend that all that the responses to the Requests for Proposals show is that the De-pancaking Mitigation worked to encourage competition. Kentucky Municipals assert that the responses to the Requests for Proposals are not, instead, sufficient evidence of the adequacy of competitive options *without* de-pancaking.⁶⁶

46. The second alternative factor Kentucky Municipals dispute is the Commission's reliance on LG&E/KU's near-term analysis that estimated that, even without the De-pancaking Mitigation, suppliers located in MISO that responded to the Requests for

⁶⁴ Kentucky Municipals Request for Rehearing at 9.

⁶⁵ *Id.* at 9-10.

⁶⁶ *Id.* at 10-11.

Proposals could deliver to Kentucky Municipals at a cost that is, on average, 7.8 percent less than current LG&E/KU cost-based requirements service. Kentucky Municipals emphasize that they contested this cost estimate analysis and asserted that there were defects in LG&E/KU's assumptions; one of such defects was that, even if the analysis was revised to be a more accurate comparison of near-term costs, it nevertheless is flawed because no customer would give five years' notice to terminate a long-term power supply contract based on a projection that it could save money (or, under the revised analysis, only pay 2.5 percent more) in the near-term. Kentucky Municipals explain that their own expert testified that the customers needed to, and did, consider projected conditions several years into the future and for a lengthy period thereafter.⁶⁷

47. Kentucky Municipals contend that, rather than address this flaw, the March Order relied on LG&E/KU's near-term analysis, which estimated that costs to Kentucky Municipals would be within 105 percent of the market price range the Commission considers to be competitive in its application of the Delivered Price Test to analyze short-term energy sales. Kentucky Municipals assert that this near-term analysis would not represent sound planning consistent with prudent utility practice for the type of competitive long-term power supply needed by Kentucky Municipals. Kentucky Municipals argue that, for the same reason, the Commission should not have relied on a short-term analysis when the Commission acknowledged that the issue is the availability of long-term supply and noted that the Delivered Price Test focuses only on short-term markets.⁶⁸ Further, Kentucky Municipals assert that the March Order considered as speculative and did not even address the longer-term analysis presented by the Kentucky Municipal Energy Agency's power supply expert (or the reasonableness of its assumptions), which showed that, in 2028, with the De-pancaking Mitigation in place, the total delivered cost of long-term power from MISO would be 6.1 to 17.2 percent lower than the cost of KU's

⁶⁷ *Id.* at 11-12.

⁶⁸ *Id.* at 12-13. Kentucky Municipals also argue that the Commission's reliance on the near-term analysis as somehow representative of prices at which suppliers in MISO could deliver power to the LG&E/KU market without the De-pancaking Mitigation is misplaced, even in the near-term, because Kentucky Municipals' cost estimate regarding the price 2.5 percent greater than LG&E/KU's cost-based rate only applies to the Kentucky Municipal Energy Agency and its resource portfolio. Kentucky Municipals argue that it therefore reflects the unique cost-reducing impact of the Kentucky Municipal Energy Agency's low-cost, three-year term supply from Illinois Power Marketing Company that can be delivered without using the MISO transmission system. Kentucky Municipals contend that it is not representative of available prices from suppliers located in MISO without the De-pancaking Mitigation. *Id.* n.29.

requirements service, but if the De-pancaking Mitigation were removed, it would be 6.4 to 17.5 percent higher.⁶⁹

48. Kentucky Municipals argue that the March Order also disregarded evidence that the Kentucky Municipal Energy Agency's procurement process identified no parties with plans to develop resources within the LG&E/KU market, other than photovoltaic resources. Kentucky Municipals add that the loads of their members are not large enough to justify building such generation for their own use and that building such generation would be too risky. Kentucky Municipals argue, in short, that the record demonstrates that no resources in the LG&E/KU market can be expected to mitigate the cost of re-pancaked rates if the De-pancaking Mitigation is terminated and that this barrier to entry refutes any presumption that the long-term LG&E/KU market is inherently competitive.⁷⁰

49. Kentucky Municipals suggest that another omission in the March Order is the failure to address evidence demonstrating the substantial magnitude of MISO transmission charges that will be added to the cost of resources imported from MISO. According to Kentucky Municipals, their expert's analysis showed that the additional cost of eliminating the De-pancaking Mitigation would be \$8/MWh, or 15 percent of the reference price.⁷¹ Kentucky Municipals add that, for their customers relying more extensively on resources in MISO, such as KMPA and Berea, the additional cost is approximately \$11/MWh, or 23 percent of the reference price in the near-term. Kentucky Municipals state that, for the City of Benham, due to its low load factor, its additional cost would be over \$23/MWh, or 47 percent of the reference price. Kentucky Municipals argue that, using LG&E/KU's own estimates of higher future MISO transmission charges after the Kentucky Municipal Energy Agency will no longer have the benefit of the three-year coal resource that avoids MISO transmission service, those additional costs are: \$14/MWh (29 percent) for the Kentucky Municipal Energy Agency portfolio; around \$17/MWh (34 percent) for Owensboro; around \$19/MWh for KMPA and Berea (37 and 41 percent, respectively); and over \$30 MW/h (63 percent) for Benham.⁷²

⁶⁹ *Id.* at 13-14.

⁷⁰ *Id.* at 14-15.

⁷¹ *Id.* at 16.

⁷² *Id.* at 17. Kentucky Municipals also dispute the March Order's negative inference regarding Kentucky Municipals' lack of analysis of the competitiveness of offers responding to the Requests for Proposals. They explain that they were limited by nondisclosure agreements and competitive concerns with respect to LG&E/KU. Kentucky Municipals argue, however, that they had no obligation to provide such information as LG&E/KU has the burden to rebut the presumption that markets are not

Kentucky Municipals argue that the March Order fails to address how these loads in the LG&E/KU market can hope to be competitive with LG&E/KU in the long-term if they are forced to bear the additional costs without the De-pancaking Mitigation.⁷³

50. Third, Kentucky Municipals assert that the March Order overstated the share of the Kentucky Municipal Energy Agency's portfolio located outside of MISO. Kentucky Municipals explain that the March Order referenced LG&E/KU's assertion that the Kentucky Municipal Energy Agency's transmission reservations indicate that 65 percent of the capacity selected to serve their members' load is located outside MISO. Kentucky Municipals argue that the March Order erroneously stated that they did not contest this point, when the Kentucky Municipal Energy Agency's expert did so and explained that most of the resources Kentucky Municipals plan to use are anticipated to come from MISO. Kentucky Municipals also contend that the March Order ignored the undisputed testimony in the record that two of the Kentucky Municipal Energy Agency's members, Berea and Benham, have sourced the bulk of their resources from MISO through their purchases from AMP through the mid-2020s. Kentucky Municipals explain that Owensboro has committed to purchase most of its supply from a MISO source into the latter half of the 2020s and that, as to the Kentucky Municipal Energy Agency's all requirements portfolio, by 2022, more than 50 percent of the Kentucky Municipal Energy Agency's capacity resources would be supplied from resources located outside of the LG&E/KU market.⁷⁴ Kentucky Municipals add that the capacity from non-MISO resources is only as high as 65 percent during the initial three-year period while the 100 MW resource from Illinois Power Marketing Company is available, but because of the barriers to entry in the LG&E/KU market, that level is not representative of the Kentucky Municipal Energy Agency's current resource plans after 2022 or its long-term resource portfolio.⁷⁵

51. In addition, Kentucky Municipals assert that the March Order overlooked record evidence of Kentucky Municipals' necessary reliance to a greater extent on energy, as opposed to capacity, from MISO resources. Kentucky Municipals explain that the Kentucky Municipal Energy Agency's modeling of the use of its resource portfolio to serve its requirements customers indicates that at least 85 percent of the energy will come from MISO beginning in June 2022 and that there are no service schedules or agreements under

competitive, and they provided ample evidence to dispute LG&E/KU's arguments. *Id.* n.42.

⁷³ *Id.* at 17.

⁷⁴ *Id.* at 17-18.

⁷⁵ *Id.* n.47.

which other energy products can be purchased from LG&E/KU. Kentucky Municipals contend that the March Order failed to consider the impact that eliminating the De-pancaking Mitigation would have on these purchases.⁷⁶

52. Fourth, Kentucky Municipals take issue with LG&E/KU's Delivered Price Test evidence of the number of competitive suppliers. Kentucky Municipals agree with the Commission that competitive conditions have changed significantly since the Merger, but they argue that LG&E/KU's Delivered Price Test analysis of potential short-term energy sales does not address the forward-looking issue here—whether a sufficient number of long-term suppliers for wholesale customer loads in the LG&E/KU market would remain competitive if they bear the cost of an additional pancaked wheeling charge. Kentucky Municipals assert that, as the March Order noted, LG&E/KU's position concedes that the issue here is the availability of long-term supply, whereas the Delivered Price Test focuses solely on short-term markets. They add that this is the same Delivered Price Test that showed screen failures in the moderately and highly concentrated LG&E/KU market.⁷⁷ Kentucky Municipals argue that, even if the Delivered Price Test were relevant, LG&E/KU's application of it overstates the number of competitive suppliers because it fails to account for the economic incentive of suppliers in organized markets to instead sell their energy within those markets. Kentucky Municipals contend that the March Order brushed this aside by stating that the Commission does not require that Delivered Price Tests account for opportunity costs, but that regardless of whether applicants are *required* to consider opportunity costs, failing to do so overstates the number of potential competitive suppliers.⁷⁸ Kentucky Municipals also assert that the raw number of suppliers is inadequate to demonstrate meaningful competition. Kentucky Municipals argue that the reason the Commission uses the Herfindahl-Hirschman Index instead of counting the number of suppliers is that a market can be highly concentrated and uncompetitive, despite the presence of multiple suppliers. Kentucky Municipals again state that LG&E/KU's own Delivered Price Test confirms this fact and admits that the market is highly concentrated, despite the ostensible presence of more than 100 suppliers.⁷⁹

53. Fifth, Kentucky Municipals contend that competitive conditions remain substantially similar to when the Commission directed LG&E/KU to implement the De-pancaking Mitigation. Kentucky Municipals argue that increases in potential suppliers and the formation of large regional transmission organizations, as the

⁷⁶ *Id.* at 19.

⁷⁷ *Id.* at 19-20.

⁷⁸ *Id.* at 20.

⁷⁹ *Id.* at 21.

Commission emphasized, had already occurred between 1998 and 2006, yet in 2006, the Commission directed LG&E/KU to maintain de-pancaked rates as a condition of its withdrawal from MISO. Kentucky Municipals argue that they present uncontroverted evidence that the increase in suppliers that the Commission relied on in the March Order had already occurred by 2006. Kentucky Municipals assert that LG&E/KU's response that no one argued in 2006 that De-pancaking Mitigation was unnecessary is beside the point because the Commission exercised its public interest responsibilities and found that it was necessary then. Kentucky Municipals contend that the Commission here failed to explain what changed between 2006 and now so as to make the De-pancaking Mitigation that was required no longer necessary.

54. Lastly, Kentucky Municipals contend that, at best, the Commission can conclude based on the record that, with the De-pancaking Mitigation, some customers were able to build power supply portfolios at competitive prices. Kentucky Municipals argue that that conclusion is not sufficient to show that the same customers could have done so without the De-pancaking Mitigation, nor is it sufficient to show that the same customers will be able to develop competitive power supply portfolios in the future. Thus, Kentucky Municipals contend that the Commission lacks substantial evidence for its principal finding that loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers after the De-pancaking Mitigation is removed and that, as a result, the March Order violates the FPA.⁸⁰

55. AMP makes similar arguments. According to AMP, the Commission erred in determining that there was sufficient competition for Rate Schedule No. 402 Customers without the De-pancaking Mitigation because it ignored the arguments and record evidence regarding the necessity of the mitigation.⁸¹ AMP takes issue with the Commission's reliance on the Kentucky Municipal Energy Agency's Requests for Proposals. AMP explains that, under FPA section 203(b), the Commission must evaluate whether the terms and conditions of a merger are in the public interest and that those terms and conditions do not adversely impact competition. AMP asserts that, despite arguments in the record that indicated that removing the De-pancaking Mitigation would result in insufficient competition, the Commission found otherwise based on the results of several Kentucky Municipal Energy Agency Requests for Proposals. AMP explains, however, that these Requests for Proposals were conducted with the De-pancaking Mitigation in place. Thus, AMP argues that the Requests for Proposals are not dispositive evidence that the De-pancaking Mitigation is no longer necessary and, at best, the record is incomplete. AMP contends that the fact that the Requests for Proposals under the De-pancaking

⁸⁰ *Id.* at 22.

⁸¹ AMP Request for Rehearing at 2.

Mitigation are capable of attracting sufficient competitive suppliers is insufficient evidence that it is time to remove the De-pancaking Mitigation.⁸²

56. In addition, AMP asserts that the Commission failed to give weight to the impact of removing the De-pancaking Mitigation on the already-constrained availability of firm transmission in the LG&E/KU footprint. According to AMP, as explained in its protest, firm transmission is not always available, even when there are a host of competitive suppliers. AMP further argues that available paths may be uneconomic due to multiple transmission wheeling charges. AMP thus contends that the practicalities of the constrained availability of transmission in the LG&E/KU footprint require that the Commission evaluate and determine based on sufficient evidence the adequacy of competitive options without mitigation to serve Rate Schedule No. 402 Customers. AMP asserts that, without such evidence, relying only on the results of the Requests for Proposals that were conducted with the De-pancaking Mitigation in place lacks reasoned decision-making, including a rational connection between the facts found and the decision that mitigation is no longer required.⁸³

57. AMP also argues that the Commission erred by concluding that there would be sufficient competition under FPA section 203(b) according to the Delivered Price Test. Specifically, AMP contends that the Commission failed to explain its decision to eliminate the De-pancaking Mitigation despite evidence in the Delivered Price Test that such elimination will have a negative effect on competition in the LG&E/KU footprint.⁸⁴ AMP explains that the Commission noted that LG&E/KU's Delivered Price Test showed that removing the De-pancaking Mitigation resulted in screen failures when the market is moderately and highly concentrated, which indicates that terminating the De-pancaking Mitigation will reduce the number of competitive suppliers. According to AMP, record evidence indicates that LG&E/KU's estimates of the number of competitive suppliers that are reduced as a result of removing the De-pancaking Mitigation are low, and that re-pancaking would significantly increase market concentration. AMP thus asserts that such evidence indicates that further review is warranted. AMP argues that the Commission's determination does not withstand the arbitrary and capricious standard of review because, despite this evidence, it does not explain why a sufficient number of suppliers remain able to compete to make sales in the LG&E/KU market if the De-pancaking Mitigation is removed.⁸⁵

⁸² *Id.* at 4-5.

⁸³ *Id.* at 5-6.

⁸⁴ *Id.* at 6-7.

⁸⁵ *Id.* at 7-8.

iii. **Commission Determination**

58. We deny rehearing as to whether the Commission erred in finding that loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers without the De-pancaking Mitigation.

59. As an initial matter, we disagree with Kentucky Municipals that the screen failures shown in the Delivered Price Test create a presumption that the elimination of the De-pancaking Mitigation will create or enhance market power that can be rebutted only with a preponderance of alternative evidence. As the Commission explained in Order No. 642:

[A] violation of the Appendix A screen does not conclusively demonstrate that the horizontal aspect of a proposed merger would have anticompetitive consequences. If the screen is violated, the Commission will take a closer look at whether the merger would harm competition . . . The facts of each case . . . determine whether the merger would harm competition. When there is a screen failure, applicants must provide evidence of relevant market conditions that indicate a lack of a competitive problem or they should propose mitigation.⁸⁶

60. The Commission followed this approach in the March Order by considering the evidence presented by LG&E/KU of relevant market conditions supporting its contention that the De-pancaking Mitigation is no longer necessary. As explained in the March Order and below, this evidence demonstrated that there will continue to be a sufficient number of competitive suppliers able to deliver power to the LG&E/KU market if the De-pancaking Mitigation is terminated.

61. Before addressing the specific objections raised to the Commission's analysis, it is important to note that Kentucky Municipals and AMP both disregard that the Commission considered the totality of the factors proposed by LG&E/KU, taken together. Specifically, the Commission evaluated evidence regarding the number of suppliers who responded to the Requests for Proposals, evidence regarding the cost competitiveness of those responses absent the De-pancaking Mitigation, and evidence regarding the number of competitive suppliers identified by LG&E/KU's Delivered Price Test. Based on its consideration of this evidence as a whole, the Commission concluded that loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers. It was the combination of these factors taken together that allowed the Commission to conclude that the De-pancaking Mitigation no longer is

⁸⁶ Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,897 (footnotes omitted).

necessary for the Commission to continue to find the Merger to be consistent with the public interest, notwithstanding the screen violations identified in the Delivered Price Test. We respond below to the specific arguments regarding the Commission's evaluation of each factor.

Evidence Regarding the Responses to the Kentucky Municipal Energy Agency Requests for Proposals

62. Kentucky Municipals and AMP argue that the Commission's reliance on the Requests for Proposals results was misplaced because the processes that led to those results assumed that the De-pancaking Mitigation would remain in effect. We disagree. In addition to relying on the number of responses to the Requests for Proposals, the Commission also considered the record evidence regarding the effect of terminating the De-pancaking Mitigation on the competitiveness of the offers accepted by the Kentucky Municipal Energy Agency. In doing so, the Commission used Kentucky Municipals' own estimate of the cost effects of such termination, which on its face overstated the cost effect in certain respects.⁸⁷

63. The Commission determined that, even using this overstated estimate of the cost effect, termination of the De-pancaking Mitigation did not prevent those offers from being competitive.⁸⁸ Kentucky Municipals, which was the only party in possession of the actual data regarding the prices of all offers received, failed to present any of that data to support their claim that elimination of the De-pancaking Mitigation rendered the offers uneconomic.⁸⁹

⁸⁷ For example, Kentucky Municipals reduced the LG&E/KU requirements service rate to account for the recent reduction in the federal income tax rate, but they did not make a corresponding reduction in the cost-based transmission rates charged by MISO or LG&E/KU. March Order, 166 FERC ¶ 61,206 at P 70 n.115.

⁸⁸ *Id.* P 70.

⁸⁹ Kentucky Municipals attempt to excuse their failure to submit this data on the grounds that it was protected by non-disclosure agreements and was competitively sensitive. They also assert that, in any event, they had no obligation to produce the data because LG&E/KU had the burden of proof. Kentucky Municipals Request for Rehearing at 17 n.42. However, the Commission's regulations permit the submission of data on a confidential basis to accommodate these kinds of concerns. *See* 18 C.F.R. § 388.112 (2019). Further, while it is true that LG&E/KU had the burden of proof, it presented estimates of the effects of De-pancaking Mitigation based on the only evidence available to it. Kentucky Municipals could have rebutted LG&E/KU's

64. Furthermore, as the Commission noted, the record evidence showed that a significant portion of the offers submitted in response to the Requests for Proposals were submitted by suppliers located outside of MISO, and that a number of those offers were economic.⁹⁰ Because the De-pancaking Mitigation applies only to transmission from resources located in MISO, elimination of the De-pancaking Mitigation would have no effect on the competitiveness of these offers.

65. Kentucky Municipals take the Commission to task for relying on the evidence submitted by LG&E/KU regarding the Kentucky Municipal Energy Agency's transmission reservations, which showed that 65 percent of the capacity selected by the Kentucky Municipal Energy Agency in response to the Requests for Proposals was located outside of MISO.⁹¹ While it is true, as Kentucky Municipals note, that their witness made a general statement that most of the units the Kentucky Municipal Energy Agency *planned to use* are located in MISO, that witness did not address, and presented no specific evidence regarding, the capacity actually selected by the Kentucky Municipal Energy Agency as a result of the Requests for Proposals.⁹² Nor did this witness contest the accuracy of the transmission reservation data cited by LG&E/KU or present any alternative explanation for the meaning of that data. Consequently, the testimony cited by Kentucky Municipals does not lead us to revise the conclusion that a significant number of the offers submitted in response to the Requests for Proposals, including a significant number of offers that were accepted, were submitted by suppliers located outside of MISO and whose offers therefore are unaffected by termination of the De-pancaking Mitigation.

66. Kentucky Municipals also assert that the Commission failed to consider their need for a greater amount of energy sourced in MISO than capacity and argue that the "March [] Order ignored the impact the elimination of de-pancaking would have on those purchases."⁹³ This argument is misplaced. The Commission evaluated the record evidence regarding the submission of Requests for Proposals, combined with the record evidence regarding the effect of the termination of the De-pancaking Mitigation on

evidence with the data on the specific offers if they believed that LG&E/KU's evidence was incorrect.

⁹⁰ March Order, 166 FERC ¶ 61,206 at P 71.

⁹¹ Kentucky Municipals Request for Rehearing at 17-18.

⁹² Kentucky Municipals, Protest, Docket Nos. EC98-2-000 and ER18-2162-000, at Ex. KM-1 at 24 (filed Oct. 2, 2018).

⁹³ Kentucky Municipals Request for Rehearing at 19.

suppliers located in MISO. The Commission found that this evidence supports the conclusion that there is a sufficient number of suppliers—located both within and outside of MISO—that can supply customers located in the LG&E/KU market at competitive prices. That Kentucky Municipals may need more energy than capacity from suppliers located in MISO does not affect the Commission’s conclusion based on this evidence.

67. Equally unavailing is Kentucky Municipals’ argument that the Commission inappropriately declined to consider Kentucky Municipals’ long-term estimates of the effects of termination of the De-pancaking Mitigation on the competitiveness of long-term power from MISO.⁹⁴ The Commission’s review of mergers typically focuses on the competitive effects in short-term energy markets and not on long-term effects.⁹⁵ The Delivered Price Test required by the Commission’s regulations—including the Delivered Price Test whose screen failures led the Commission to analyze the results of the Requests for Proposals—focuses on such markets. This is because the Commission has concluded that long-term capacity markets generally are competitive. As the Commission stated in Order No. 697, “absent entry barriers, long-term capacity markets are inherently competitive because new market entrants can build alternative generating supply.”⁹⁶ Consequently, the Commission does not analyze the competitive effects of mergers over longer terms, even for mergers in markets where most wholesale customers are municipal customers that contract for their supplies on a long-term basis, as is the

⁹⁴ *Id.* at 12-14.

⁹⁵ March Order, 166 FERC ¶ 61,206 at n.116 (citing *NextEra Energy, Inc.*, 165 FERC ¶ 61,199, at P 31 (2018) (“The Commission usually reviews transactions based upon market conditions at the time of the transaction, under the assumption that determining future market conditions is speculative and uncertain.”); *Westar Energy, Inc.*, 115 FERC ¶ 61,228, at P 79 (“Given the uncertainty regarding market conditions ten years from now, we will not require mitigation at this time.”), *order on reh’g*, 117 FERC ¶ 61,011 (2006), *order on reh’g*, 118 FERC ¶ 61,237 (2007)).

⁹⁶ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, *clarified*, 121 FERC ¶ 61,260, at P 122 (2007), *order on reh’g*, Order No. 697-A, 123 FERC ¶ 61,055, at Appx. D-1, *clarified*, 124 FERC ¶ 61,055, *order on reh’g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh’g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh’g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff’d sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied Public Citizen, Inc. v. FERC*, 567 U.S. 934 (2012).

case here.⁹⁷ For this reason, the Commission appropriately focused on the short-term cost effects of the termination of the De-pancaking Mitigation rather than on the speculative 10-year estimate presented by Kentucky Municipals.

68. Recognizing the Commission's finding in Order No. 697 regarding the competitiveness of long-term capacity markets, Kentucky Municipals argue that the existence of pancaked transmission rates into and out of the LG&E/KU market constitutes a barrier to entry that precludes competition for long-term capacity in the LG&E/KU market. We disagree. The existence of pancaked charges means that external resources face additional charges to sell into a particular market. This is true everywhere and not only in the LG&E/KU market. Although pancaked rates may affect the price of external resources, it does not automatically eliminate them from the market as suppliers. Indeed, the record evidence in this proceeding demonstrates that there is a sufficient number of suppliers that can sell in the LG&E/KU market at a competitive price, even after accounting for pancaked rates.⁹⁸

69. Moreover, Kentucky Municipals' concerns about the long-term effects of terminating the De-pancaking Mitigation are largely addressed by the Commission's imposition of a Transition Mechanism, as a condition of its approval of LG&E/KU's request, requiring that the De-pancaking Mitigation be retained for the initial terms of customers' contracts for supplies sourced in MISO, as clarified further below.⁹⁹ The Transition Mechanism effectively addresses the concerns raised by Kentucky Municipals regarding the effects of the termination of De-pancaking Mitigation on the existing supply contracts of the Kentucky Municipal Energy Agency, Owensboro, KMPA, Berea, and Benham.¹⁰⁰

70. Lastly, we disagree with AMP regarding the impact of terminating the De-pancaking Mitigation on the availability of firm transmission.¹⁰¹ This argument is based on speculation, and we note that AMP provided no specific evidence that would support its argument. Further, it is possible that, with the addition of extra wheeling charges, demand for available transmission paths impacted by such charges may actually decrease as

⁹⁷ See, e.g., *NextEra Energy, Inc.*, 165 FERC ¶ 61,199; *Silver Merger Sub, Inc.*, 145 FERC ¶ 61,261 (2013); *Duke Energy Corp.*, 136 FERC ¶ 61,245 (2011).

⁹⁸ March Order, 166 FERC ¶ 61,206 at PP 69-70.

⁹⁹ *Id.* PP 79-82.

¹⁰⁰ Kentucky Municipals Request for Rehearing at 17.

¹⁰¹ AMP Request for Rehearing at 2.

customers turn to resources that can be sourced through paths that do not require multiple charges. In any event, AMP is incorrect when it asserts that the Commission did not consider evidence regarding the availability of transmission and the effects of multiple wheeling charges.

The Delivered Price Test evaluated by the Commission is based on a detailed analysis of the availability of transmission and the effects of transmission charges.¹⁰²

Delivered Price Test

71. The screen failures identified in the Delivered Price Test submitted by LG&E/KU that the Commission relied upon were atypical in that they did not result from any increase in market share by LG&E/KU or change in the size of the LG&E/KU market.¹⁰³ Instead, the screen failures result solely from a reduction in the number of suppliers located *outside* of the LG&E/KU market who potentially could export into the LG&E/KU market, thereby increasing the shares of the LG&E/KU market allocated to the remaining suppliers located outside the market.¹⁰⁴

72. The Delivered Price Test therefore shows that the only effect of terminating the De-pancaking Mitigation is to reduce the number of potential suppliers located outside of the LG&E/KU market. This is significant because suppliers located outside the LG&E/KU market do not have the same ability to exercise market power as suppliers located inside that market. Suppliers located inside the LG&E/KU market can withhold their capacity and potentially reduce the total amount of supply in the market, thereby driving up prices. The situation is different for suppliers located outside the market. As long as there is significantly more competitive supply located outside of the LG&E/KU market than there is transmission capacity into that market, most of the outside supply is unable to be delivered into the market due to a lack of transmission capacity, even though the price of that supply is competitive. For example, if there is 3,000 MW of competitive supply located outside of the LG&E/KU market but there is only 1,000 MW of import capacity, it would not be possible to deliver 2,000 MW of competitive outside supply into the LG&E/KU market. This means that if one potential supplier located outside of the market attempted to exercise market power by withholding its supplies from the market, the withholding of its supplies would free up transmission capacity into the market that

¹⁰² The analysis of transmission underlying the Delivered Price Test is described in detail in Ex. LG&E/KU-2.3. LG&E/KU Filing at Ex. LG&E/KU-2.3.

¹⁰³ See Louisville Gas and Electric Company and Kentucky Utilities Company, Motion for Leave to Answer and Answer, Docket Nos. EC98-2-001 and ER18-2162-000, at Ex. LG&E/KU-8.2 (filed Oct. 26, 2018).

¹⁰⁴ See LG&E/KU Filing, Ex. LG&E/KU-2 at 28-29. This is referred-to by LG&E/KU as a “re-shuffling” of suppliers.

could be used instead by a different economic supplier that previously was not able to import into the market. Therefore, so long as there is a large number of potential suppliers located outside the LG&E/KU market, the withholding of capacity by one outside supplier would not reduce the amount of supply that can be delivered in the LG&E/KU market or cause price increases in the market.

73. Additionally, because the termination of the De-pancaking Mitigation does not reduce the amount of transmission capacity for imports into the LG&E/KU market, any attempt by LG&E to withhold its capacity located inside the market would continue to face competition from the same amount of external resources. Therefore, so long as a large number of competitive outside suppliers remains after the termination of the De-pancaking Mitigation, screen failures resulting from the termination are not competitively significant.

74. Consequently, Kentucky Municipals are incorrect when they assert that the raw number of competitive suppliers identified by the Delivered Price Test is inadequate to counter the inference created by the high HHI levels and screen failures identified by the Delivered Price Test. The number of suppliers considered by the Commission included only suppliers that are economic and could make sales inside the LG&E/KU market at competitive prices if a different outside supplier attempted to withhold its supply from the market. The fact that the Delivered Price Test shows more than 100 potential competitive suppliers remaining outside of the LG&E/KU market even after termination of the De-pancaking Mitigation is highly relevant and compelling evidence that the screen failures shown in the Delivered Price Test do not represent a competitive concern.

75. It is of course correct that not all 100+ potential suppliers identified in the Delivered Price Test actually would compete to make sales in the LG&E/KU market, and some of them would have better economic opportunities to make sales elsewhere, as Kentucky Municipals argue.¹⁰⁵ But the very nature of the Delivered Price Test is that it only identifies *potential* competitive suppliers.¹⁰⁶ Kentucky Municipals' argument therefore is not a criticism unique to the application of the Delivered Price Test in this case. The fact that there are over 100 potential suppliers who could deliver power to loads in LG&E/KU at a competitive price provides reasonable assurance that at least some suppliers actually would do so. The existence of such potential suppliers also corroborates, and is corroborated by, the evidence discussed above regarding the responses to the Kentucky Municipal Energy Agency's Requests for Proposals.

¹⁰⁵ Kentucky Municipals Request for Rehearing at 20.

¹⁰⁶ See 18 C.F.R. § 33.3(c)(3) (2019) (describing the test as requiring applicants to “identify potential suppliers to each destination market”).

76. Finally, we do not find relevant Kentucky Municipals' arguments that competitive conditions remain substantially similar to when the Commission directed LG&E/KU to implement the De-pancaking Mitigation in the MISO Withdrawal Order issued in 2006. That directive simply perpetuated the mitigation required by the Commission in the 1998 Merger Order without any consideration of the competitive conditions in 2006. As explained herein, we conclude, based on our forward-looking analysis, that there is a sufficient number of potential suppliers to the LG&E/KU market even after termination of the De-pancaking Mitigation.

77. In sum, we disagree that the Commission erred by concluding that loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers. The Commission's conclusion was based on the record evidence showing that there were numerous responses to the Kentucky Municipal Energy Agency's Requests for Proposals from suppliers located both in MISO and in other markets unaffected by termination of the De-pancaking Mitigation; that termination of De-pancaking Mitigation did not render uneconomic the suppliers selected by the Kentucky Municipal Energy Agency; and that the Delivered Price Test identified over 100 potential suppliers that are able to make sales into the LG&E/KU market at competitive prices. Therefore, we deny rehearing.

c. Section 205 Arguments

i. March Order

78. In the March Order, the Commission rejected LG&E/KU's Filing pursuant to FPA section 205 to remove the De-pancaking Mitigation from Rate Schedule No. 402 because the filing did not include the Transition Mechanism. Despite this rejection, the Commission provided guidance regarding the relevant FPA section 205 arguments that were raised that also would be applicable to LG&E/KU's filing to implement the Transition Mechanism.¹⁰⁷

79. The Commission first addressed arguments that re-pancaked rates would be unduly discriminatory absent a transition mechanism. Specifically, the Commission explained that no party disputes that, without the De-pancaking Mitigation, all transmission customers other than the Illinois Municipal Energy Agency and the Indiana Municipal Power Agency will pay the same rate for the same service.¹⁰⁸ The Commission concluded that the Illinois Municipal Energy Agency and the Indiana

¹⁰⁷ March Order, 166 FERC ¶ 61,206 at PP 83-84.

¹⁰⁸ The Illinois Municipal Energy Agency and Indiana Municipal Power Agency each have rate de-pancaking agreements with LG&E/KU that are not relevant here.

Municipal Power Agency entered into settlement agreements regarding de-pancaked rates and that these separate agreements can justify disparate rate treatment.¹⁰⁹

80. The Commission also rejected arguments that removal of the De-pancaking Mitigation would violate a general Commission policy favoring rate de-pancaking. The Commission explained that it has required de-pancaking within RTOs, in the context of multi-company utility holding companies, and in other unique contexts. However, except for these specific contexts, the Commission stated that it does not have a policy requiring de-pancaked rates between different transmission providers.¹¹⁰

ii. Request for Rehearing

81. According to KMPA, the Commission erred by not addressing arguments and evidence that sought to demonstrate that LG&E/KU's request to remove the De-pancaking Mitigation from Rate Schedule No. 402 is not just and reasonable under FPA section 205. KMPA explains that the Commission addressed only arguments regarding the Illinois Municipal Energy Agency/Indiana Municipal Power Agency agreements and arguments regarding the Commission's policy favoring de-pancaking. KMPA argues that the Commission failed to address arguments and evidence put forth by KMPA and its members regarding re-pancaking generally. Specifically, KMPA explains that it made the following arguments that the Commission failed to address:

[R]e-pancaking of transmission rates for use of LG&E/KU transmission facilities for imports of the physical resources owned by KMPA, Paducah and Princeton which are located within the MISO footprint is unjust, unreasonable, unduly discriminatory and preferential because (1) KMPA and the Members are obligated to pay for their ownership of existing generation facilities located inside the MISO footprint and have paid for facilities in connection with transmission service over LG&E/KU facilities; (2) KMPA does not have available alternatives to re-pancaked transmission rates; . . . (4) LG&E/KU's arguments over subsidization are misplaced; and (5) re-pancaking would impose significant unreasonable costs on KMPA and the Members, particularly as compared to the rate decrease for LG&E/KU's other transmission customers.¹¹¹

¹⁰⁹ March Order, 166 FERC ¶ 61,206 at P 97.

¹¹⁰ *Id.* P 98.

¹¹¹ KMPA Request for Rehearing at 16.

82. KMPA explains that, although the Commission addressed some of the FPA section 205 arguments as “guidance,” it should have addressed all arguments in order to engage in reasoned decision-making, particularly in light of the Commission’s acknowledgement that these FPA section 205 arguments would be applicable should LG&E/KU submit an FPA section 205 filing with the Transition Mechanism. KMPA therefore argues that the Commission failed to satisfy its obligation to adequately respond to a party’s argument with respect to the FPA section 205 filing, and that its error should be corrected on rehearing.¹¹²

iii. Commission Determination

83. We deny rehearing on the issue of whether the Commission properly addressed the FPA section 205 arguments made in this proceeding. We find most of KMPA’s claims to be rendered moot based on our decision, discussed below, clarifying that KMPA and its members should be eligible for the Transition Mechanism. Other of KMPA’s arguments, i.e., regarding subsidization, are misplaced. The Commission’s determination to allow removal of the De-pancaking Mitigation was not based on LG&E/KU’s arguments regarding subsidization.¹¹³ As to KMPA’s argument that re-pancaking would impose significant costs on it and its members, we reiterate that KMPA and its members are eligible for the Transition Mechanism. Thus, KMPA’s investments entered into prior to the date of the March Order will remain on the same economic footing as they were before the March Order.¹¹⁴

d. Dismissal of Request for Hearing

i. March Order

84. In the March Order, the Commission dismissed as moot Kentucky Municipals’ motion for summary disposition and request for hearing given the issuance of an order in the proceeding.¹¹⁵

¹¹² *Id.* at 15-17.

¹¹³ *See supra* PP 36-42.

¹¹⁴ *See infra* P 109.

¹¹⁵ March Order, 166 FERC ¶ 61,206 at P 22.

ii. Request for Rehearing

85. Kentucky Municipals argue that the Commission erred by not ordering a hearing to address the conflicting evidence regarding the need for the De-pancaking Mitigation. Kentucky Municipals argue that, because terminating the De-pancaking Mitigation will impose significant costs on loads seeking to compete in the LG&E/KU market, at minimum, the Commission should have granted Kentucky Municipals' conditional request for a hearing to explore and resolve the substantial disagreements and conflicting evidence on the central factual issue of whether loads located in the LG&E/KU market will continue to have access to a sufficient number of competitive suppliers if the mitigation is removed. Kentucky Municipals assert that reliance on the conclusory statements of LG&E/KU's witnesses, whose evidence was contested, fails to satisfy the requirement that the Commission base its decisions on substantial evidence.¹¹⁶

iii. Commission Determination

86. We deny rehearing. Contrary to Kentucky Municipals' assertions, the Commission did not simply rely on the unsupported statements of LG&E/KU's witness, but based its decision on the substantial record evidence submitted by all parties. As the courts have held, the Commission's "choice whether to hold an evidentiary hearing 'is generally discretionary.'"¹¹⁷ Moreover, "[e]ven when there are disputed factual issues, FERC does not need to conduct an evidentiary hearing if it can adequately resolve the issues on a written record."¹¹⁸ Such was the case here in this proceeding, as shown by the Commission's evaluation of the evidence in the record.¹¹⁹

2. Requests for Clarification

a. March Order

87. The Commission conditioned its approval of terminating the De-pancaking Mitigation on LG&E/KU providing a Transition Mechanism for those customers located

¹¹⁶ Kentucky Municipals Request for Rehearing at 23.

¹¹⁷ *Blumenthal v. FERC*, 613 F.3d 1142, 1144 (D.C. Cir. 2010) (quoting *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 128 (D.C. Cir. 1982)).

¹¹⁸ *Id.* at 1145 (citing *Ark. Elec. Energy Consumers v. FERC*, 290 F.3d 362, 369-70 (D.C. Cir. 2002); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993)).

¹¹⁹ *See supra* PP 61-77; *see also* March Order, 166 FERC ¶ 61,206 at PP 67-73 (evaluating analyses provided by parties and the variations therein).

in the LG&E/KU market that reasonably relied on such mitigation. The Commission explained that, although it determined that there would continue to be a sufficient number of competitive suppliers in the LG&E/KU market if the De-pancaking Mitigation was terminated, termination will affect the relative economics of competing suppliers in different markets by making the cost of purchases from resources located in MISO more expensive.¹²⁰

88. The Commission identified certain of the KU Requirements Customers as having made business decisions in reliance on the De-pancaking Mitigation and considered these customers to be eligible for the Transition Mechanism (Transition Customers).¹²¹ Among other Rate Schedule No. 402 Customers, the Commission concluded that the Transition Mechanism would not apply to Rate Schedule No. 402 Customers located outside of the LG&E/KU market, specifically, the TVA Distributor Group, comprised in relevant part of Paducah and Princeton.¹²² The Commission found that it would not have been reasonable for customers outside of the LG&E/KU market to have relied on the continuation of a tariff provision that was intended to preserve horizontal competition within the LG&E/KU market.¹²³

89. The Commission found that, for the Transition Mechanism, the De-pancaking Mitigation must continue for a transition period equal to the initial term¹²⁴ of each power purchase agreement entered into by a Transition Customer that relies on transmission service on the MISO transmission system and that a Transition Customer entered into in reliance on the De-pancaking Mitigation prior to the issuance of the March Order. The Commission noted that this included: (1) contracts entered into by the Kentucky Municipal Energy Agency to supply KU Requirements Customers that went into effect on May 1, 2019; (2) the requirements contract between Benham and AMP that was then in effect; (3) the requirements contract between Berea and AMP that went into effect on May 1, 2019; and (4) the contract between Owensboro and Big Rivers Electric

¹²⁰ March Order, 166 FERC ¶ 61,206 at P 79.

¹²¹ The Commission specified that these customers were Barbourville, Bardwell, Benham, Berea, Corbin, Falmouth, Frankfort, Madisonville, Paris, Providence, and Owensboro. *Id.* P 80.

¹²² *Id.* P 81 & n.125.

¹²³ *Id.* P 81.

¹²⁴ The Commission explained that, by “initial term,” it meant the term specified in the power purchase agreement before any extensions pursuant to an evergreen provision or other provision in the contract extending that term. *Id.* P 82 n.126.

Cooperative. The Commission also explained that, as the initial term of each such power purchase agreement terminates, or if such power purchase agreement is terminated before the end of its initial term, the De-pancaking Mitigation will terminate with respect to the transmission service associated with that agreement.¹²⁵

b. Issues Raised in Requests for Clarification

i. Customers Eligible for Transition Mechanism

90. KMPA argues that the Commission erred by excluding it and its members, Paducah and Princeton, from the Transition Mechanism.¹²⁶ As such, KMPA requests that the Commission clarify that KMPA and its members qualify for the Transition Mechanism.¹²⁷

91. First, KMPA explains that, when Paducah and Princeton agreed to Rate Schedule No. 402 in 2006, they had both already given notice of contract termination to TVA. KMPA states that, contrary to the Commission's assumption, Paducah and Princeton are directly interconnected with LG&E/KU and have spent approximately \$10.8 million and \$11.6 million, respectively, to do so. KMPA explains further that both Paducah and Princeton purchase transmission service from LG&E/KU. KMPA also points out that, since 2010, Paducah has operated its combustion turbine peaking plant at the interconnection with LG&E/KU and from which power is on occasion dispatched into the LG&E/KU transmission system.¹²⁸ In addition, KMPA explains that the Commission's reliance on the label "TVA Distributor Group" is misplaced because Paducah and Princeton terminated their contracts with TVA in December 2009 and January 2010, respectively, and have been

¹²⁵ *Id.* P 82.

¹²⁶ KMPA Request for Rehearing at 4.

¹²⁷ *Id.* at 12-13. KMPA notes that, if the Commission intended to exclude KMPA and its members from eligibility for the Transition Mechanism, KMPA seeks rehearing. *Id.* at 13-15. Because we correct the error regarding KMPA's position in the LG&E/KU market and reliance on the De-pancaking Mitigation and clarify that KMPA should qualify for the Transition Mechanism below, we need not address KMPA's request for rehearing on this same issue.

¹²⁸ *Id.* at 8-9.

operating in the LG&E/KU market since interconnecting with the LG&E/KU system in 2009. KMPA thus argues that it and its members are located in the LG&E/KU market.¹²⁹

92. KMPA states that it has also made business decisions in reliance on LG&E/KU's membership in MISO and on the De-pancaking Mitigation. KMPA explains that, when LG&E/KU filed to withdraw from MISO, KMPA's members had already taken measures in reliance on de-pancaked transmission rates. KMPA states, for example, that its members terminated their wholesale power contracts with TVA, analyzed alternative sources of power supply, committed through KMPA to participate in the Prairie State project, interconnected their facilities with and funded upgrades to LG&E/KU's transmission system, and have operated within the LG&E/KU market since 2009.¹³⁰

93. As to the Prairie State project, KMPA explains that it and its members have an ownership interest in the project, located in MISO, the development, construction, financing, and ongoing operational costs of which are passed along to KMPA's members through "take or pay" power sales agreements dated September 1, 2007. KMPA states that, under these agreements, Paducah and Princeton agree to purchase their entitlement percentages of KMPA's share of the electric power and energy anticipated to be generated by the Prairie State project at rates sufficient for KMPA to recover its costs associated with its ownership interest. KMPA points out that its members are obligated to pay for their portions of those costs regardless of whether the project is operating and whether the plant's output is suspended, interrupted, or otherwise. KMPA explains that, in connection with its participation in the Prairie State project, KMPA has issued more than \$525 million in bonded indebtedness.¹³¹

94. KMPA also states that it has arranged for the system impact studies and facilities studies necessary to facilitate interconnection with the LG&E/KU system. KMPA adds that, in order to interconnect with LG&E/KU, for approximately \$10.8 million, Paducah constructed a 161 kV transmission line extension to provide service to Paducah's Coleman Road substation and, for a second connection to LG&E/KU's system, installed a new ring bus and switching station as well as associated transformers and metering facilities. KMPA states that Princeton constructed an interconnection substation and 161 kV line, installed equipment, and upgraded facilities to interconnect with LG&E/KU, totaling approximately \$11.6 million.¹³²

¹²⁹ *Id.*

¹³⁰ *Id.* at 10.

¹³¹ *Id.* at 10-11.

¹³² *Id.* at 11.

95. In addition, KMPA explains that it has made other significant business decisions in reliance on the De-pancaking Mitigation. Specifically, it states that: (1) Paducah and Princeton are parties to a power sales contract dated November 1, 2007, for MISO hydroelectric power generation; (2) in 2010, Paducah completed construction and began operating a gas-fired combustion turbine peaking facility in LG&E/KU's control area; and (3) KMPA has entered into a number of other agreements that facilitate the import from or export to MISO of power under the LG&E/KU Tariff, including a Network Integration Transmission Service Agreement and a Network Operating Agreement between KMPA and LG&E/KU, an Interim Large Generator Interconnection Agreement, and agreements for long-term, firm point-to-point MISO transmission service.¹³³

96. Based on these significant business decisions, KMPA argues that it and its members have relied on the De-pancaking Mitigation. KMPA also explains that it is undeniable that the relative economics of each of these business decisions will change if KMPA and its members are required to pay pancaked rates for transmission service from their power supplies in MISO to their customers in the LG&E/KU market. KMPA explains, moreover, that it and its members likely would have made different business decisions, such as not investing in generation facilities in MISO, if they had anticipated they would later be subject to pancaked rates for doing so. KMPA requests, therefore, that the Commission clarify that KMPA and its members qualify for the Transition Mechanism to correct for the Commission's error in excluding them.¹³⁴

97. Kentucky Municipals also request clarification that the Transition Mechanism applies to KMPA and its members, Princeton and Paducah.¹³⁵

ii. List of Power Purchase Agreements

98. Kentucky Municipals request clarification that the list of contracts identified in the March Order at Paragraph 82 was not intended to be exhaustive and that the Transition Mechanism should apply to the initial term of any contract that: (1) was entered into by a customer located in the LG&E/KU market; (2) relies on MISO transmission service; and (3) was entered into in reliance on the De-pancaking Mitigation before March 21, 2019 (i.e., the issuance date of the March Order). According to Kentucky Municipals, granting

¹³³ *Id.* at 11-12.

¹³⁴ *Id.* at 12-13.

¹³⁵ Kentucky Municipals Request for Rehearing at 30-33.

such clarification would be consistent with the Commission's stated purpose and would avoid any contracts inadvertently being excluded from the Transition Mechanism.¹³⁶

99. Kentucky Municipals state, for example, that the Commission identified the requirements contract between the City of Benham and AMP that was in effect until April 30, 2019 as being included in the Transition Mechanism. Kentucky Municipals explain, however, that Benham has two contracts with AMP: (1) a 2015 agreement covering requirements service through April 30, 2019; and (2) a contract entered into in October 2018 for requirements service from May 1, 2019, through May 31, 2024. Kentucky Municipals state that both contracts rely on MISO transmission service and were entered into in reliance on the De-pancaking Mitigation before the issuance of the March Order and, thus, should meet the Commission's criteria for being included in the Transition Mechanism. Kentucky Municipals suggest that the anticipated FPA section 205 proceeding in which LG&E/KU files to implement the Transition Mechanism will provide the opportunity for the Commission to identify all contracts within the scope of the intended transition mechanism.¹³⁷

100. Kentucky Municipals explain that, if the Commission declines to grant the requested clarification, then they seek rehearing because due process requires they receive an opportunity to offer a full list of contracts before the Commission reaches a conclusion. Kentucky Municipals argue that restricting the Transition Mechanism to only four sets of contracts the Commission identified based on the limited record here would be unduly discriminatory.¹³⁸

101. AMP similarly requests clarification as to the contracts that may have been made in reliance on the De-pancaking Mitigation. AMP contends that the Commission ignored power sales contracts between KMPA and AMP that established ownership interests in generation in the MISO footprint that were entered into before LG&E/KU submitted its request to remove the De-pancaking Mitigation and in reliance on that mitigation. AMP also explains that, in October 2018, the City of Benham, Kentucky and AMP entered into a remaining requirements power supply schedule beginning on May 1, 2019, and extending to May 31, 2024, which was also made in reliance on the De-pancaking Mitigation and before the March Order issued. AMP asks that the Commission clarify

¹³⁶ *Id.* at 28.

¹³⁷ *Id.* at 29.

¹³⁸ *Id.* at 29-30.

that the De-pancaking Mitigation must continue for a transition period equal to the initial term of each of these power sales contracts as well.¹³⁹

iii. Other Financially Binding Commitments

102. Kentucky Municipals request that the Commission clarify that the Transition Mechanism applies to all financially binding commitments made in reliance on De-pancaking Mitigation, including but not limited to power purchase agreements. Kentucky Municipals explain that, while power purchase agreements represent the most common long-term financial commitments made by Kentucky Municipals, they are not the only long-term financial commitments made in reliance on the De-pancaking Mitigation.¹⁴⁰

103. For example, Kentucky Municipals explain that KMPA has issued hundreds of millions of dollars of bonds to support its ownership in the Prairie State project in MISO. Kentucky Municipals state that these bonds are supported through “take or pay” power sales agreements with KMPA executed by Princeton and Paducah in 2007. Kentucky Municipals assert that these power sales agreements entered into in reliance on the De-pancaking Mitigation represent financial commitments for the cost of power supply resources that, though intended primarily as security for the KMPA bonds, are no less binding than conventional power purchase agreements.¹⁴¹

104. In addition, Kentucky Municipals state that another type of long-term financial commitment they have made in connection with assembling their power supply portfolios after giving notice to terminate their contracts with KU is for associated long-term firm point-to-point transmission service. Kentucky Municipals explain that, for example, the Kentucky Municipal Energy Agency entered into two ten-year commitments for 100 MW each of MISO Firm Point-to-Point transmission service.¹⁴² Kentucky Municipals state

¹³⁹ AMP Request for Rehearing at 8-10.

¹⁴⁰ Kentucky Municipals Request for Rehearing at 34.

¹⁴¹ *Id.*

¹⁴² Kentucky Municipals explain that, under the MISO Open Access Transmission, Energy and Operating Reserves Markets Tariff (MISO Tariff) and its *pro forma* Service Agreement – Long-term Firm Point-to-Point, a Transmission Customer must pay a Transmission Charge for the amount of Reserved Capacity for the duration of the term, regardless of whether the Transmission Customer schedules power using that Reserved Capacity. *Id.* at 34-35; *see also* MISO, FERC Electric Tariff, Schedule 7, Long-Term

that, through these reservations, the Kentucky Municipal Energy Agency has a binding financial obligation to pay MISO for that point-to-point transmission service through April 30, 2029 and April 30, 2027. Kentucky Municipals explain that these long-term commitments were made in reliance on the De-pancaking Mitigation and represent exactly the kind of reliance interest the Commission stated it was protecting via the Transition Mechanism.¹⁴³

105. Kentucky Municipals suggest that MISO Firm Point-to-Point transmission reservations have an initial term and thus could fit with the Commission's approach for limiting the duration of the Transition Mechanism for those reservations. According to Kentucky Municipals, although a point-to-point transmission reservation is not necessarily tied to a particular power purchase agreement, as a practical matter, customers make transmission reservations to support their overall power supply portfolio (e.g., the Kentucky Municipal Energy Agency's ten-year contract for peaking power from Paducah's combustion turbine plant located in the LG&E/KU market). However, because the Kentucky Municipal Energy Agency has no access to reserve sharing or economy energy in the LG&E/KU market, Kentucky Municipals state that including the Paducah peaking power contract in the Kentucky Municipal Energy Agency's portfolio only made sense with access to supporting resources and energy purchases from the MISO market, requiring long-term MISO Firm Point-to-Point transmission reservations.¹⁴⁴ Kentucky Municipals argue that a portion of the Kentucky Municipal Energy Agency's point-to-point transmission reservations can be tied directly to the power purchase agreement for the Paducah peaking power facility. In the alternative, Kentucky Municipals explain that the Commission could choose to limit the transition period for transmission reservations to the initial term of the power purchase agreement that is being supported by the transmission reservation.

106. According to Kentucky Municipals, this is also true for other portions of the Kentucky Municipal Energy Agency's two transmission reservations. Specifically, in addition to the contract for Paducah's peaking resource, Kentucky Municipals explain that one reservation was made to support the Kentucky Municipal Energy Agency's power purchase agreement with Big Rivers Electric Cooperative for 100 MW of base load power from resources in MISO for ten years (through May 31, 2029), whereas the other supports Berea's 35 MW five-year contract with AMP and Benham's 3 MW five-

and Short-Term Firm Point-to-Point Service (32.0.0). Capitalized terms in the previous sentence are defined in the MISO Tariff.

¹⁴³ Kentucky Municipals Request for Rehearing at 35.

¹⁴⁴ *Id.* at 35-36.

year contract with AMP which has an initial transmission reservation term through April 30, 2027.¹⁴⁵

107. For these reasons, Kentucky Municipals request that the Transition Mechanism apply to these commitments. They add that:

[w]hether any particular transmission reservation was made in reliance on De-pancaking Mitigation and whether the transmission reservation supports any particular power purchase agreement are factual questions best addressed in the context of a specific implementation proposal to be filed by LG&E/KU pursuant to FPA Section 205. But the Commission should clarify the principle that the [T]ransition [M]echanism does, indeed, apply to the initial terms of all “long-term and financial commitments [made] in reliance on the De-pancaking Mitigation.”¹⁴⁶

108. Kentucky Municipals seek rehearing of the March Order if the Commission declines to grant the above clarifications because the March Order established the Transition Mechanism to protect customers’ reliance interests but then erred by arbitrarily failing to fully protect those interests by excluding financial commitments that do not take the form of a power purchase agreement. Kentucky Municipals argue that the Commission concluded that the public interest requires the Transition Mechanism, but offered no reason for distinguishing among the reliance interests in power purchase agreements, power plant ownership interests, and firm point-to-point transmission reservations, all of which are binding financial commitments.¹⁴⁷

c. Commission Determination

109. We grant the requested clarifications. First, we clarify that KMPA and its members, Princeton and Paducah, should be considered Transition Customers for purposes of the Transition Mechanism. As KMPA and Kentucky Municipals explain,

¹⁴⁵ *Id.* at 36. Kentucky Municipals explain that, in 2022, the 62 MW MISO reservation will also support the Kentucky Municipal Energy Agency’s 2018 power purchase agreement for solar energy. Kentucky Municipals state that, although that agreement is for 20 years, Kentucky Municipals do not request that the Transition Mechanism apply to that reservation beyond the initial term of the Paducah contract, i.e., through May 31, 2029. *Id.* at n.95.

¹⁴⁶ *Id.* at 37.

¹⁴⁷ *Id.* at 37-38.

KMPA and its members are located in the LG&E/KU market and have invested significant resources to maintain the interconnection with LG&E/KU. In addition, KMPA has relied on the De-pancaking Mitigation in a similar fashion to Kentucky Municipals, through KMPA's participation in the Prairie State project as well as Princeton and Paducah's power sales contract for MISO hydroelectric generation. Therefore, KMPA meets the Commission's criteria for being eligible for the Transition Mechanism and should be considered a Transition Customer.

110. We also clarify that the Transition Mechanism must continue for a transition period equal to the initial term of Benham's October 2018 contract for requirements service from May 1, 2019, to May 31, 2024. The preceding contract between AMP and Benham for requirements service through April 20, 2019 was included in the scope of the Transition Mechanism, and the next contract for such requirements service should be included as well because it was entered into prior to the issuance of the March Order. We further clarify that the Commission's discussion of the contracts in the March Order was not limited to the four contracts described and that, if other contracts were entered into by a Transition Customer in reliance on the De-pancaking Mitigation prior to the issuance of the March Order, those contracts should be covered by the Transition Mechanism as well.

111. We agree with Kentucky Municipals that the De-pancaking Mitigation should continue for other long-term financial commitments, such as for Firm Point-to-Point transmission service, as was provided under Rate Schedule No. 402.¹⁴⁸ However, we clarify that the Transition Mechanism will only cover transmission service requests so long as such service requests are used for the initial term of the power purchase or sales agreement covered by the Transition Mechanism (i.e., entered into before the issuance of the March Order), which include imports to the LG&E/KU market from generation located on the MISO system and exports to the MISO market from generation located on the LG&E/KU transmission system.¹⁴⁹

112. We also agree that the Transition Mechanism should apply to KMPA and its members' participation in the Prairie State project, i.e., KMPA's ownership share of the Prairie State project and the "take or pay" power sales agreements.

¹⁴⁸ See, e.g., *Owensboro Mun. Utils. v. Louisville Gas and Elec. Co.*, 166 FERC ¶ 61,131, at P 45 (2019).

¹⁴⁹ *Louisville Gas and Elec. Co.*, 168 FERC ¶ 61,151 at P 52.

The Commission orders:

The Commission denies rehearing and grants clarification, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.