172 FERC ¶ 61,227
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

Louisville Gas and Electric Company	Docket Nos.	ER19-2396-001
Kentucky Utilities Company		ER19-2397-001

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued September 17, 2020)

1. On October 10, 2019, Louisville Gas and Electric Company (LG&E) and Kentucky Utilities Company (KU) (together, LG&E/KU) filed a request for rehearing and the Kentucky Municipals[1] filed a request for clarification and, in the alternative, request for rehearing of the Commission's September 10, 2019 order in the above-captioned proceedings.[2] In the September Rejection Order, the Commission rejected, without prejudice, the unexecuted transition mechanism agreement (Transition Agreement) filed by LG&E/KU in response to the March Order[3] and provided guidance to assist LG&E/KU in developing a new proposal.

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[1] Kentucky Municipals are the Kentucky Municipal Energy Agency (KYMEA) 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). KYMEA'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] *Louisville Gas and Elec. Co.*, 168 FERC ¶ 61,151 (2019) (September Rejection Order).

[3] In the March Order, the Commission conditionally granted LG&E/KU's request to remove a market power mitigation measure originating from LG&E/KU's merger in 1998 (Merger) and from LG&E/KU's subsequent withdrawal from the Midcontinent

2. Pursuant to *Allegheny Defense Project v. FERC*,[4] the rehearing requests filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a) of the Federal Power Act (FPA),[5] however, we are modifying the discussion in the September Rejection Order and setting aside the order, in part, as discussed below.[6]

I. Background

A. The Merger

3. 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.[7] The increase in market concentration was due to customers in the KU destination market (KU Destination Market)[8] 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

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Independent System Operator, Inc. (MISO) in 2006. In 2006, MISO was known as the Midwest Independent Transmission System Operator, Inc.

[4] *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir. June 30, 2020).

[5] 16 U.S.C. § 825*l*(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[6] *Allegheny Defense Project*, slip op. at 30. We note that the parties raised many of the same rehearing issues in the proceeding in Docket Nos. EC98-2-003 and ER18-2162-002. Concurrent with this order, we issue our order addressing arguments raised on rehearing in Docket Nos. EC98-2-003 and ER18-2162-002.

[7] *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).

[8] 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).

increased horizontal market power in the KU Destination Market through several mitigation measures and ratepayer protection mechanisms.[9]

4. 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 adversely affect competition.[10] 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.[11] 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. Specifically, 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 [MISO] 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.[12]

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[9] 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.

[10] *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.

[11] *Id.* at 62,222.

[12] *Id.* at 62,222-23.

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

5. 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 underlying the conditions established by the Commission in connection with the Merger, "particularly those relating to . . . rate de-pancaking."[13]

6. 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/KU 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.[14] LG&E/KU claimed that maintaining de-pancaked rates would address the horizontal market power issues identified by the Commission in the Merger Order.

7. 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.[15] 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:

> [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].[16]

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

[14] *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.

[15] *Id.* PP 108-110.

[16] *Id.* P 112.

8. 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] withdrawal."[17] 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]."[18]

C. The Merger Mitigation De-pancaking Mechanism

9. 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).[19] Specifically, Rate Schedule No. 402 establishes the Merger Mitigation De-pancaking mechanism (De-pancaking Mitigation) to shield the "[Merger Mitigation De-pancaking (MMD)] Parties," comprised of the KU Municipals,[20] the Tennessee Valley Authority (TVA) Distributor Group,[21] and any future Requirements Customers[22] (together, Rate Schedule No. 402 Customers) "from any re-pancaking of

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[17] *Id.* P 113.

[18] *Id.* at n.70.

[19] *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, one of which was the original Rate Schedule No. 402 (Original Rate Schedule No. 402), before it was finalized in Rate Schedule No. 402 and accepted.

[20] 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 KU Requirements Customers.

[21] 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.

[22] 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)

rates for transmission service between [LG&E/KU's] transmission system and the remaining members of [MISO]."[23]

10. 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;[24] 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.[25] 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.[26] Rate Schedule No. 402 also provides that:

> [t]he [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

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who purchase requirements electric service from LG&E/KU." Rate Schedule No. 402, First Revised Sheet No. 2, Definitions.

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

[24] 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.

[25] *Id.*

[26] *Id.* § 1.a.ii.

¶ 61,019 (2006). Any proposed changes to these requirements are governed by Section 203 of the FPA.[27]

D. March Order

11. 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.[28] 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.

12. 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.[29] 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).[30]

13. In response to the March Order, on July 12, 2019, pursuant to FPA section 205,[31] LG&E/KU filed an unexecuted Transition Agreement to implement the Transition Mechanism.

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[27] *Id.* § 1.a.v.

[28] LG&E/KU, Joint Application under FPA Section 203 and Section 205, Docket Nos. EC98-2-001 and ER18-2162-000 (filed Aug. 3, 2018) (LG&E/KU Filing).

[29] March Order, 166 FERC ¶ 61,206 at PP 45, 67-73.

[30] *Id.* PP 45, 74-82.

[31] 16 U.S.C. § 824d.

E. September Rejection and Rehearing Orders

14. In the September Rejection Order, the Commission rejected LG&E/KU's proposed Transition Agreement to implement the Transition Mechanism without prejudice and provided guidance to assist LG&E/KU in developing a new proposal.[32] Specifically, the Commission provided guidance as to which customers should be entitled to the Transition Mechanism, which power purchase agreements should be covered by the Transition Mechanism (i.e., Covered Agreements), how transmission service reservations (TSR) covered by the Transition Mechanism should be defined (i.e., Covered TSRs), which charges under MISO Schedules are eligible for reimbursement, which reimbursement adjustments can be made, how the De-pancaking Mitigation could be terminated, and whether exports from the LG&E/KU transmission system into the MISO market are covered by the Transition Mechanism.

15. Concurrent with the September Rejection Order, in Docket Nos. EC98-2-002 and ER18-2162-002, the Commission issued an order on rehearing that addressed requests for rehearing and clarification filed by American Municipal Power, Inc. (AMP), Kentucky Municipals, and KMPA regarding the March Order.[33] The Commission denied the requests for rehearing but granted the requests for clarification as to various aspects of the Transition Mechanism.

II. Requests for Rehearing and Clarification of the September Rejection Order

16. LG&E/KU requests rehearing with respect to whether the Commission: (1) misstated and misapplied the standard for review in evaluating the Transition Agreement; (2) erred in including certain Transition Customers; (3) ignored evidence that certain charges under certain MISO Schedules are not pancaked charges; (4) erred by failing to state whether the prohibition on Covered TSRs applies to transmission associated with non-MISO resources; (5) erred in finding that the Transition Agreement should apply to any agreement entered into before the March Order; and (6) erred by rejecting LG&E/KU's proposal to eliminate de-pancaking for exports to MISO in its Transition Agreement.

17. Kentucky Municipals request clarification and, in the alternative, rehearing regarding: (1) the extent to which the Transition Mechanism applies to a specific TSR; (2) whether the Transition Mechanism includes an additional power purchase agreement;

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[32] September Rejection Order, 168 FERC ¶ 61,151.

[33] *Louisville Gas and Elec. Co.*, 168 FERC ¶ 61,152 (2019) (September Rehearing Order).

and (3) whether the Transition Mechanism would apply if load is moved into the MISO market.

18. KMPA and Kentucky Municipals filed answers to LG&E/KU's request for rehearing. LG&E/KU filed a response to Kentucky Municipals' request for clarification and, in the alternative, rehearing and a reply to KMPA's answer.

III. Discussion

A. Procedural Matters

19. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing.[34] Accordingly, we reject the answers filed by KMPA, Kentucky Municipals, and LG&E/KU.

20. LG&E/KU raises a procedural issue with respect to the September Rejection Order regarding the Commission's decision to reject the answers submitted in the proceeding.

1. Rejection of Prior Answers

a. September Rejection Order

21. In the September Rejection Order, the Commission stated that it was not persuaded to accept the answers filed in the proceeding by LG&E/KU, Kentucky Municipals, and KMPA.[35] Accordingly, pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,[36] the Commission rejected the answers.

b. Request for Rehearing

22. LG&E/KU contends that the Commission was arbitrary and capricious and abused its discretion by rejecting answers that responded to new information and arguments

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[34] 18 C.F.R. § 385.713(d)(1) (2020). We evaluate a pleading based on its substance, rather than its style or form. *See, e.g.*, *Stowers Oil & Gas Co.*, 27 FERC ¶ 61,001, at 61,002 n.3 (1984) ("Nor does the style in which a petitioner frames a document necessarily dictate how the Commission must treat it."). While Kentucky Municipals styled their pleading as a request for clarification and, in the alternative, request for rehearing, we find that, in substance, it is a request for rehearing.

[35] September Rejection Order, 168 FERC ¶ 61,151 at P 15.

[36] 18 C.F.R. § 385.213(a)(2) (2020).

presented in the protests. By rejecting the answers, LGE&E/KU argues that the Commission failed to ensure a complete record in the proceeding and prejudiced LG&E/KU's ability to defend its decisions implementing the Transition Mechanism. LG&E/KU argues that, although Rule 213(a)(2) of the Commission's Rules of Practice and Procedure generally prohibits an answer to a protest or to an answer, the Commission routinely grants waiver of the prohibition, among other reasons, because fairness dictates that parties be allowed to respond to new evidence and arguments. LG&E/KU asserts that, in the September Rejection Order, the Commission denied it this opportunity because Kentucky Municipals' and Princeton and Paducah's protests raised arguments and new facts to which LG&E/KU had a right to respond.[37]

c. Commission Determination

23. We disagree with LG&E/KU's argument that the Commission was arbitrary and capricious and abused its discretion by rejecting the answers in the September Rejection Order. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure provides that answers to protests or answers are prohibited unless otherwise ordered by the decisional authority. Therefore, the rule provides the Commission with discretion as to whether to allow answers.[38] In the September Rejection Order, the Commission stated that it was not persuaded to accept the answers filed in this proceeding and, therefore, rejected them.[39] LG&E/KU's arguments in their rehearing request have not persuaded us to do otherwise. Simply because the Commission has exercised its discretion to allow answers in certain cases does not mean that the Commission was required to do so here.

B. Substantive Matters

1. Standard of Review

a. September Rejection Order

24. In the September Rejection Order, the Commission disagreed with LG&E/KU that the Transition Agreement satisfied the Commission's condition in the March Order regarding termination of the De-pancaking Mitigation. The Commission emphasized, in the March Order, that its approval of terminating the De-pancaking Mitigation was conditioned "on LG&E/KU providing a transition mechanism for those customers located

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[37] LG&E/KU October 10, 2019 Request at 19-21.

[38] *See, e.g., Pub. Serv. Co. of New Hampshire*, 134 FERC ¶ 61,041, at P 11 (2011) (stating that the Commission may exercise its discretion under Rule 213(a)(2) and choose to allow an answer).

[39] September Rejection Order, 168 FERC ¶ 61,151 at P 15.

in the LG&E/KU market that reasonably relied on such mitigation" prior to the March Order.[40] The Commission further explained that, pursuant to the Transition Mechanism, "the De-pancaking Mitigation must continue for a transition period equal to the initial term of each power purchase agreement entered into by a Transition Customer that relies on transmission service on the MISO transmission system."[41] The Commission explained that it would evaluate the Transition Agreement for compliance with this condition.[42] The Commission added that it would also evaluate whether the Transition Agreement was just, reasonable, and not unduly discriminatory or preferential, as required by FPA section 205.[43]

25. In addition, the Commission noted that, instead of amending Rate Schedule No. 402, which included the "Merger Mitigation De-pancaking mechanism," to comply with the March Order, LG&E/KU filed the Transition Agreement, which would have superseded Rate Schedule No. 402 in its entirety. While the Commission acknowledged that much of Rate Schedule No. 402 had been mooted by the passage of time and that it would be appropriate to supersede Rate Schedule No. 402 in its entirety for this reason, the Commission nonetheless found that any agreement replacing Rate Schedule No. 402 must give the Transition Customers the same level of protection against transmission rate pancaking as the "Merger Mitigation De-pancaking mechanism" included in Rate Schedule No. 402.[44] However, as explained in more detail in the September Rejection Order and below, the Commission concluded that the Transition Agreement did not do so and was ultimately inconsistent with the Commission's condition for the Transition Mechanism set forth in the March Order.[45]

b. <u>Request for Rehearing</u>

26. LG&E/KU argues that the Commission misstated and misapplied the standard for reviewing the Transition Agreement. LG&E/KU states that the March Order required it to submit a new filing pursuant to FPA section 205 for the Transition Mechanism and, although the Commission identified certain parameters for the Transition Mechanism,

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[40] September Rejection Order, 168 FERC ¶ 61,151 at P 16 (quoting March Order, 166 FERC ¶ 61,206 at P 80).

[41] *Id.* P 16 (quoting March Order, 166 FERC ¶ 61,206 at P 82).

[42] *Id.*

[43] *Id.*

[44] *Id.* P 17.

[45] *Id.* P 18.

because this is a new FPA section 205 proceeding, LG&E/KU was free to propose the terms of a just and reasonable transition toward eliminating the De-pancaking Mitigation. LG&E/KU argues that the Commission's decision on such a filing must be based on whether the filing is just and reasonable and not unduly discriminatory. LG&E/KU asserts that the September Rejection Order fails to identify this standard; rather, LG&E/KU argues that the Commission applied an erroneous standard that proposed that the Transition Mechanism must replicate Rate Schedule No. 402.[46]

27. LG&E/KU asserts that the Commission applied a false standard when the Commission stated that LG&E/KU's proposal to replace Rate Schedule No. 402 in its entirety would be appropriate if the Transition Agreement gives the Transition Customers the same level of protection against transmission rate pancaking as included in Rate Schedule No. 402.[47] LG&E/KU argues that comparing its proposed Transition Mechanism to Rate Schedule No. 402 is inappropriate because the March Order designated a "smaller universe than Rate Schedule No. 402 customers" as eligible for transition protection. LG&E/KU contends that the March Order set forth different terms for the Transition Mechanism than what was included in Rate Schedule No. 402, which also means a different level of protection than Rate Schedule No. 402. Therefore, LG&E/KU argues, the Commission failed to articulate a basis to require that the same level of protection be required.[48]

28. LG&E/KU also argues that the application of the same level of protection standard to the Transition Agreement assumes that the Transition Mechanism should apply to the "MISO schedules enumerated by the Kentucky Municipals."[49] LG&E/KU posits that the scope of the MISO schedules subject to reimbursement under Rate Schedule No. 402 had not been clear and that the Transition Agreement was intended to address this problem. In sum, LG&E/KU argues that the question before the Commission was not how Rate Schedule No. 402 should apply, but rather whether the new terms of the Transition Agreement are just and reasonable.[50]

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[46] LG&E/KU October 10, 2019 Request at 28.

[47] *Id.* at 25 (citing March Order, 166 FERC ¶ 61,206 at P 17).

[48] *Id.* at 26-27.

[49] *Id.* at 28.

[50] *Id.* at 27-28.

c. Commission Determination

29. We disagree with the request for rehearing as to the standard of review applied to the Transition Agreement. We find that LG&E/KU's arguments overly simplify the context of this proceeding. In the March Order, the Commission, under FPA section 203(b), granted LG&E/KU's request to terminate the De-pancaking Mitigation, but required LG&E/KU to provide a Transition Mechanism 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.[51] In the same order, the Commission also rejected, without prejudice, LG&E/KU's filing, under FPA section 205, to remove De-pancaking Mitigation from its tariff (Rate Schedule No. 402) because the Commission found that the filing did not include the Transition Mechanism required by the March Order. Subsequently, LG&E/KU submitted, under FPA section 205, the Transition Agreement, as required by the March Order.

30. In evaluating the Transition Agreement, the Commission evaluated whether the Transition Agreement was just, reasonable, and not unduly discriminatory or preferential, as required by FPA section 205.[52] Because the Transition Mechanism is in response to the Commission's directive in the March Order, the Commission's evaluation also includes an analysis to ensure that LG&E/KU's proposed Transition Agreement complies with the requirements from the March Order.[53] To do as LG&E/KU requests—namely, to analyze the Transition Agreement only under the just and reasonable and not unduly discriminatory standard of FPA section 205—would be arbitrary and capricious and ignore the Commission's directives under FPA section 203 regarding terminating the De-pancaking Mitigation. Accordingly, we find that the Commission applied the correct standard of review in the September Rejection Order by evaluating whether the Transition Agreement was just, reasonable, and not unduly discriminatory or preferential, as required by FPA section 205, and also whether it complies with the Commission's directives under FPA section 203 in the March Order.

31. In addition, we are not persuaded by LG&E/KU's argument that the Commission erred by finding that it would be appropriate to supersede Rate Schedule No. 402 in its entirety provided that the Transition Mechanism gives the Transition Customers the same level of protection against transmission rate pancaking as the Merger Mitigation De-pancaking mechanism included in Rate Schedule No. 402. We disagree with LG&E/KU's argument that comparing the Transition Mechanism to Rate Schedule

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[51] March Order, 166 FERC ¶ 61,206 at P 82.

[52] September Rejection Order, 168 FERC ¶ 61,151 at P 16.

[53] *Id.*

No. 402 is inappropriate because the Commission laid out different terms for de-pancaking under the Transition Mechanism than were included under Rate Schedule No. 402. This argument misses the Commission's purpose for requiring a Transition Mechanism. The Commission found the De-pancaking Mitigation in Rate Schedule No. 402 to be sufficient to mitigate LG&E/KU's horizontal market power concerns that arose from LG&E/KU's withdrawal from MISO.[54] In terminating this mitigation, the Commission determined that the De-pancaking Mitigation must continue for a transition period for customers who entered into certain agreements in reliance of the De-pancaking Mitigation prior to the March Order.[55] The Commission never stated that the Transition Mechanism was to provide different terms or a different level of protection than the De-pancaking Mitigation in Rate Schedule No. 402.

32. Further, LG&E/KU's argument that, unlike Rate Schedule No. 402, the Transition Mechanism only applies to purchases from MISO and not to exports into MISO is unsupported. In the March Order, the Commission did not make that distinction; instead, the Commission stated that the Transition Mechanism should apply to purchase agreements "entered into by a Transition Customer that relies on transmission service on the MISO transmission system . . . ."[56] Accordingly, as the Commission found in the September Rejection Order, the De-pancaking Mitigation as accepted by the Commission in Rate Schedule 402 must continue under the Transition Mechanism, but this does not necessarily require the exact same rate schedule.[57]

2. Scope of the Transition Mechanism

a. Transition Customers

i. September Rejection Order

33. The Commission reiterated that, in the March Order, it identified 11 Transition Customers entitled to De-pancaking Mitigation under the Transition Mechanism.[58] In

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[54] *E.ON U.S., LLC*, Docket No. ER06-1279-001 (Nov. 9, 2006) (delegated order).

[55] March Order, 166 FERC ¶ 61,206 at P 82.

[56] *Id.*

[57] As the Commission acknowledged, many portions of Rate Schedule No. 402 have been mooted by the passage of time. September Rejection Order, 168 FERC ¶ 61,151 at P 17.

[58] *Id.* P 28 & n.37. In the March Order, the Commission identified as Transition Customers 10 of the 12 KU Requirements Customers (i.e., Barbourville, Bardwell,

addition, the Commission noted that, in the September Rehearing Order, it identified three additional Transition Customers, KMPA and its members Paducah and Princeton, as being located in the LG&E/KU market and thus entitled to service under the Transition Mechanism.[59] The Commission rejected LG&E/KU's arguments as to why three of the Transition Customers – Falmouth, Princeton, and Paducah – should not be entitled to service under the Transition Mechanism.

(a) <u>Princeton and Paducah</u>

34. The Commission disagreed with LG&E/KU's arguments that Princeton and Paducah should not be entitled to the Transition Mechanism based on a lack of reliance. Specifically, the Commission disagreed with LG&E/KU that it must have been apparent to KMPA at the time of KMPA's Prairie State Energy Campus (Prairie State)[60] investment that LG&E/KU would not remain in MISO. The Commission noted that LG&E/KU's proposal to withdraw from MISO was controversial and that it was not clear whether LG&E/KU would ultimately leave MISO.[61] The Commission further explained that LG&E/KU filed the original Rate Schedule No. 402, providing for transmission rate de-pancaking, in February 2006, before KMPA had executed the definitive agreements committing it to the Prairie State project. The Commission noted that KMPA also made other later commitments in reliance on transmission rate de-pancaking.[62]

35. The Commission noted that LG&E/KU's argument ignored that, in approving the Merger, the Commission relied on the transmission rate de-pancaking provided by LG&E/KU joining MISO to mitigate the market power created by the Merger.[63] The Commission concluded it was likely that, if LG&E/KU were to be permitted to leave MISO in 2006, LG&E/KU would have had to propose some kind of de-pancaking

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Benham, Corbin, Falmouth, Frankfort, Madisonville, Paris, Providence, and Berea) and Owensboro. March Order, 166 FERC ¶ 61,206 at P 80.

[59] September Rejection Order, 168 FERC ¶ 61,151 at P 31; September Rehearing Order, 168 FERC ¶ 61,152 at P 109.

[60] KMPA states that it was formed in early 2005 by Princeton and Paducah to participate in the development of Prairie State, a 1,600 MW coal-fired generating station in southwest Illinois. KMPA, Supplemental Protest, Docket Nos. EC98-2-001 and ER18-2162-000, at 3 (filed Oct. 2, 2018).

[61] September Rejection Order, 168 FERC ¶ 61,151 at P 33.

[62] *Id.*

[63] *Id.* P 34 (citing Merger Order, 82 FERC at 62,222-23).

mechanism to replace its MISO membership in order to continue to satisfy the Commission's market power concerns expressed in the Merger Order.[64] The Commission emphasized that LG&E/KU's notice of withdrawal did just that. The Commission concluded that, although the provisions of Rate Schedule No. 402 ultimately adopted represented a different form of rate de-pancaking than what LG&E/KU originally proposed, this was because the Commission found the original proposal to be inadequate. The Commission explained that there never was any question in the proceeding addressing LG&E/KU's withdrawal from MISO that de-pancaking might not be required.[65]

36. Consequently, the Commission determined that, regardless of what KMPA may have known or should have expected regarding LG&E/KU's continued membership in MISO at the time KMPA committed to Prairie State, KMPA reasonably could have relied on there being some form of transmission rate de-pancaking that would have applied to the transmission of power from Prairie State to Princeton and Paducah based on the Commission's holding in the Merger Order. The Commission therefore found that it was appropriate to include Princeton and Paducah, as well as KMPA, as Transition Customers entitled to the Transition Mechanism.[66]

(1) <u>Request for Rehearing</u>

37. LG&E/KU argues that the Commission's decision to include Princeton and Paducah in the Transition Mechanism is arbitrary and capricious for several reasons. LG&E/KU asserts that the March Order established two criteria for whether a Rate Schedule 402 customer is eligible for the Transition Mechanism: (1) the customer must be in the LG&E/KU market; and (2) the customer must have reasonably acted in reliance on De-pancaking Mitigation prior to the issuance of the March Order.[67] Based on these two criteria, LG&E/KU states that it excluded Princeton Paducah in the Transition Agreement. LG&E/KU asserts that, in the September Rejection Order, the Commission made no finding as to whether Princeton and Paducah are in the LG&E/KU market and ignored evidence that Princeton and Paducah were not in fact in the LG&E/KU market. Specifically, LG&E/KU asserts that: (1) Princeton and Paducah were never one of the Requirements Customers that the Commission sought to protect in the 1998 Merger; (2) TVA provided Princeton and Paducah with their wholesale requirements service until

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[64] *Id.* P 35.

[65] *Id.*

[66] *Id.* P 36.

[67] LG&E/KU October 10, 2019 Request at 29 (citing March Order, 166 FERC ¶ 61,206 at P 80).

December 2009 for Paducah and January 2010 for Princeton, after LG&E/KU left MISO in 2006; and (3) Princeton and Paducah did not become LG&E/KU transmission customers until 2009, after LG&E/KU left MISO and after Princeton and Paducah made their power supply decisions to invest in Prairie State and to purchase power from certain hydroelectric generation in MISO. LG&E/KU argues that Princeton and Paducah made these power supply decisions before they were in the LG&E/KU market in contrast to the other Transition Customers, who were in the LG&E/KU market at the time of the Merger and after.[68]

38. LG&E/KU also argues that the record does not support a finding that Princeton and Paducah relied on the De-pancaking Mitigation. LG&E argues that the Commission has found similar reliance claims, such as those in *Northern Natural Gas Co.*, to be unreasonable, in part because the pipeline at issue in that case had no obligation to continue the tariff provisions. LG&E/KU contends that similarly it had no obligation to provide Princeton and Paducah with de-pancaked transmission rates in the first place and had an explicit stated right to seek to change such rates. LG&E/KU suggests that Princeton and Paducah's rights to de-pancaked transmission were only what were reflected in Rate Schedule No. 402, whereas for other Transition Customers, the de-pancaking terms of Rate Schedule No. 402 reflected a Commission-imposed requirement that the Commission recognized in the March Order.[69]

39. LG&E/KU contends that Princeton and Paducah's reliance claim is based on the fact that in 2005 they entered into agreements to source their supply from Prairie State in MISO and that, rather than an actual reliance standard, the Commission in the September Rejection Order used a "reasonably could have relied standard" and abandons the March Order, its own precedent, and reasoned decision-making.[70] LG&E/KU argues that the Commission's analysis falls short because the Commission only speculated regarding the continued likelihood of de-pancaked transmission at the time LG&E/KU left MISO. LG&E/KU asserts that the Merger Order only stated that the Commission would evaluate LG&E/KU's withdrawal from MISO for horizontal market power issues, not that de-pancaking would continue. LG&E/KU further posits that nothing in the record supports the Commission's conclusion that de-pancaked transmission was likely as Princeton and Paducah made their decision to terminate service with TVA and invest in Prairie State around when LG&E/KU provided notice to MISO and the

[68] *Id.* at 29-32.

[69] *Id.* at 32-33.

[70] *Id.* at 33-34.

Kentucky Commission in December 2004 and January 2005, respectively, regarding leaving MISO.[71]

40. LG&E/KU further asserts that Princeton and Paducah's reliance on Original Rate Schedule No. 402, which preceded currently effective Rate Schedule No. 402, is unreasonable because such extrinsic evidence is inadmissible.[72] As to reliance on Rate Schedule No. 402, LG&E/KU maintains that Princeton and Paducah provided no evidence indicating that the rate schedule was a deciding factor in their investment in Prairie State and that any reliance is undermined by the fact that LG&E/KU never promised static transmission rates. As such, LG&E/KU contends that any reliance by Princeton and Paducah would have been wholly unreasonable.[73]

41. In addition, LG&E/KU maintains that Princeton and Paducah are not similarly situated with other Transition Customers because there are no power purchase agreements to include and no reasonable initial term to apply. LG&E/KU contends that constructing and financing a peaking plant and the ability to make "Drive In" sales is incompatible with the Commission's rationale for the Transition Mechanism to retain access to competitive supply arrangements.[74] LG&E/KU also points out that including Princeton and Paducah as Transition Customers based on Prairie State ignores the Commission's principle that building new supply disciplines horizontal market power.[75]

42. LG&E/KU also argues that, because the Commission rejected the Transition Agreement based on factual findings about reliance, the Commission erred in not setting those disputed issues of fact for hearing – specifically, whether and to what degree Princeton and Paducah actually relied or should have relied on the De-pancaking Mitigation when making their supply decisions. LG&E/KU points out that Princeton and Paducah argued in their protest, with testimony, that they relied on the De-pancaking Mitigation, but LG&E/KU, in its initial filing of the Transition Agreement and its answers, argued that Princeton and Paducah did not rely on the De-pancaking Mitigation and questioned the weight of Princeton and Paducah's evidence. LG&E/KU also notes that Kentucky Municipals' and Princeton and Paducah's protests included requests that the Commission set the matter for hearing and that LG&E/KU did not oppose those

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[71] *Id.* at 34-35.

[72] *Id.* at 35-36.

[73] *Id.* at 36-37.

[74] *Id.* at 37-38.

[75] *Id.* at 38-39.

requests. LG&E/KU argues that the Commission's consideration of the Transition Agreement thus failed to account for all of the evidence presented and that the Commission should have set the matter for hearing.[76]

(2) <u>Commission Determination</u>

43. We disagree with the request for rehearing as to the Commission's decision to include Princeton and Paducah as Transition Customers. As an initial matter, we find that LG&E/KU's argument as to whether Princeton and Paducah qualify as Transition Customers, as well as LG&E/KU's other arguments on this issue, stem from LG&E/KU's misunderstanding of the Commission's directives in the March Order. In particular, the Commission's Transition Mechanism is based on whether a customer was in the LG&E/KU market and made decisions that relied on the De-pancaking Mitigation *as of the date of the March Order*, and is not based on, as LG&E/KU asserts, whether a customer was in the LG&E/KU market at the time of the Merger and made decisions that relied on the De-pancaking Mitigation as of the date of the March Order.

44. LG&E/KU admits that Princeton and Paducah interconnected and became part of LG&E/KU's system in 2009, and based on evidence in the record, at least with respect to Prairie State, Princeton and Paducah entered into binding agreements in 2007. Prior to the date of the March Order, Rate Schedule No. 402 Customers had no way of knowing whether or when the De-pancaking Mitigation would terminate as such termination required a Commission order authorizing the termination. Accordingly, the date of eligibility as to whether Princeton and Paducah are Transition Customers is the March Order, not the date of the Merger or when LG&E/KU was a member of MISO.

45. We disagree with LG&E/KU's argument that the record does not support a finding that Princeton and Paducah relied on the De-pancaking Mitigation.[77] As discussed below, we find that it was reasonable for Princeton and Paducah to rely on the De-pancaking Mitigation that was in effect in planning to interconnect to the LG&E/KU system.[78] LG&E/KU's argument – that similar to the pipeline in *Northern Natural Gas Co.*, LG&E/KU had no obligation to provide Princeton and Paducah with mitigation in the form of de-pancaked transmission rates in the first place, and had an explicitly stated right to seek to change such rates – is unpersuasive because it ignores the fact that the de-pancaked rates provided for under Rate Schedule No. 402 were required as a condition of the Merger Order and as part of LG&E/KU's withdrawal from MISO. We also note that LG&E/KU admits that it chose to use original Rate Schedule No. 402, to which Kentucky

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[76] *Id.* at 22-23.

[77] *Louisville Gas and Electric Company*, 172 FERC ¶ 61,228, at P39 (2020).

[78] September Rehearing Order 168 FERC ¶ 61,152 at P 109.

Municipals and the TVA Distributor Group were parties, to comply with the Commission's directive that LG&E/KU continue to provide de-pancaked transmission rates to address the Commission's horizontal market power concerns in relation to LG&E/KU's withdrawal from MISO.[79] The current form of Rate Schedule No. 402 was ultimately the one accepted as part of LG&E/KU's compliance.[80]

46. We also disagree with LG&E/KU that, with respect to Princeton and Paducah's reliance claim, the Commission required an actual reliance standard and, in the September Rejection Order, abandoned the March Order, its own precedent, and reasoned decision-making. LG&E/KU fails to recognize that, when the Merger Order stated that the Commission would evaluate LG&E/KU's withdrawal from MISO in light of horizontal market power concerns, this would include the requirement that de-pancaked transmission would continue. The Commission authorized the Merger in part based on LG&E/KU's membership in MISO. The Commission concluded that LG&E/KU's membership in MISO satisfied the horizontal market power concerns raised by the Merger because membership in a regional transmission organization (RTO) with standardized transmission rates would broaden the universe of sellers that would be available to customers in the LG&E/KU market to mitigate market power concerns.[81]

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[79] *See* LG&E/KU Filing at 13-14.

[80] *E.ON U.S. LLC*, Docket No. ER06-1279-001 (Nov. 9, 2006) (delegated order).

[81] In the Merger Order, the Commission explained:

> Second, [independent system operators (ISO)] can ensure expansion of geographic markets by eliminating pancaked transmission rates in regions. Through the availability of transmission service at a single rate, the number of suppliers able to reach markets (such as the KU [Requirements Customers] destination market) increases, thereby lowering market concentration. . . . We regard LG&E and KU's participation as parties in [MISO] filings as evidence of their commitment to membership in [MISO]. Our approval of the [M]erger is based on LG&E and KU's continued participation in [MISO]. If LG&E and KU seek permission to withdraw from the [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 [s]ection 203(b) of the FPA to address any concern, and order further procedures as appropriate.

Merger Order, 82 FERC at 62,222; *see also* MISO Withdrawal Order, 114 FERC ¶ 61,282 at PP 108-118 (describing how LG&E/KU's then-proposed reciprocity

Indeed, in allowing LG&E/KU to withdraw from MISO, the Commission conditioned its "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.]"[82] Thus, LG&E/KU is incorrect that the Commission merely speculated regarding the likelihood of de-pancaked transmission at the time LG&E/KU left MISO. It was squarely at issue when LG&E/KU merged and when LG&E/KU left MISO.

47. Given that de-pancaked transmission has been at issue since LG&E/KU merged, there is sufficient evidence in the record to demonstrate that Princeton and Paducah reasonably relied on the De-pancaking Mitigation based on their business decisions and position in the LG&E/KU market. First, Princeton and Paducah's first agreement with respect to Prairie State was executed on February 9, 2005, which was *before* LG&E/KU received authorization from the Commission to leave MISO.[83] Then, KMPA and its members executed power sales agreements regarding their respective shares of Prairie State on September 1, 2007 after the De-pancaking Mitigation took effect on September 1, 2006. Princeton and Paducah also both paid substantial sums to interconnect to the LG&E/KU transmission system in 2009 and 2012, respectively. Princeton and Paducah terminated their wholesale contracts with TVA in January 2010 and December 2009, respectively, after giving notice five years prior to the termination.[84] Most importantly, as part of KMPA's consideration of whether to fully participate in Prairie State, KMPA continued to evaluate its power supply options, which involved determining whether de-pancaked transmission was available.[85] As such, given that de-pancaked transmission has been at issue since LG&E/KU merged and remained at issue when LG&E/KU withdrew from MISO, we find that there is sufficient evidence in the record to find that KMPA reasonably relied on the De-pancaking Mitigation.

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agreement would provide mitigation comparable to MISO membership by maintaining rate de-pancaking but requiring an alternative proposal if the proposed reciprocity agreement did not manifest).

[82] MISO Withdrawal Order, 114 FERC ¶ 61,282 at P 112 (emphasis added).

[83] KMPA, Protest, Docket Nos. EC98-2-001 and ER18-2162-000, at 6-7 (filed Oct. 2, 2018).

[84] *See also* KMPA, Supplemental Protest, Docket Nos. ER19-2396-000 and ER19-2397-000, at 20-23 (filed Aug. 2, 2019).

[85] *See, e.g.*, *id.*, Thornton Aff. at 10-13.

48. Furthermore, we disagree with LG&E/KU that the MISO Withdrawal proceeding is irrelevant to whether Princeton and Paducah relied on the De-pancaking Mitigation. As explained above, until LG&E/KU received Commission authorization to withdraw from MISO and satisfied the Commission's concerns regarding horizontal market power and transmission rate de-pancaking under FPA section 203, it was reasonable for Princeton and Paducah, in planning to interconnect to the LG&E/KU system, to rely first on LG&E/KU's membership in MISO and then on the De-pancaking Mitigation as part of Rate Schedule No. 402. It is irrelevant that Princeton and Paducah may not have qualified for the De-pancaking Mitigation originally at the time of the Merger. The Commission accepted Rate Schedule No. 402 as satisfying its concerns regarding LG&E/KU withdrawing from MISO under FPA section 203, and Rate Schedule No. 402 offered the De-pancaking Mitigation to more than simply the KU Requirements Customers at the time of the Merger. As to LG&E/KU's argument concerning Original Rate Schedule No. 402, the Commission merely referenced Original Rate Schedule No. 402 to signal that de-pancaking continued to be a concern of the Commission until the current Rate Schedule No. 402 was accepted by the Commission.[86] For these reasons, we disagree with LG&E/KU's argument that the record does not support the conclusion that Princeton and Paducah reasonably relied on the De-pancaking Mitigation.

49. We also disagree with LG&E/KU's argument that the prescribed characteristics of the Transition Mechanism do not apply to Princeton and Paducah as they are not similarly situated with the other Transition Customers because there is no power purchase agreement to include with respect to Prairie State and that constructing and financing Prairie State bears no relationship to retaining access to competitive supply arrangements. As we explain in the order addressing arguments raised on rehearing, in Docket Nos. EC98-2-003 and ER18-2162-002, being issued concurrently,[87] although the Commission found that terminating the De-pancaking Mitigation would affect the cost of purchases from resources located in MISO and that, under the Transition Mechanism, the De-pancaking Mitigation must continue for a transition period equal to the initial term of each power purchase agreement entered into by a Transition Customer, LG&E/KU mistakenly assumed that the De-pancaking Mitigation should take a more limited form under the Transition Mechanism than it had under Rate Schedule No. 402. LG&E/KU fails to acknowledge that, just as Kentucky Municipals sourced power in MISO and relied on the De-pancaking Mitigation under Rate Schedule No. 402, so too did Princeton

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[86] In any event, LG&E/KU's argument as to Original Rate Schedule No. 402 is without merit because the Commission required LG&E/KU to maintain rate de-pancaking in the MISO Withdrawal Order before the Commission even considered the merits of Original Rate Schedule No. 402 for compliance purposes. MISO Withdrawal Order, 114 FERC ¶ 61,282 at P 112.

[87] *Louisville Gas and Electric Company*, 172 FERC ¶ 61,228, at PP 40-42.

and Paducah. Prairie State is part of KMPA's power supply portfolio,[88] and KMPA and its members made the decision to invest in that supply prior to the issuance of the March Order.[89] In addition, Princeton and Paducah both have power sales agreements with KMPA for the provision of power from Prairie State, and Princeton and Paducah use MISO transmission service to deliver the power from Prairie State. This transmission service was and still is covered under the "Drive-Out" framework of the De-pancaking Mitigation in Rate Schedule No. 402, which remains in effect. LG&E/KU chose to narrowly interpret the Commission's language in the March Order to exclude that which was previously subject to the De-pancaking Mitigation provisions of Rate Schedule No. 402. However, the Commission made no such distinctions in the March Order and then clarified, in the September Rehearing Order, that its language in the March Order was not meant to be exhaustive given the purpose of the De-pancaking Mitigation.[90] We therefore disagree with LG&E/KU's argument that the prescribed characteristics of the Transition Mechanism do not apply to Princeton and Paducah as they are not similarly situated with the other Transition Customers based on their lack of power purchase agreements and their decision to construct and finance Prairie State.

50. Lastly, we disagree with LG&E/KU's argument that the Commission erred in not setting disputed issues of fact for hearing, i.e., whether and to what degree Princeton and Paducah relied or should have relied on the De-pancaking Mitigation when making their supply decisions. As discussed in the order addressing arguments raised on rehearing in Docket Nos. EC98-2-003 and ER18-2162-000, LG&E/KU mistakenly assumes a different standard for reliance than what the Commission articulated in the March Order. Thus, there were no disputed issues of fact for hearing regarding Princeton and Paducah's reliance on the De-pancaking Mitigation.

(b) Falmouth

51. In the September Rejection Order, the Commission pointed out that in the March Order, it specifically identified Falmouth as being entitled to the Transition Mechanism

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[88] *See, e.g.*, KMPA, Supplemental Protest, Docket Nos. EC98-2-001 and ER18-2162-000, at 6-7 (filed Oct. 2, 2018).

[89] *Id.*

[90] *See* September Rehearing Order, 168 FERC ¶ 61,152 at P 111 (clarifying that contracts in addition to those listed in the March Order, if entered into by a Transition Customer in reliance on the De-pancaking Mitigation prior to the issuance of the March Order, should be covered as well).

and that LG&E/KU did not request rehearing of that finding.[91] The Commission also explained that LG&E/KU's argument that Falmouth should not be entitled to the Transition Mechanism was based on the fact that Falmouth joined PJM in 2018, a fact that was known before the March Order.[92] The Commission explained that LG&E/KU's presentation of this argument for the first time in this proceeding represented a collateral attack on the March Order.[93] The Commission thus rejected the argument.

(1) <u>Request for Rehearing</u>

52. According to LG&E/KU, the Commission erred in including Falmouth as a Transition Customer. LG&E/KU maintains that it is undisputed that Falmouth is located on the East Kentucky Power Cooperative transmission system that is part of PJM and that Falmouth is no longer a designated network load nor a network customer of the LG&E/KU transmission system. LG&E/KU adds that there is no evidence that Falmouth is LG&E/KU's transmission customer. LG&E/KU argues that the Commission made no attempt to reconcile its decision to include Falmouth as a Transition Customer with the purpose of the De-pancaking Mitigation. LG&E/KU maintains that the Commission's rationale was to simply reject LG&E/KU's proposal to exclude Falmouth on the basis that it was a collateral attack on the March Order. LG&E/KU asserts however that this rationale ignores that the Commission is required to satisfactorily explain its actions. LG&E argues that this rationale results in an arbitrary decision that conflicts with the Commission's determination that LG&E/KU can terminate its de-pancaking obligation under the Transition Agreement as long as a customer terminates its transmission service with LG&E/KU.[94]

53. LG&E/KU argues that it is irrelevant whether Falmouth was listed in the March Order because the Commission required LG&E/KU to submit a Transition Mechanism and that evaluation of any proposed Transition Mechanism is a brand new section 205 proceeding, governed by the just and reasonable standard of review. LG&E/KU contends as such that, under this standard of review, it was reasonable for LG&E/KU to exclude Falmouth because inclusion would have been inconsistent with the purpose of discontinuing the De-pancaking Mitigation. LG&E/KU points out that Falmouth itself has not objected to being excluded from the Agreement, and LG&E/KU thus maintains that the Commission's decision could only have resulted from applying the incorrect

[91] September Rejection Order, 168 FERC ¶ 61,151 at P 30 (citing March Order, 166 FERC ¶ 61,206 at P 80).

[92] *Id.*

[93] *Id.*

[94] LG&E/KU October 10, 2019 Request at 39-40.

standard that the Transition Mechanism must be the same as Rate Schedule No. 402, in which Falmouth was included.[95]

(2) Commission Determination

54. We set aside the September Rejection Order, in part, as to whether Falmouth should be included as a Transition Customer. As LG&E/KU explains, Falmouth is located on the East Kentucky Power Cooperative transmission system that is part of PJM, and Falmouth is no longer a designated network load nor a network customer of the LG&E/KU transmission system.[96] Because Falmouth is no longer a load interconnected with the LG&E/KU transmission system, we find that it is no longer in the LG&E/KU market for purposes of the Transition Mechanism and should not be a Transition Customer.

(c) Kentucky Municipal Energy Agency

55. The Commission found that KYMEA should be included as a Transition Customer eligible for the Transition Mechanism. The Commission noted that, although KYMEA's members have been identified as Transition Customers, KYMEA is the entity holding transmission reservations that qualify for the Transition Mechanism. The Commission also explained that, because KYMEA entered into certain power purchase agreements for its members, who have been identified as Transition Customers, and the Commission established the Transition Mechanism to ensure those customers retain access to alternative competitive supply arrangements, it was appropriate to include KYMEA as a Transition Customer as well. However, the Commission clarified that KYMEA may not, as a Transition Customer, use the Transition Mechanism to benefit members that may join it after the issuance of the March Order that have not been identified as Transition Customers.[97]

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[95] *Id.* at 41.

[96] *City of Falmouth, Kentucky*, 168 FERC ¶ 61,088, at P 8 (2019) (dismissing Falmouth's rehearing request as moot based on a finding that Falmouth now takes conforming open access transmission service from PJM and no longer takes transmission service from the LGE/KU transmission system). Under a Wholesale Distribution Service Agreement between LG&E/KU and KYMEA filed in Docket No. ER19-1316-000, LG&E/KU "directly assign the costs associated with the LG&E/KU-owned 69kV radial line that connects the [East Kentucky Power Cooperative, Inc.] system to the City of Falmouth." *Id*. P 6.

[97] September Rejection Order, 168 FERC ¶ 61,151 at P 37.

(1) Request for Rehearing

56. According to LG&E/KU, the Commission's determination to include KYMEA as a Transition Customer was arbitrary and capricious because the Commission provided no justification for why KYMEA should be a party to the Transition Agreement on its own, in addition to the Transition Customers. LG&E/KU argues that KYMEA was not included in the March Order as a Transition Customer and that, if it was essential, would have been included as a party to Rate Schedule No. 402. LG&E/KU further argues that the proposed Transition Agreement included reimbursement for the transmission charges directly or through the Transition Customers' agent, which presumably is KYMEA.[98] LG&E/KU argues that including KYMEA adds a risk that additional entities not contemplated by Rate Schedule No. 402 could benefit from the Transition Agreement and that, although it acknowledged this risk, the Commission failed to demonstrate why it is necessary to include KYMEA in the Transition Agreement.

(2) Commission Determination

57. We disagree with LG&E/KU's request for rehearing as to whether KYMEA should be considered a Transition Customer. Contrary to LG&E/KU's argument, the Commission supported its reasoning for identifying and finding that KYMEA itself should be a Transition Customer. In the September Rejection Order, the Commission explained that KYMEA should be included as a Transition Customer because it is the entity holding transmission reservations for some of its members who have been identified as Transition Customers that are eligible for the Transition Mechanism.[99] Further, we disagree with LG&E/KU's contention that additional entities not contemplated by Rate Schedule No. 402 could benefit from the Transition Mechanism. The Commission already established in the September Rejection Order that KYMEA could not use its position as a Transition Customer to benefit members that may join it after the issuance of the March Order that have not been identified as Transition Customers. Once the power purchase agreements that KYMEA members who are Transition Customers have entered into in reliance on the De-pancaking Mitigation end, the Transition Mechanism ends as well. No other members would be eligible for the Transition Mechanism.[100]

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[98] LG&E/KU October 10, 2019 Request at 42-43.

[99] September Rejection Order, 168 FERC ¶ 61,151 at P 37.

[100] Consistent with our finding that Falmouth is not a Transition Customer, Falmouth cannot be a Transition Customer by virtue of the fact that it is in KYMEA.

b. Covered MISO Charges

i. September Rejection Order

58. The Commission determined that the charges associated with MISO Schedules 26, 26-A, and 45, all of which were reimbursed under Rate Schedule No. 402, must be reimbursed under the Transition Mechanism. The Commission did not find LG&E/KU's arguments to exclude these schedules from reimbursement under the Transition Mechanism to be compelling. Specifically, the Commission found that charges under Schedules 26, 26-A, and 45 are "corresponding charges" as defined by Section 1.a.iv of Rate Schedule No. 402. The Commission explained that section 1.a.iv provides that such charges "shall include only those charges for transmission service and ancillary services where both [MISO] and the Transmission Owner provide and charge for corresponding service."[101] The Commission further explained that section 1.a.iv also provides illustrative examples, such as the example that credits are not required for congestion or marginal losses incurred in MISO if there is not a corresponding congestion or marginal loss charge for use of LG&E/KU's system.[102] The Commission concluded that, as the example illustrated, the corresponding charges provision of Rate Schedule No. 402 is not intended to require a line-by-line comparison of the MISO and LG&E/KU transmission rate cost of service, but rather to exclude from reimbursement MISO charges that have no conceptual counterpart in LG&E's transmission rates.

59. The Commission found that the charges under Schedules 26, 26-A, and 45 are different from congestion and marginal losses and, instead, conceptually should be considered as elements of MISO's cost of service for its charges for firm transmission service. The Commission explained that Schedules 26 and 26-A represent MISO's mechanism for allocating the costs of transmission facilities that cannot be assigned to a single zone. Although the Commission acknowledged that it is true that LG&E/KU provides no multi-zone transmission service, the Commission explained that this is because LG&E/KU is a single balancing authority area that is not part of a larger RTO. The Commission concluded that LG&E/KU's transmission charges include the cost of LG&E/KU's transmission facilities and that consequently the LG&E/KU transmission charges correspond to the charges imposed by MISO for the transmission facilities associated with Schedules 26 and 26-A. As such, the Commission concluded that

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[101] September Rejection Order, 168 FERC ¶ 61,151 at P 62 (quoting Rate Schedule No. 402, First Revised Sheet No. 3, § 1.a.iv).

[102] *Id.*

LG&E/KU must reimburse charges under these schedules under the Transition Mechanism.[103]

60. The Commission similarly noted that MISO uses a separate Schedule 45 (Cost Recovery of NERC[104] Recommendation or Essential Action) to account for the fact that not all of its member utilities will incur such costs or incur them to the same extent. The Commission explained that, although LG&E/KU may not have a separate schedule for the recovery of its costs of responding to a NERC Alert, there is no doubt that any such costs incurred by LG&E/KU would be recoverable in LG&E/KU's formula transmission rates to the extent they were prudently incurred and otherwise satisfy applicable standards for rate recovery. The Commission also noted that LG&E/KU was silent as to whether it has included any such costs in its formula transmission rates. Consequently, the Commission found that Schedule 45 charges also correspond to the LG&E/KU transmission charge that could (and perhaps does) include the costs covered by Schedule 45.[105] Accordingly, the Commission found that Schedule 45 charges should be reimbursed as well.[106]

ii. Request for Rehearing

61. LG&E/KU argues that, in determining that the charges associated with MISO Schedules 26, 26-A, and 45 must be reimbursed under the Transition Mechanism, the Commission ignored LG&E/KU's evidence that these schedules are not pancaked charges and failed to adequately support its determination that these charges should be in the Transition Agreement.[107] LG&E/KU contends that the Commission's conclusion that, because both Schedule 26 and 26-A charges and the LG&E/KU transmission service charges include costs associated with transmission facilities, the charges must be conceptually the same is overly simplistic. LG&E/KU maintains that the question is not whether the charges both include any transmission facility costs but whether the relevant transmission facilities and charges assessed provide a "corresponding service" to the Transition Customers.[108] LG&E/KU argues that the Commission has distinguished between various categories of transmission, such as differentiating between local

[103] *Id.* P 63.

[104] NERC is the North American Electric Reliability Corporation.

[105] September Rejection Order, 168 FERC ¶ 61,151 at P 64.

[106] *Id.*

[107] LG&E/KU October 10, 2019 Request at 48.

[108] *Id.* at 48-49.

transmission facilities with local benefits and transmission facilities that provide system-wide benefits, and that LG&E/KU explained that Schedule 26 and 26-A charges both relate solely to MISO benefits. LG&E/KU adds that Schedule 26-A charges in particular have no equivalent LG&E/KU transmission charge. LG&E/KU moreover explains that, if LG&E/KU was still within the MISO footprint, customers would be subject to both LG&E/KU transmission services charges and Schedule 26 and 26-A charges.[109]

62. As to Schedule 45 charges, LG&E/KU contends that the Commission's analysis lacks any explanation. Specifically, LG&E/KU maintains that the Commission did not conclude that Schedule 45 charges are, in fact, included in LG&E/KU transmission charges and did not point to evidence demonstrating that to be the case. LG&E/KU asserts rather that the Commission ignored LG&E/KU's argument that the costs recoverable under Schedule 45 are complex, project-specific, and not clearly defined, such that it is not possible to determine whether Schedule 45 charges correspond to or pancake with LG&E/KU transmission charges. LG&E/KU states the only thing that is certain is that these charges had been reimbursed under Rate Schedule No. 402.[110]

63. In addition, regarding Schedule 26-A charges, LG&E/KU asserts that the Commission's determination that they are reimbursable under the Transition Agreement conflicts with prior Commission precedent. Specifically, LG&E/KU explains that the Commission has determined that Schedule 26-A charges are appropriately assessed for transmission service used to export energy to other regions, including PJM, and that the Schedule 26-A Multi-Value Projects are not local and support all uses of the MISO transmission system. LG&E/KU contends that the September Rejection Order does not acknowledge this precedent nor its departure from it.[111]

iii. Commission Determination

64. We disagree with LG&E/KU's arguments on rehearing regarding whether charges under Schedule 26 and 26-A should be eligible for reimbursement under the Transition Mechanism. While we agree with LG&E/KU's assertion that the issue is whether there are "corresponding services" such that associated charges should be eligible for crediting or waiver under the existing framework of Rate Schedule No. 402, we find

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[109] *Id.* at 49.

[110] *Id.* at 50-51.

[111] *Id.* at 51-52 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 156 FERC ¶ 61,034, at P 55 (2016) (*MISO*), *on reh'g*, 164 FERC ¶ 61,191 (2018)).

that transmission services that do not have precisely identical provisions can be considered corresponding services. Section 1.a.iv of Rate Schedule No. 402 provides:

> With respect to any MMD Transaction in which TO Charges [(i.e., LG&E/KU's transmission and ancillary services billings, as applicable to an MMD Transaction)] will be waived, such waived TO Charges shall include only those charges for transmission service and ancillary services where both [MISO] and the Transmission Owner provide and charge for corresponding services. Thus, as a non-exclusive example, in a "Drive Out" MMD Transaction, the Transmission Owner shall not be obligated to credit any amounts to an MMD Party for congestion or marginal losses incurred in the [MISO] market, so long as there are no corresponding congestion or marginal loss charges for the use of [LGE/KU's] system.[112]

As the Commission explained in a recent order, there are no provisions within Rate Schedule No. 402 that require that, for services to be corresponding, they have to be the same category of transmission. Rather, the Commission has established that, even where there are differences in the type of transmission service, such services can nevertheless be corresponding and as a result the applicable charges are subject to the de-pancaking.[113] Although LG&E/KU is not part of a larger RTO with regional cost sharing or public policy initiatives, LG&E/KU nonetheless has its own transmission planning process, as it acknowledges. The criteria associated with the planning process will of course be different for a single balancing authority area compared to an RTO.

65. Further, we find unpersuasive LG&E/KU's argument that the Commission's decision in the September Rejection Order with respect to Schedule No. 26-A charges conflicts with Commission precedent. The Commission's decision in the *MISO* order has no bearing on whether charges should be eligible for reimbursement under the current framework of Rate Schedule No. 402 as applied in the Transition Mechanism because the provision of the order that LG&E/KU refers to simply states that Multi-Value Project

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[112] Rate Schedule No. 402 § 1.a.iv.

[113] *See Owensboro Mun. Utils. v. Louisville Gas and Elec. Co.*, 166 FERC ¶ 61,131, at PP 45-50 (finding that, because both MISO and LG&E/KU provided and charged for base transmission service and firmness is not a determinative factor based on the terms of Rate Schedule No. 402, Owensboro's transmission reservation on the MISO system and its transmission reservation on the LG&E/KU system represent corresponding services and LG&E/KU must reimburse Owensboro for that MISO transmission service), *reh'g denied*, 169 FERC ¶ 61,030 (2019).

charges are appropriate for transmission service between regions.[114] Even accepting LG&E/KU's arguments as true, i.e., that these charges would apply to transmission service from MISO to LG&E/KU, these charges would be paid by Rate Schedule No. 402 Customers for "Drive-Out" transactions for electricity to be delivered into the LG&E/KU control area. And as discussed above, simply because the services are not exactly the same does not mean that they are not corresponding.

66. We also find LG&E/KU's argument regarding Schedule 45 charges to be unpersuasive. In its Transition Agreement filing, LG&E/KU provided little support for its position to no longer reimburse customers for Schedule 45 charges. The extent of LG&E/KU's argument was that Schedule 45 is an "elective schedule for the recovery of costs associated with MISO's transmission owner's response to NERC Alert" and that, due to the "broad discretion" given to utilities to determine the appropriate response, it is not possible to determine "whether charges under MISO Schedule 45 correspond to or pancake with charges in LG&E/KU transmission rates."[115]

67. LG&E/KU's argument ignores that the costs of NERC-directed network upgrades that can be recovered under Schedule 45 are the same costs that can be recovered by a MISO transmission owner under its Attachment O formula rate. Schedule 45 is simply a method to separately track and recover these costs if the transmission owner so chooses.[116] Indeed, these are the same costs that LG&E/KU recovers through its Attachment O formula rale.[117] In addition, along with charges associated with Schedules

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[114] *MISO*, 156 FERC ¶ 61,034 at P 55.

[115] LG&E/KU, Transition Mechanism Agreement Filing, Docket Nos. ER19-2396-000 and ER19-2397-000, at 10. LG&E/KU's witness added, among other things, that Schedule 45 charges may include construction work in progress (CWIP) and that there is no corresponding CWIP recovery for projects in LG&E/KU's transmission rates. *Id.*, Ex. LG&E/KU-1 at 21-22.

[116] MISO, Revisions to Tariff, Docket No. ER13-841, at 2 (filed Jan. 31, 2013); *see also Midwest Indep. Sys. Operator, Inc.*, Docket No. ER13-841-000 (Mar. 22, 2013) (accepting MISO's proposal to add Schedule 45 to its tariff).

[117] *See* LG&E/KU, Annual Informational Attachment O Filing, Docket No. ER20-1274-000, at Attachment 01 (filed Mar. 13, 2020) ("This Attachment O reflects a pass-through of the costs associated with the ITO and the Reliability Coordinator and excludes amortization of regulatory assets when such amortization is charged to transmission O&M and recovered entirely from retail customers."). We note that TranServ International, Inc. serves as both the Independent Transmission Organization and Reliability Coordinator for LG&E/KU, *Louisville Gas and Elec. Co.*, 137 FERC ¶ 61,195 (2011), and the Reliability Coordinator "perform[s] all duties identified for Reliability

26 and 26-A, LG&E/KU has identified the cost of Schedule 45 charges on an Annual Cost basis and has historically credited these charges.[118] While LG&E/KU may argue that costs recoverable under Schedule 45 are "complex, project-specific, and not clearly defined," LG&E/KU has nonetheless been able to identify Schedule 45 charges and has reimbursed these charges going back to 2014.[119]

68. LG&E/KU continues to focus on the rate recovery mechanisms underlying various charges to assert that, because the charges are not calculated the same, they cannot possibly correspond to LG&E/KU transmission charges. However, as explained above, it is sufficient that LG&E/KU provides a similar service under its tariff or has a charge for a particular service under its tariff for it to be a corresponding service under the Rate Schedule No. 402 framework that will continue under the Transition Mechanism.[120] Based on LG&E/KU's historic identification and reimbursement of charges under Schedule 45 and the fact that LG&E/KU recovers reliability-related costs in its Attachment O formula rates, we find LG&E/KU's argument that it is unable to determine whether charges under Schedule 45 correspond to or pancake with charges in LG&E/KU transmission rates to be unpersuasive. Under the Transition Mechanism, LG&E/KU must continue to reimburse Schedule 45 charges.

Coordinators by NERC," which includes "identifying and mandating upgrades required to maintain reliability." MISO Withdrawal Order, 114 FERC ¶ 61,282 at P 158. LG&E/KU performs all remaining NERC obligations not required to be performed by Reliability Coordinators. *Id.* P 159.

[118] LG&E/KU Filing, Ex. LG&E/KU-1 at 8; *see also id.* at Ex. LG&E/KU-1.6. We note that LG&E/KU's witness argued that charges from Schedules 26 and 26-A do not correspond to any current charges under the LG&E/KU Tariff, which we disagree with here. However, LG&E/KU did not make that same argument with respect to charges associated with Schedule 45 and only referenced Schedules 10 (ISO Cost Recovery Adder), 26-B (Shared Network Upgrade), and 33 (Blackstart Service) as the only schedules with MISO-only charges with no analogous service or charge on the LG&E/KU system in the LG&E/KU Filing.

[119] LG&E/KU identified that Schedule 45 charges were $47 for 2014, $88 for 2015, $91 for 2016, $56 for 2017, and $41 for 2018. LG&E/KU Filing at Ex. LG&E/KU-1.6.

[120] *See supra* n.113.

c. Transmission Service Reservations

i. September Rejection Order

69. The Commission rejected the definition of Covered TSR in the Transition Agreement because the definition was too narrow.[121] The Commission noted that, in the March Order, it had required that the Transition Mechanism cover the transmission of electricity on the MISO system for the initial term of each power purchase agreement entered into in reliance on the De-pancaking Mitigation. The Commission also pointed out that, in that order, it did not require that the transmission service with MISO also be in place for the entire term of such power purchase agreements as of the date of the March Order. The Commission also noted that, consequently, transmission service covered by the Transition Mechanism can be arranged with MISO at any point in the future. The Commission stated further that so long as the transmission service being provided is for the delivery of energy from a power purchase agreement that is covered by the Transition Mechanism, the transmission service likewise is covered by the Transition Mechanism, regardless of when it is arranged.[122]

70. In rejecting LG&E/KU's definition of Covered TSR, the Commission instead required that the definition include all transmission service provided by MISO and used to deliver energy from power purchase agreements covered by the Transition Mechanism, regardless of the date of the TSR. However, the Commission clarified that, to the extent that a TSR could be used to provide for additional services not contracted for as of the date of the March Order, such as future backup supply service and economy energy purchases, these future services are not eligible for the Transition Mechanism. The Commission further noted, as it did in the September Rehearing Order, that the Transition Mechanism will only cover TSRs so long as such reservations are used for the initial terms of the power purchase or sales agreements covered by the Transition Mechanism, 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.[123]

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[121] LG&E/KU's proposed Transition Agreement had defined Covered TSRs as the specific TSR that Transition Customers had submitted to MISO as of the March Order to transmit energy to their loads. September Rejection Order, 168 FERC ¶ 61,151 at PP 50-51.

[122] *Id.*

[123] *Id.* P 52 (citing September Rehearing Order, 168 FERC ¶ 61,152 at P 110).

ii. Requests for Rehearing and Clarification

71. According to LG&E/KU, the Commission failed to explicitly state whether its prohibition on Covered TSRs being used for additional services not contracted for as of the date of the March Order applies to transmission service associated with the non-MISO power purchase agreements listed by Kentucky Municipals or something else. LG&E/KU contends that, if the Commission has some other application of Covered TSRs in mind, this is not supported by the record because Kentucky Municipals only discussed preexisting MISO transmission reservations to which the Transition Mechanism should apply. LG&E/KU thus requests that the Commission grant rehearing and reverse this determination.[124]

72. Kentucky Municipals request that the Commission clarify that the full amount of KYMEA's 100 MW TSR for firm point-to-point service from MISO (the KYMEA-CIN TSR) must be included in the Transition Mechanism. Kentucky Municipals note that the Commission granted Kentucky Municipals' requested clarifications in the September Rehearing Order and specified that TSRs must be included in the Transition Mechanism "so long as such service requests are used for the initial term of the power purchase or sales agreement covered by the Transition Mechanism."[125] Kentucky Municipals also point out that they explained that a portion of the KYMEA-CIN TSR is used to integrate KYMEA's Vistra, Paducah, Paris, and Ashwood power purchase agreements into KYMEA's overall portfolio and up to 38 MW of the KYMEA-CIN TSR is used to import power from the Benham and Berea power purchase agreements.[126] Kentucky Municipals request clarification that, because each of those power purchase agreements is covered by the Transition Mechanism and because the KYMEA-CIN TSR is used for those power purchase agreements, the KYMEA-CIN TSR must be covered by the Transition Mechanism for the initial term of the power purchase agreements for which it is used and for the full 100 MW amount of the KYMEA-CIN TSR.[127]

73. Kentucky Municipals contend that the purpose of the Transition Mechanism is to protect those financial commitments that Kentucky Municipals' members have already made, not future power supply decisions they might make. Kentucky Municipals further explain that they have already made financial commitments to the Vistra, Paducah, Paris, and Ashwood Solar power purchase agreements and to the KYMEA-CIN TSR and did so

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[124] LG&E/KU October 10, 2019 Request at 56-57.

[125] Kentucky Municipals October 10, 2019 Request at 5 (quoting September Rehearing Order, 168 FERC ¶ 61,152 at P 111).

[126] *Id.* & n.9.

[127] *Id.* at 5.

relying on the availability of economy energy and backup service from MISO. Thus, according to Kentucky Municipals, the September Rejection Order is best understood to include the full 100 MW of the KYMEA-CIN TSR in the Transition Mechanism but to exclude any future backup supply and economy energy purchases associated with future power purchase agreements.[128]

74. Kentucky Municipals argue that, if the Commission does not grant their requested clarification, they seek rehearing because the Commission erred by excluding any portion of the KYMEA-CIN TSR through April 1, 2027 from the Transition Mechanism. First, Kentucky Municipals assert that limiting the eligibility of TSRs only to the extent that such TSRs are used for the initial term of power purchase or sales agreements is inconsistent with the Commission's finding that Kentucky Municipals made long-term and financial commitments in reliance on the De-pancaking Mitigation and that the public interest requires a transition mechanism accounting for Kentucky Municipals' reliance on that mitigation.[129] Second, Kentucky Municipals argue that limiting the eligibility of TSRs only to the extent "to deliver energy from [power purchase agreements] covered by the Transition Mechanism"[130] is inconsistent with the Commission's determination that the Vistra, Paducah, Paris, and Ashwood Solar power purchase agreements should be eligible for the Transition Mechanism based on the Commission's finding that these agreements were entered into in reliance on the De-pancaking Mitigation. Thus, Kentucky Municipals contend that, because these two elements of the September Rehearing Order and September Rejection Order cannot be logically reconciled, the orders if interpreted in this manner are arbitrary and capricious.[131]

iii. <u>Commission Determination</u>

75. We disagree with Kentucky Municipals' arguments on rehearing. In the September Rehearing Order, the Commission clarified that the Transition Mechanism should continue for other long-term financial commitments, such as firm point-to-point transmission service, as was provided under Rate Schedule No. 402, but only so long as the TSRs for such transmission service are used for the initial term of the power purchase

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

[129] *Id.* at 6-7.

[130] *Id.* at 7 (quoting September Rejection Order, 168 FERC ¶ 61,151 at P 52).

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

or sales agreement covered by the Transition Mechanism.[132] In other words, the controlling initial term for the Transition Mechanism is not the term of the TSR itself, but rather, the initial terms of the power purchase or sales agreements underlying the TSR.[133] A TSR alone cannot extend the De-pancaking Mitigation under the Transition Mechanism given that the Transition Mechanism is term-limited by the power purchase and sales agreements that use MISO transmission service. To find otherwise, as Kentucky Municipals request on rehearing, would mean that the term of the TSR itself could be used to extend the Transition Mechanism beyond the initial terms of any power purchase or sales agreements that relied on the TSR. Accordingly, to maintain the purpose and integrity of the Transition Mechanism, the Commission was correct to limit the term of TSRs that are eligible for the Transition Mechanism to the terms of the power purchase or sales agreements that make use of those reservations.

76. We emphasize that the Transition Mechanism is the continuation of the De-pancaking Mitigation for a term-limited period. As established in the March Order, that period is limited to the initial term of the power purchase agreements entered into by customers in the LG&E/KU market in reliance on the De-pancaking Mitigation prior to the issuance of the March Order. In the September Rehearing Order, the Commission clarified that, due to the nature of the De-pancaking Mitigation, power sales agreements entered into by customers in the LG&E/KU market in reliance on the De-pancaking Mitigation prior to the issuance of the March Order are also eligible for the Transition Mechanism.[134] Using the existing framework of the De-pancaking Mitigation,[135] "Drive-Out" purchases from MISO and "Drive-In" sales into MISO would continue to be eligible for reimbursement of relevant pancaked charges if agreements for those purchases or sales were entered into in reliance on the De-pancaking Mitigation prior to the issuance of the March Order.

77. However, in arguing for the term of the KYMEA-CIN TSR to be eligible for the Transition Mechanism as a standalone financial commitment, Kentucky Municipals seek to extend the Transition Mechanism, and thus the De-pancaking Mitigation, beyond the Commission's intended purpose in the March Order. Kentucky Municipals are correct that the Commission intended the Transition Mechanism to protect the economics of the decisions made by Kentucky Municipals while the De-pancaking Mitigation was in effect. However, in the context of the Transition Mechanism, a TSR is not a separate

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[132] September Rehearing Order, 168 FERC ¶ 61,152 at P 111; *see also* September Rejection Order, 168 FERC ¶ 61,151 at P 52.

[133] *See* March Order, 166 FERC ¶ 61,206 at P 82.

[134] September Rehearing Order, 168 FERC ¶ 61,152 at PP 109, 112.

[135] Rate Schedule No. 402 § 1.a.i & 1.a.ii.

financial commitment that merits a different term from the power purchase or sales agreement that uses it. Such a finding would allow any pancaked charges that result from that TSR, i.e., the KYMEA-CIN TSR, to be eligible for reimbursement potentially past the term of the existing power purchase agreements for which the KYMEA-CIN TSR (or other TSR) was designated. Allowing such an extended reimbursement period or additional future power purchases would be contrary to the rationale behind the Transition Mechanism, which was intended to protect, for a limited period of time, the customers that accessed the market and reasonably relied on the De-Pancaking Mitigation when making their past power supply choices. If the Commission were to accept Kentucky Municipals' argument – that the term of the KYMEA-CIN TSR should be controlling, then Kentucky Municipals could use the KYMEA-CIN TSR to preserve the de-pancaking for future power supply transactions not yet entered into either through extensions beyond the initial terms of the existing power purchase agreements or by entering into new power purchase agreements. Because the Commission found in the March Order that customers have access to competitive power supply choices, customers' future power supply choices should not be part of the Transition Mechanism and these customers should pay transmission charges for their future power supply choices.

78. Similar to the Commission's finding that the initial term of the power purchase or sales agreement covered by the Transition Mechanism is controlling as to the term of the related TSR,[136] we find that the megawatts of the power purchase or sales agreements covered by the Transition Mechanism controls the MWs of the related TSR (i.e., the extent to which a TSR is a Covered TSR). If the Commission were to grant Kentucky Municipals' request, then Kentucky Municipals could use the KYMEA-CIN TSR to preserve the de-pancaking for future power supply transactions entered into after the date of the March Order.

79. With the above explanation as well as the clarification below with respect to the scope of the agreements eligible for the Transition Mechanism, we have addressed LG&E/KU's concerns with respect to this issue. For TSRs to be eligible for the Transition Mechanism, they must be consistent with the discussion above. As discussed below, only agreements with respect to purchases from or sales into MISO are eligible for the Transition Mechanism as only those agreements would require MISO transmission.

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[136] September Rehearing Order, 168 FERC ¶ 61,152 at P 111; *see also* September Rejection Order, 168 FERC ¶ 61,151 at P 52.

d. Power Purchase and Sales Agreements

i. September Rejection Order

80. The Commission agreed with Kentucky Municipals that each of the power purchase agreements it listed in its protest should be covered by the Transition Mechanism to the extent they are not already considered as such. The Commission noted that each of the power purchase agreements was entered into before the issuance of the March Order, exists to serve the loads of KYMEA's and KMPA's customers, and was entered into in reliance on the continued existence of the De-pancaking Mitigation. The Commission further noted that, as it explained in the September Rehearing Order, the list of the power purchase agreements described by the Commission in the March Order was not meant to be an exhaustive list. Accordingly, the Commission found that it was appropriate for LG&E/KU to cover these power purchase agreements as part of the Transition Mechanism.[137]

ii. Requests for Rehearing and Clarification

81. According to LG&E/KU, the Commission's finding that the Transition Agreement should apply to any purchase agreement that was entered into before the March Order, exists to serve the loads of KYMEA's and KMPA's customers, and was entered into in reliance on the continued existence of the De-pancaking Mitigation is arbitrary and capricious because the March Order found that the De-pancaking Mitigation applies only to transmission from resources located in MISO.[138] LG&E/KU argues that, rather than continuing with the rationale in the March Order to focus on purchase agreements that rely on MISO transmission service, the Commission concluded, based on Kentucky Municipals' assertions of speculative, future reliance, that certain non-MISO power purchase agreements qualify for rate de-pancaking under the Transition Agreement.[139] LG&E/KU maintains that this decision does not rely on any factual evidence that the indicated non-MISO purchase agreements were entered into in reliance on the De-pancaking Mitigation or evidence supporting Kentucky Municipals' assertion that MISO transmission for backup supply service and economy energy is necessary to support the integration of non-MISO resources into KYMEA's portfolio.[140] LG&E/KU maintains that the Commission's September Rehearing Order recognized that the De-pancaking

[137] September Rejection Order, 168 FERC ¶ 61,151 at P 42 (citing September Rehearing Order, 168 FERC ¶ 61,152 at P 110).

[138] LG&E/KU October 10, 2019 Request at 44.

[139] *Id.* at 45.

[140] *Id.* at 46.

Mitigation applies only to transmission from resources located in MISO, yet the Commission, in the September Rejection Order, expanded the Transition Mechanism to resources located outside of the MISO region and concluded that transmission service for future backup supply service and economy energy purchases are not eligible for the Transition Mechanism.[141] LG&E/KU argues that there is no reasoned basis to expand the Transition Mechanism in this way because doing so permits Transition Customers to qualify for the Transition Mechanism so long as the customer could point to an arrangement entered into prior to the March Order that purportedly relied on MISO transmission. LG&E/KU contends that this undermines the conclusion in the March Order that the De-pancaking Mitigation is no longer necessary to address horizontal market power concerns in the LG&E/KU market.[142]

82. Kentucky Municipals request clarification, out of an abundance of caution, that both the Owensboro-Ashwood Solar power purchase agreement and KYMEA-Ashwood Solar power purchase agreement are Covered Agreements.[143] Kentucky Municipals explain that the Ashwood Solar project is a new solar generation project to be constructed in Lyon County, Kentucky, with a total expected nameplate capacity of approximately 86 MW. Kentucky Municipals add that the KYMEA and Owensboro contracts with Ashwood Solar 1, LLC were negotiated in tandem, and that, under those contracts, KYMEA's share of the output is 53.75 MW and Owensboro's share is 32.25 MW. Kentucky Municipals explain that both were signed prior to the March Order and were entered into in reliance on the De-pancaking Mitigation and thus meet the Commission's criteria for inclusion in the Transition Mechanism. Kentucky Municipals request rehearing if the Commission concludes that the Owensboro-Ashwood Solar power purchase agreement does not qualify for the Transition Mechanism.[144]

iii. Commission Determination

83. We disagree with Kentucky Municipals' arguments on rehearing regarding whether the Owensboro-Ashwood Solar power purchase agreement and KYMEA-Ashwood Solar power purchase agreement are eligible for the Transition Mechanism. In the September Rehearing Order, the Commission clarified that the Commission's discussion of contracts in the March Order was not limited to the four contracts described

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[141] *Id.* at 46-47.

[142] *Id.* at 47.

[143] Kentucky Municipals October 10, 2019 Request at 8-9. Kentucky Municipals note that, due to an error, the Owensboro-Ashwood Solar power purchase agreement appeared only on the list in Exhibit KM-1 of their August 2, 2019 protest. *Id.* at 9.

[144] *Id.*

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.[145] This includes all power purchase or sales agreements for sales between the LG&E/KU and MISO markets entered into prior to the issuance of the March Order. However, we note that customers could only have relied on the De-pancaking Mitigation if they entered into either: (1) an agreement to purchase power from generation located in MISO to serve their load in LG&E/KU and therefore used both LG&E/KU and MISO transmission service; or (2) an agreement to sell power from their generation located in the LG&E/KU market into MISO and therefore used both LG&E/KU and MISO transmission service. This is consistent with the Commission's clarification in the September Rehearing Order and with the scope of the De-pancaking Mitigation as provided in Rate Schedule No. 402, including its continuation in the form of the Transition Mechanism.[146] Because the Owensboro-Ashwood Solar power purchase agreement and KYMEA-Ashwood Solar power purchase agreement are for power sourced in the LG&E/KU market to serve load in the LG&E/KU market, these power purchase agreements are not eligible for the Transition Mechanism.

84. We agree with LG&E/KU's request for rehearing in part as to the specific contracts eligible for the Transition Mechanism and set aside the September Rejection Order, in part, on this issue. We agree that only where MISO transmission is required for the power purchase or sales agreement should the agreement be eligible for the Transition Mechanism (i.e., a Covered Agreement). However, we sustain the Commission's finding in the September Rejection Order as to whether to limit the agreements eligible to power purchase agreements associated with MISO resources for the reasons listed above. Agreements that provide for purchases from or sales into MISO, and thus require MISO transmission, are eligible for the Transition Mechanism.

e. Exports to MISO

i. September Rejection Order

85. The Commission rejected LG&E/KU's proposal to eliminate its de-pancaking obligation for exports from the LG&E/KU balancing authority area to MISO. The Commission pointed out, as LG&E/KU acknowledged, that the De-pancaking Mitigation contained in Rate Schedule No. 402 required de-pancaking for such exports. The Commission thus concluded that its requirement that LG&E/KU retain the De-pancaking Mitigation for Transition Customers as a Transition Mechanism included the requirement

[145] September Rehearing Order, 168 FERC ¶ 61,152 at P 110.

[146] *See id.* P 111.

that LG&E/KU retain the de-pancaking provisions for exports from the LG&E/KU balancing authority area to MISO that is provided in Rate Schedule No. 402.[147]

86. The Commission explained that, in the March Order, it found that it would not be consistent with the public interest to remove the De-pancaking Mitigation without a transition mechanism accounting for Kentucky Municipals' reliance on that mitigation.[148] The Commission therefore held in the March Order that the existing De-pancaking Mitigation, which covers 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, should remain in effect for a transition period. In the March Order, the Commission explained how the Transition Mechanism would operate for certain power purchase agreements that import power to the LG&E/KU market from generation located on the MISO system.[149] However, the Commission did not, as LG&E/KU asserts, limit the scope of the Transition Mechanism for the De-Pancaking Mitigation to imports.[150]

87. The Commission further noted that it appeared that the ability of Transition Customers to export power to MISO was factored into at least some of such Transition Customers' calculations as to which supply options to select. The Commission pointed to, as an example, Paducah's peaking plant being constructed and financed with the expectation that Paducah would have the ability to make "Drive-In" sales into MISO without incurring pancaked transmission charges. The Commission therefore found that preserving Transition Customers' de-pancaking for export transactions to MISO was consistent with the Commission's finding that the Transition Mechanism is appropriate to protect the Transition Customers' reliance on de-pancaked rates when making their initial supply arrangements.[151]

ii. <u>Request for Rehearing</u>

88. According to LG&E/KU, the Commission's rejection of LG&E/KU's proposal to eliminate its de-pancaking obligation for exports to MISO is arbitrary and capricious because it is based on the erroneous standard that the proposed Transition Mechanism must replicate Rate Schedule No. 402 and unreasonably expands the scope of the

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[147] September Rejection Order, 168 FERC ¶ 61,151 at P 78.

[148] March Order, 166 FERC ¶ 61,206 at P 78.

[149] *Id.* P 82.

[150] September Rejection Order, 168 FERC ¶ 61,151 at P 79.

[151] *Id.* P 80 (citing March Order, 166 FERC ¶ 61,206 at PP 74-79).

Transition Mechanism beyond what the March Order required. LG&E/KU also contends that the Commission's determination regarding exports misapprehends the purpose of the De-pancaking Mitigation in the first place as this case has always been about horizontal market power and protecting KU Requirements Customers' access to competing supplies.[152] LG&E/KU argues that this consideration did not change when the Commission issued the MISO Withdrawal Order and that the Commission repeatedly emphasized that its requirements applied only to mitigating horizontal market power concerns.[153]

89. LG&E/KU contends similarly that the March Order did not mention exports, likely because, as indicated in the Merger Order and MISO Withdrawal Order, the Commission did not consider whether horizontal market power mitigation would cover sales from KU Requirements Customers to a market in MISO. LG&E/KU argues rather that the Commission made clear in the March Order that the Transition Mechanism addresses mitigation intended to preserve horizontal market power mitigation within the LG&E/KU market for KU Requirements Customers.[154] LG&E/KU asserts that, although it did waive transmission charges for exports to MISO pursuant to Rate Schedule No. 402, this provision was unrelated to market power mitigation, which was limited to issues surrounding access to supply. LG&E/KU maintains that this is another application of the erroneous standard of review that the Transition Mechanism must replicate Rate Schedule No. 402.[155] LG&E/KU further argues that, unlike the power purchase agreements entered into by the Transition Customers, there is no evidence of a binding obligation for any Transition Customers to sell into MISO that was entered into in reliance on the De-Pancaking Mitigation. LG&E/KU points out that only Owensboro has a single TSR for sales into MISO, which ends in 2020, and that Owensboro has not alleged that it has any firm sales contracts or obligations to sell into MISO.[156]

iii. Commission Determination

90. We disagree with LG&E/KU's arguments on rehearing as to the Commission's determination to allow exports to MISO to be included in the Transition Mechanism. We find that LG&E/KU's arguments with respect with this issue are misplaced. Although LG&E/KU is correct that the Commission's market power mitigation analysis of the

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[152] LG&E/KU October 10, 2019 Request at 52-53.

[153] *Id.* at 53-54.

[154] *Id.* at 54-55.

[155] *Id.* at 55.

[156] *Id.* at 55-56.

Merger focused on the increased ability of energy suppliers to reach markets to lower market concentration, what the Commission accepted as the De-pancaking Mitigation in compliance with the MISO Withdrawal Order was Rate Schedule No. 402.[157] Rate Schedule No. 402 provides that MISO transmission charges with respect to "Drive-Out" purchases from MISO and "Drive-In" sales into MISO will be reimbursed if there is a corresponding LG&E/KU transmission charge. Rate Schedule No. 402, as a whole, sought to replicate LG&E/KU's membership in MISO in compliance with the Commission's original directives regarding its market power analysis in the Merger Order.[158]

91. In the March Order, the Commission concluded that loads located in the LG&E/KU market have access to a sufficient number of competitive suppliers such that the De-pancaking Mitigation can be terminated. However, the Commission also determined that a Transition Mechanism was required to phase out the De-pancaking Mitigation for certain customers. The Commission in the September Rehearing Order concluded that each customer in the LG&E/KU market that reasonably relied on the De-pancaking Mitigation should continue to make use of the De-pancaking Mitigation to protect the economics of their decisions made while the mitigation was in effect.

92. The De-pancaking Mitigation, as set forth in Rate Schedule No. 402, is not simply reimbursement for pancaked transmission charges associated with "Drive-Out" purchases from MISO. The De-pancaking Mitigation involves reimbursement for pancaked transmission charges associated with both "Drive-In" sales to and "Drive-Out" purchases from MISO. The Commission stated in the March Order that the De-pancaking Mitigation must continue for a transition period limited to the terms of certain agreements and then later clarified that agreements for exports into MISO should also be eligible for reimbursement. Thus, LG&E/KU's argument that the "De-pancaking Mitigation" is narrower than what is currently provided under Rate Schedule No. 402 is a result of LG&E/KU's misinterpretation of the relevant Commission orders.

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[157] *E.ON U.S. LLC*, Docket No. ER06-1279-001 (Nov. 9, 2006) (delegated order).

[158] *See* MISO Withdrawal Order, 114 FERC ¶ 61,282 at P 110 ("Here, we find that [LG&E/KU's] de-pancaking proposal, with some revisions discussed below, will maintain rate de-pancaking between [LG&E/KU's] system and the footprint of the remaining [MISO] membership and thereby provide mitigation comparable to that achieved by [LG&E/KU's] membership. As such, [LG&E/KU's] proposal, if implemented in compliance with the conditions discussed below, will satisfy [LG&E/KU's] Merger Conditions."). The Commission ultimately accepted Rate Schedule No. 402 as satisfying those conditions.

f. Termination of Reimbursement Obligation

i. September Rejection Order

93. The Commission rejected LG&E/KU's proposed termination conditions in two respects. First, the Commission, as discussed earlier, concluded that LG&E/KU cannot limit its de-pancaking obligation to only TSRs in effect as of the date of the March Order. As a result, the Commission found that LG&E/KU cannot terminate the de-pancaking obligation under the Transition Mechanism if a TSR tied to a Covered Agreement is canceled unless the Transition Customer does not put another transmission arrangement in place. The Commission also determined that LG&E/KU cannot terminate its de-pancaking obligation when a Transition Customer terminates its service under the LG&E/KU Tariff unless the Transition Customer does not replace that service with different service delivering electricity from MISO to the Transition Customer's load, e.g., if network service were replaced with point-to-point service, or vice versa. However, as the Commission clarified in the September Rehearing Order, the Transition Mechanism will only cover transmission service reservations so long as such reservations are used for the initial term of the power purchase or sales agreements covered by the Transition Mechanism, 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.[159]

ii. Request for Clarification and Rehearing

94. Kentucky Municipals contend that there is no basis for distinguishing between transmission rate pancakes created by pseudo-tying load into MISO and those created by physically tying load into MISO. Kentucky Municipals agree with the Commission that if, for example, a Transition Customer moves load into MISO, to the extent that the load is served from MISO resources such that rate pancaking is eliminated, the de-pancaking reimbursement should be reduced commensurately. According to Kentucky Municipals, however, although the September Rejection Order used the example of load pseudo-tied to another balancing authority area,[160] it is equally true that a Transition Customer moving load into MISO, for example, could still depend on the LG&E/KU transmission system for delivery to its load if it physically connects its load into MISO, rather than by

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[159] September Rejection Order, 168 FERC ¶ 61,151 at P 75 (citing September Rehearing Order, 168 FERC ¶ 61,152 at P 110).

[160] *Id.* P 68.

pseudo-tie.[161] Kentucky Municipals suggest that, in either case, the customer will still need LG&E/KU's point-to-point transmission to export the resources located in the LG&E/KU market into MISO for delivery to its load. As such, Kentucky Municipals argue that the De-pancaking Mitigation should continue to apply for the transition period of the initial term of the power purchase agreement for each such resources.[162] Accordingly, Kentucky Municipals request that the Commission clarify that for both pseudo-ties and physical ties of load into MISO, the De-pancaking Mitigation's waiver of charges for exports from the LG&E/KU balancing authority area into MISO should continue through the initial term of any Covered Agreement that will still depend on the LG&E/KU transmission system for delivery to its load.[163]

95. Kentucky Municipals suggest that if a Transition Customer, for example, finds itself compelled to join MISO as a result of the Commission's decision in the March Order that the De-pancaking Mitigation can terminate after a transition period, the Transition Customer's power purchase agreements for resources located within the LG&E/KU balancing authority area for which no transition pancake currently exists will be faced with new pancakes to deliver those resources into MISO. Kentucky Municipals explain that, in that instance, the Transition Customer that has previously relied upon network integration service from LG&E/KU to obtain delivery from the resource to its load within LG&E/KU will instead need firm point-to-point LG&E/KU service to export the resource output to serve its load in MISO.[164]

96. Kentucky Municipals state that the Commission ruled that a Transition Customer's termination of transmission service under the LG&E/KU Tariff does not terminate LG&E/KU's de-pancaking obligation where existing transmission service is replaced by a different LG&E/KU transmission service.[165] However, Kentucky Municipals point out that the September Rejection Order also provided that, if network service, for example,

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[161] Kentucky Municipals October 10, 2019 Request at 10. Kentucky Municipals explain that this would not be a realistic option for most of the Kentucky Municipals, but it may become feasible, with sufficient lead time and construction or purchase of an intervening transmission line, for a Kentucky Municipal located on the MISO border. *Id.*

[162] *Id.* at 11.

[163] *Id.*

[164] *Id.*

[165] *Id.*

were replaced with point-to-point service or vice versa, LG&E/KU's de-pancaking obligation could not be terminated.[166]

97. According to Kentucky Municipals, replacement of network service with point-to-point service is precisely what would be required by a Transition Customer that is effectively forced by the March Order to move its load into MISO. Kentucky Municipals note that the Commission clarified that the Transition Mechanism will only continue so long as such TSRs are used for the initial term of the power purchase or sales agreement covered by the Transition Mechanism, which includes 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.[167] Kentucky Municipals explain that the Ashwood Solar power purchase agreements, for example, would require just such an export to the MISO market and a replacement of LG&E/KU network service with LG&E/KU point-to-point service for a Transition Customer that moves its load into MISO. Kentucky Municipals request that the De-pancaking Mitigation (through waiver of the point-to-point charges for the export over the LG&E/KU transmission system) should continue to apply through the initial term of those power purchase agreements. Kentucky Municipals request further that, for a Transition Customer that moves load into MISO, the De-pancaking Mitigation should similarly continue to apply for resources within the LG&E/KU market that are currently delivered using LG&E/KU network service without pancaked transmission charges to loads within the LG&E/KU market, but will require LG&E/KU point-to-point service to export them into MISO when the loads are moved into MISO as a result of the March Order, such as the entitlements that a Transition Customer may have to power purchased from the Southeastern Power Administration.[168]

98. In the alternative, Kentucky Municipals request that, if this clarification is not provided, the Commission grant rehearing of the decision, if so interpreted, not to require continuation of the De-pancaking Mitigation during the transition period under the described circumstances.[169]

iii. <u>Commission Determination</u>

99. We deny Kentucky Municipals' request that the Commission find that, for both pseudo-ties and physical ties of load to MISO, the Transition Mechanism must include

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[166] *Id.* at 12 (citing September Rejection Order, 168 FERC ¶ 61,151 at n.84).

[167] September Rehearing Order, 168 FERC ¶ 61,152 at P 111.

[168] *Id.* at 12-13.

[169] *Id.* at 13.

waiver of charges for delivery of LG&E/KU resources to such load. In the September Rejection Order, the Commission concluded that, to the extent that a Transition Customer electrically leaves the LG&E/KU balancing authority area through a pseudo-tie to another balancing authority area, the Transition Customer could still depend on LG&E/KU transmission system for delivery of MISO resources to its load.[170] The agreements eligible for the Transition Mechanism, discussed above, which predate the issuance of the March Order, largely involve purchases from resources located in MISO.[171] Transactions associated with these MISO resources thus involve both MISO and LG&E/KU transmission service for delivery from MISO to load in the LG&E/KU market, creating a rate pancake. Accordingly, the Commission held that the Transition Mechanism, which is a term-limited continuation of the De-pancaking Mitigation, should apply to transmission associated with that delivery as there would continue to be a rate pancake for transactions involving MISO resources.[172]

100. Kentucky Municipals, however, request that the Commission extend the Transition Mechanism to a scenario not contemplated by the September Rejection Order. Specifically, Kentucky Municipals argue that, if a Transition Customer pseudo-ties its load into the MISO balancing authority area or physically ties its load to MISO's transmission system in the future, the Transition Mechanism should apply to the agreements and transmission service associated with *LG&E/KU resources* to allow for delivery of these LG&E/KU resources to its load, which in these future scenarios now exists in the MISO balancing authority area or within the MISO RTO footprint. Kentucky Municipals' scenario does not involve any rate pancakes as of the March Order, and thus the De-pancaking Mitigation and the Transition Mechanism would not apply. Kentucky Municipals gloss over the fact that, prior to the date of the March Order, these agreements involved no transmission eligible for the De-pancaking Mitigation as the underlying LG&E/KU resources only serve load in the LG&E/KU

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[170] September Rejection Order, 168 FERC ¶ 61,151 at P 68. We note that, although the Commission's finding on this point was in the context of whether LG&E/KU could change the extent to which it will reimburse certain transmission charges under the Transition Mechanism, it is also relevant to whether LG&E/KU can terminate its reimbursement obligations under the Transition Mechanism.

[171] We note that, if there are "Drive-In" sales into MISO from LG&E/KU resources that predate the issuance of the March Order, and would have qualified for the De-pancaking Mitigation as of the date of the March Order, these agreements are also eligible for the Transition Mechanism as pancaked rates associated with these sales occurred prior to the issuance of the March Order.

[172] *See* March Order, 166 FERC ¶ 61,206 at P 82. These transactions fall under the "Drive-Out" structure in the De-pancaking Mitigation.

market. Kentucky Municipals even acknowledge that no rate pancake exists for these LG&E/KU resources and their agreements.[173]

101. The Transition Mechanism was designed to protect business decisions made as of the date of the March Order with respect to the Transition Customers' power supply decisions.[174] As a result, only those agreements that required MISO transmission service and would have qualified for the De-pancaking Mitigation as of the date of the March Order are eligible for coverage under the Transition Mechanism.[175] In other words, only where transactions associated with those agreements resulted in pancaked rates as of that date would the De-pancaking Mitigation, and consequently the Transition Mechanism, apply. Kentucky Municipals seek to extend the Commission's findings in the September Rejection Order with respect to the applicability of the Transition Mechanism beyond the purpose of the Transition Mechanism.

The Commission orders:

In response to the requests for rehearing, the September Rejection Order is hereby modified and set aside, in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[173] Kentucky Municipals October 10, 2019 Request at 11.

[174] March Order, 166 FERC ¶ 61,206 at P 79.

[175] *Id.* P 82.