

144 FERC ¶ 61,063
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

East Kentucky Power Cooperative, Inc.,

Docket No. ER13-1570-000

ORDER ACCEPTING CANCELLATION

(Issued July 26, 2013)

1. On May 29, 2013, East Kentucky Power Cooperative, Inc. (EKPC) filed a notice of cancellation of its reciprocity Open Access Transmission Tariff (OATT),¹ and requests that the Commission accept its notice of cancellation effective June 1, 2013. Due to its June 1, 2013 integration into PJM, EKPC will no longer be providing transmission service in the EKPC zone. Therefore, as discussed below, we find there is no longer a need for EKPC to have a reciprocity OATT on file and we accept EKPC's cancellation of its reciprocity OATT, effective June 1, 2013, as requested.

I. Background

2. EKPC, an exempt generation and transmission cooperative,² has transferred functional control of its transmission facilities rated 100 kV and above to PJM Interconnection, LLC (PJM) and integrated into PJM.

3. On March 28, 2013, in Docket Nos. ER13-1177-000, ER13-1178-000, and ER13-1179-000, PJM and EKPC submitted a joint filing in connection with EKPC's June 1, 2013 integration into PJM. In conjunction with EKPC's integration into PJM and with that filing, EKPC also submitted support for modifications to the PJM OATT related to the establishment and recovery of EKPC's revenue requirements, rate design and provisions of the PJM OATT governing the recovery of transmission-related costs incurred by EKPC.

¹ 18 C.F.R. § 35.28(e) (2012).

² See 16 U.S.C. § 824(f) (2006).

4. The EKPC integration filing also included a non-conforming Network Integration Transmission Services Agreement (NITSA) between PJM and Louisville Gas and Electric Company (LG&E) and Kentucky Utilities Company (KU) (collectively, LG&E/KU) along with an attached settlement agreement (Stipulation). The Stipulation was entered into between PJM, the Office of the Attorney General of the Commonwealth of Kentucky, EKPC, and LG&E/KU and was accepted by the Kentucky Public Service Commission (Kentucky Commission) who, among other things, conditionally approved EKPC's application to transfer functional control of its transmission facilities operated at 100 kV and above to PJM.³ The NITSA and Stipulation together spell out the terms and conditions of the transmission service received by LG&E/KU from PJM. The Stipulation states that LG&E/KU will pay PJM for transmission service but LG&E/KU will not be a part of the PJM markets and will not pay any other PJM rates or charges.⁴ The Stipulation provides EKPC will contract separately with LG&E/KU to provide Ancillary Services Schedule 1 (Scheduling, System Control and Dispatch Service) and Ancillary Services Schedule 2 (Reactive Power Supply and Voltage Control From Generation or Other Sources Service) services (collectively, Schedule 1 and Schedule 2 services).⁵ The Stipulation also memorializes the parties' agreement that any LG&E/KU intervention into EKPC's integration proceedings (including the withdrawal of EKPC's OATT) before this Commission shall be in support of and not to contest these arrangements.⁶ Finally, Section 6.1 of the Stipulation reserved the Kentucky Commission's jurisdiction over the Stipulation for the enforcement and monitoring of the commitments in the agreement.⁷

5. On April 18, 2013, LG&E/KU filed comments supporting the filing of the NITSA. On May 22, 2013, the EKPC integration filing was accepted and made effective June 1, 2013, as requested.⁸

³ EKPC integration filing, Transmittal at 10-12, Docket Nos. ER13-1177-000, *et al.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ EKPC integration filing, Attachment F, Section 6 of the NITSA, Docket No. ER13-1177-000, *et al.*

⁸ *See East Kentucky Power Coop., Inc.*, Docket No. ER13-1177-000, *et al.*, (May 22, 2013) (delegated letter order) (May 2013 Letter Order).

6. On June 21, 2013, LG&E/KU filed a request for clarification or, in the alternative, rehearing (request for clarification/rehearing) of the May 2013 Letter Order. On May 30, 2013, EKPC filed in Docket No. EL13-68-000 a cost study and testimony in support of its proposed Schedule 2 rates under the PJM OATT to receive compensation for making certain units of its reactive power production capability available to PJM.

II. EKPC's Filing

7. On May 29, 2013, in the above docket, EKPC filed to cancel its reciprocity OATT, effective June 1, 2013 or the effective date of EKPC's integration into PJM. EKPC states that, as part of becoming a transmission owning member of PJM, it must cancel its reciprocity OATT. EKPC further states that the transmission service currently being provided to LG&E/KU pursuant to the EKPC OATT will instead be provided by PJM pursuant to a NITSA with LG&E/KU.

III. Notice of Filing and Responsive Pleadings

A. Notice

8. Notice of the filing was published in the *Federal Register*, 78 Fed. Reg. 34,368 (2013), with interventions and protests due on or before June 19, 2013. On June 19, 2013, LG&E/KU filed a timely request to intervene and protest. On June 28, 2013, EKPC filed a motion to answer and answer to LG&E/KU's protest. On July 15, 2013, LG&E/KU filed a motion to respond and a response to EKPC's answer.

B. Responsive Pleadings

1. LG&E/KU Protest

9. LG&E/KU argue that, while they understand the need for EKPC's OATT to be cancelled, they object to the cancellation of Schedule 1 and Schedule 2 to EKPC's OATT because EKPC has failed to live up to its contractual commitments regarding these schedules. Specifically, LG&E/KU argue EKPC and LG&E/KU entered into a Stipulation⁹ that required EKPC to provide Schedule 1 and Schedule 2 services, "based upon the terms and conditions as currently set forth in Schedules 1 and 2 of EKPC's current Open Access Transmission Tariff."¹⁰ LG&E/KU aver that the Stipulation states that the EKPC current OATT rates - the same rates that EKPC seeks to cancel in this

⁹ LG&E/KU attached a copy of the NITSA and Stipulation to its protest as "Attachment A."

¹⁰ LG&E/KU Protest at 1 (citing Attachment A, Section 2.1.4 of the Stipulation).

docket - would be used for Schedule 1 and Schedule 2 services, with the right to modify the rates in the future. LG&E/KU state that, by attempting to cancel rates for Schedule 1 and Schedule 2 services without taking further action to ensure that PJM will charge the current Schedule 1 and Schedule 2 rates to LG&E/KU, EKPC is not adhering to the Stipulation's requirement that LG&E/KU be held harmless from the effects of EKPC's integration into PJM. Therefore, LG&E/KU contend the Commission, before approving the notice of withdrawal, should require that EKPC commit to file with the Commission to implement its current Schedule 1 and Schedule 2 OATT rates for LG&E/KU consistent with the Stipulation.

10. Next, LG&E/KU argue that the Schedule 1 and Schedule 2 service rates are jurisdictional under the Stipulation and must be filed with the Commission. LG&E/KU contend that, with EKPC joining PJM, LG&E/KU will now take transmission service from PJM (a Commission jurisdictional entity) pursuant to the NITSA (a Commission jurisdictional agreement) as there is no longer EKPC transmission service. LG&E/KU insist that, because service to LG&E/KU is now provided by PJM, the Commission must find that EKPC's pass-through charge for Schedule 1 and Schedule 2 are just and reasonable pursuant to the *City of Vernon*¹¹ standard. Therefore, LG&E/KU request that, before the Commission approves any cancellation of EKPC's current rates, it should require EKPC to file the agreed-to rates with the Commission and to the extent that EKPC seeks to modify those rates, any modification meet a just and reasonable standard.

2. EKPC Answer

11. In its answer, EKPC argues that it is in full compliance with both the spirit and the letter of the Stipulation. EKPC states that neither the Stipulation nor the Kentucky Commission order¹² approving it, requires EKPC to file with the Commission the rates that EKPC charges to LG&E/KU for Schedule 1 and Schedule 2 services. EKPC asserts the Stipulation provides that the LG&E/KU would enter into a NITSA with PJM and pay the EKPC zonal transmission rate, but would not be subject to other PJM charges.¹³ EKPC also states the NITSA and Stipulation require that EKPC contract with LG&E/KU

¹¹See *City of Vernon, California and California Independent Sys. Operator, Inc.*, Opinion No. 479, 111 FERC ¶ 61,092 (2005), *order on reh'g*, Opinion No. 479-A, 112 FERC ¶ 61,207 (2005), *reh'g denied*, Opinion No. 479-B, 115 FERC ¶ 61,297 (2006) (*City of Vernon*).

¹² *Application of East Kentucky Power Cooperative, Inc. to Transfer Functional Control of Certain Transmission Facilities to PJM Interconnection, LLC*, Case No. 2012-00169 (Kentucky Public Service Commission, Dec. 20, 2012).

¹³ EKPC Answer at 4 (citing Exhibit 1, Sections 2.1.2 – 2.1.4 of the Stipulation).

to provide Schedule 1 and Schedule 2 services. For that reason and consistent with the requirement in Section 2.1.4 of the Stipulation that the contract be based on the terms and conditions of EKPC's existing OATT, EKPC states it tendered a draft "Ancillary Services Agreement" to LG&E/KU.¹⁴ EKPC argues that this draft agreement reflects the same terms and conditions of service for Schedule 1 and Schedule 2 services that exist in its current OATT.

12. EKPC contends that LG&E/KU's claims are premised on the erroneous assumption that the Schedule 1 and Schedule 2 service contract and the rates charged for the contract service are subject to Commission jurisdiction. EKPC states the Stipulation is a settlement of a state regulatory proceeding that was approved by the Kentucky Commission and incorporated into the Kentucky Commission order. EKPC argues that LG&E/KU attempt to shoe-horn the Stipulation before this Commission by citing Section 7.4 of the NITSA.¹⁵ However, EKPC argues that, absent the provisions of the Stipulation, LG&E/KU would have to acquire both transmission and Schedule 1 and Schedule 2 services on EKPC's system from PJM under the rates, terms and conditions of the PJM OATT. Moreover, EKPC asserts that the above scenario would have subjected LG&E/KU's load on the EKPC system to the PJM charges. Instead, EKPC states that NITSA and Stipulation insulate LG&E/KU from PJM and the PJM rates and the purpose of the Stipulation was to ensure that LG&E/KU do not pay Commission-regulated rates.

13. Finally, EKPC states the Commission should accept its notice of cancellation of the EKPC OATT. EKPC argues that cancellation of the reciprocity OATT filed with the Commission is a necessary step of the EKPC integration into PJM, which was accepted by May 2013 Letter Order. As such, EKPC urges the Commission to accept the cancellation with an effective date of June 1, 2013.

3. LG&E/KU Response

14. In their response, LG&E/KU reassert their request that the Commission condition any acceptance of the cancellation of EKPC OATT on EKPC negotiating and filing an agreement with LG&E/KU based on the rates, terms and conditions of service listed in EKPC's reciprocity OATT. LG&E/KU also state that there was no indication in the Stipulation or NITSA that the parties intended to move the Schedule 1 and Schedule 2

¹⁴ EKPC Answer at 4 (includes a copy of the draft "Ancillary Services Agreement" as Exhibit 2 for the Commission's information.).

¹⁵ See NITSA § 7.4 ("ancillary services charges are based on the terms and conditions in the Stipulation").

services outside the PJM framework, or that the rates for those services could be changed without regulatory oversight.

IV. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motion to intervene serves to make LG&E/KU the entity that filed it a party to this proceeding.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits answers to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers that EKPC and LG&E/KU filed in this proceeding because the answers have provided information that assisted us in our decision-making process.

B. Substantive Matters

17. We accept EKPC's cancellation of its reciprocity OATT, effective June 1, 2013 as requested. Due to its June 1, 2013 integration into PJM, EKPC will no longer be providing transmission service in the EKPC zone because PJM will assume functional control over its transmission facilities operated at 100 kV and above.¹⁶ Therefore, there is no longer a need for EKPC to have a reciprocity OATT on file.

18. According to LG&E/KU, EKPC should not be allowed to cancel Schedule 1 and Schedule 2 of its reciprocity OATT, before EKPC negotiates and files an agreement with LG&E/KU based on the rates, terms and conditions of service provided in Schedule 1 and Schedule 2 of EKPC's reciprocity OATT. LG&E/KU argue that a filing to replace Schedule 1 and Schedule 2 is necessary under the Stipulation before the reciprocity OATT can be withdrawn. The Stipulation states that LG&E/KU will receive service under Schedule 1 and Schedule 2 "based upon the terms and conditions as currently set forth in Schedule 1 and Schedule 2 of EKPC's current Open Access Transmission Tariff."

¹⁶To implement the integration of EKPC in the PJM Region, PJM filed modifications its Open Access Transmission Tariff (OATT), Amended and Restated Operating Agreement (OA), Reliability Assurance Agreement Among Load Serving entities in the PJM Region (RAA), and Consolidated Transmission Owners Agreement (CTOA); these modifications were accepted in the May 2013 Letter Order. *See East Kentucky Power Coop., Inc.*, Docket No. ER13-1177-000, *et al.*, (May 22, 2013) (delegated letter order).

19. We reject the argument that the reciprocity OATT cannot be withdrawn until a new contract is signed between EKPC and LG&E/KU.¹⁷ The NITSA and attached Stipulation, as explained below, provide that the Schedule 1 and Schedule 2 services will not be provided by PJM, but by EKPC. Hence, the rates paid by LG&E/KU for ancillary services are not pass-through rates from PJM and need not be on file with the Commission.

20. The LG&E/KU NITSA¹⁸ provides that PJM will not provide ancillary services, but that EKPC will supply LG&E/KU those services through a bilateral contract between the two. Sections 2.1.2 and 2.1.4 of the Stipulation attached to the NITSA provide that PJM will charge LG&E/KU only for transmission service and will not charge for ancillary services. Section 2.1.4 states:

With respect to Ancillary Services Schedules 1 (Scheduling, System Control and Dispatch Service) and 2 (Reactive Supply and Voltage Control from Generation or Other Sources Service), the Utilities will contract with EKPC to supply such services to the Utilities, who will purchase them based upon the terms and conditions as currently set forth in Schedules 1 and 2 of EKPC's current Open Access Transmission Tariff. EKPC reserves its right to modify the rates for Schedules 1 and 2, and thus the charges payable by the Utilities; however, any such change shall be based only on EKPC's costs and not PJM's costs. (*emphasis added*).

21. These ancillary services, therefore, were specifically exempted from LG&E/KU's NITSA. Because EKPC is an exempt utility under FPA section 201(f), this Commission has no jurisdiction over the rates that EKPC will charge LG&E/KU for ancillary services; a bilateral agreement between an exempt utility under FPA section 201(f) and a customer is not subject to Commission review and approval. While Section 2.1.4 of the Stipulation

¹⁷ Even if the reciprocity OATT remained on file, this Commission cannot enforce its provisions. The Commission's only recourse would be to permit a public utility transmission provider to refuse to offer reciprocity transmission service. *See Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), Order No. 1000-A, 139 FERC ¶ 61,132, at P 774, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

¹⁸ The NITSA incorporates the provisions of the attached Stipulation with respect to ancillary services rates. *See* NITSA § 7.4 ("ancillary services charges are based on the terms and conditions in the Stipulation").

refers to the current terms and conditions in Schedule 1 and Schedule 2, this is a bilateral agreement between EKPC and LG&E/KU, not an obligation to maintain an unnecessary reciprocity OATT on file. In any event, the Stipulation itself contemplates that EKPC may modify those rates subject to review by the appropriate state jurisdictional entity.¹⁹

22. LG&E/KU counter that, under *City of Vernon*,²⁰ the rates for services under Schedule 1 and Schedule 2 are pass-through rates that fall under the Commission's jurisdiction and therefore that any change to those rates cannot be made without the Commission reviewing and approving them as just and reasonable. LG&E/KU observe that EKPC voluntarily joined PJM. They then assert that the service LG&E/KU take from EKPC now originates in PJM pursuant to the NITSA and Stipulation, a jurisdictional utility, and is simply passed through to them by EKPC. EKPC disputes that the rates for service under Schedule 1 and Schedule 2 are jurisdictional to the Commission. It notes that it is a non-jurisdictional utility because it is a generation and transmission cooperative with outstanding debt from the Rural Utilities Service. Further, EKPC explains that, unlike *City of Vernon*, the rates to be paid by LG&E/KU under the bilateral agreement are not a component of PJM's jurisdictional rates because the objective of the Stipulation was to insulate LG&E/KU from PJM's rates to allow LG&E/KU to purchase Schedule 1 and Schedule 2 services from EKPC at contractual rates rather than from PJM at PJM's rates.

23. We find that the *City of Vernon* is distinguishable from this proceeding. In *City of Vernon*, the Commission recognized that, as a municipally-owned utility, Vernon was not subject to its section 205 jurisdiction.²¹ However, the Commission noted that because Vernon voluntarily submitted its revenue requirement as a component of CAISO's jurisdictional rate, Vernon's revenue requirement is "subject to a full and complete

¹⁹ While Section 2.1.4 of the Stipulation states that "EKPC reserves its right to modify the rates for Schedules 1 and 2, and thus the charges payable by the Utilities," we do not interpret that reservation of a right to change rates as authorizing EKPC to file with this Commission. Indeed, Section 6.1 provides that the Kentucky Commission "shall retain jurisdiction following the transfer of control from EKPC to monitor and enforce these commitments."

²⁰ EKPC's Answer at 11 citing to *City of Vernon, California*, Opinion No. 479, 111 FERC ¶ 61,092, *order on reh'g*, Opinion No. 479-A, 112 FERC ¶ 61,207 (2005), *reh'g denied*, Opinion No. 479-B, 115 FERC ¶ 61,297 (2006) (*City of Vernon*).

²¹ *City of Vernon, California*, Opinion No. 479, 111 FERC ¶ 61,092, *order on reh'g*, Opinion No. 479-A, 112 FERC ¶ 61,207 (2005), *reh'g denied*, Opinion No. 479-B, 115 FERC ¶ 61,297 (2006).

section 205 review as part of our section 205 review of that jurisdictional rate.”²² The Commission explained that, in *Pacific Gas & Elec. Co. v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit held that the Commission has statutory authority to review Vernon’s revenue requirement “to the extent necessary to ensure that the CAISO rates are just and reasonable.”²³ Subsequently, the court upheld the Commission’s decision that subjecting the revenue requirements of non-jurisdictional utilities (like Vernon) to a full section 205 review is “the only way to ensure that CAISO’s rate is just and reasonable.”²⁴ As the rates paid here by LG&E/KU are not pass-through rates as discussed in *City of Vernon*, because the non-conforming NITSA provides that these services will be provided by EKPC, not by PJM, *City of Vernon* is inapposite. As the Commission previously found in *Louisville Gas & Electric Company and Kentucky Utilities Company v. East Kentucky Power Cooperative, Inc.*,²⁵ with respect to a dispute between LG&E/KU and EKPC regarding EKPC’s rates under a bilateral interconnection agreement, we do not have jurisdiction to review these rates and EKPC may change these rates without filing under section 205 of the Federal Power Act.

24. Accordingly, we accept EKPC’s cancellation of its reciprocity OATT, effective June 1, 2013.

The Commission orders:

EKPC’s cancellation of its OATT is hereby accepted, effective June 1, 2013.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²² *City of Vernon*, Opinion No. 479, 111 FERC ¶ 61,092 at P 44.

²³ *Id.* P 43 (quoting *Pacific Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1117 (D.C. Cir. 2002)).

²⁴ *Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 672 (D.C. Cir. 2007).

²⁵ 109 FERC ¶ 61,330 (2004).