172 FERC ¶ 61,228
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Louisville Gas and Electric Company
Kentucky Utilities Company

Docket Nos. EC98-2-003
ER18-2162-002

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 Rehearing Order, the Commission denied rehearing but granted clarification with respect to certain issues arising from LG&E/KU's request, under section 203(b) of the Federal Power Act (FPA),[3] to remove a market power mitigation measure that originated from LG&E/KU's 1998 merger (Merger) and

[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 ¶ 61,152 (2019) (September Rehearing Order).

[3] 16 U.S.C. § 824b(b) (2018).

from LG&E/KU's subsequent withdrawal from the Midcontinent Independent System Operator, Inc. (MISO) in 2006.[4]

2. Pursuant to *Allegheny Defense Project v. FERC*,[5] 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,[6] however, we are modifying the discussion in the September Rehearing Order and setting aside the order, in part, as discussed below.[7]

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.[8] The increase in market concentration was due to customers in the KU destination market (KU Destination Market)[9] losing LG&E as a viable competitor to KU as a result of the

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[4] In 2006, MISO was known as the Midwest Independent Transmission System Operator, Inc.

[5] *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020).

[6] 16 U.S.C. § 825*l*(a) (2018) ("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.").

[7] *Allegheny Defense Project*, 964 F.3d at 16-17. We note that the parties raised many of the same issues on rehearing in the proceeding in Docket Nos. ER19-2396-001 and ER19-2397-001. Concurrent with this order, we issue our order addressing arguments raised on rehearing in Docket Nos. ER19-2396-001 and ER19-2397-001.

[8] *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).

[9] 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,

Merger. To address this concern, LG&E/KU committed to mitigate the potential for increased horizontal market power in the KU Destination Market through several mitigation measures and ratepayer protection mechanisms.[10]

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.[11] 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 competitive suppliers able to reach markets, such as the KU Destination Market, would increase, thereby lowering market concentration.[12] 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

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Providence, Frankfort, and Berea. *Louisville Gas and Elec. Co.*, 82 FERC ¶ 61,308, at 62,215 n.7 (1998) (Merger Order).

[10] 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.

[11] *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.

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

> believe there is no reason to investigate competitive issues further.[13]

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."[14]

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.[15] 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.[16] 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

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

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

[15] *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.

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

> rates for transmission service between [LG&E/KU's] transmission system and the remaining members of [MISO].[17]

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."[18] 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]."[19]

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).[20] Specifically, Rate Schedule No. 402 establishes the Merger Mitigation De-pancaking mechanism (De-pancaking Mitigation) to shield the "MMD Parties," comprised of the KU Municipals,[21] the Tennessee Valley Authority (TVA)

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[17] *Id.* P 112.

[18] *Id.* P 113.

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

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

[21] 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.

Distributor Group,[22] and any future Requirements Customers[23] (together, Rate Schedule No. 402 Customers) "from any re-pancaking of rates for transmission service between [LG&E/KU's] transmission system and the remaining members of [MISO]."[24]

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;[25] 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.[26] 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

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[22] 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.

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

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

[25] 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.

[26] *Id*.

charges to deliver such electricity to any point within the MISO system beyond the MISO-LG&E-KU interface.[27] 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 ¶ 61,019 (2006). Any proposed changes to these requirements are governed by Section 203 of the FPA.[28]

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.[29] 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.[30] 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).[31] On July 12, 2019, in Docket

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[27] *Id.* § 1.a.ii.

[28] *Id.* § 1.a.v.

[29] 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).

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

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

Nos. ER19-2396-000 and ER19-2397-000, LG&E/KU filed a proposal to implement a Transition Mechanism.

E. September Rehearing and Rejection Orders

13. In response to the March Order, American Municipal Power, Inc. (AMP), Kentucky Municipals, and KMPA filed requests for rehearing and clarification on several issues. The Commission denied the requests for rehearing with respect to: (1) Kentucky Municipals' argument that the Commission erred with regard to the standard of review under FPA section 203(b); (2) the arguments raised by AMP, Kentucky Municipals, and KMPA as to the Commission's findings in the March Order regarding the need for the De-pancaking Mitigation; and (3) KMPA's argument that the Commission failed to respond to certain arguments in the record and Kentucky Municipals' argument that the Commission erred in dismissing their request for a hearing. However, the Commission granted AMP's, Kentucky Municipals', and KMPA's requests for clarification as to: (1) whether other customers should be eligible for the Transition Mechanism; (2) whether the list of power purchase agreements eligible for the Transition Mechanism should be expanded to include other power purchase agreement; and (3) whether the Transition Mechanism should apply to other long-term financial commitments, such as firm point-to-point transmission and KMPA's ownership share of the Prairie State Energy Campus project (Prairie State).

14. Concurrent with the September Rehearing Order, the Commission rejected LG&E/KU's proposed Transition Mechanism in Docket Nos. ER19-2396-000 and ER19-2397-000 without prejudice and provided guidance to assist LG&E/KU in developing a new proposal.[32]

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

15. LG&E/KU requests rehearing of the Commission's clarifications in the September Rehearing Order that: (1) KMPA's members, Princeton and Paducah, are Transition Customers; (2) other contracts, besides those listed in the March Order, are eligible for the Transition Mechanism if they were entered into prior to the issuance of the March Order; and (3) exports from the LG&E/KU transmission system into the MISO market must be covered by the Transition Mechanism.

16. Kentucky Municipals request clarification and, in the alternative, rehearing regarding: (1) the extent to which the Transition Mechanism applies to a specific transmission service reservation (TSR); (2) whether the Transition Mechanism includes

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[32] *Louisville Gas and Elec. Co.*, 168 FERC ¶ 61,151 (2019) (September Rejection Order).

additional power purchase agreements; and (3) whether the Transition Mechanism would apply if load is moved into the MISO market.

17. 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, request for rehearing, and a reply to KMPA's answer.

III. Discussion

A. Procedural Matters

18. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing.[33] Accordingly, we reject the answers filed by KMPA, Kentucky Municipals, and LG&E/KU.

B. Substantive Matters

1. Transition Customers

a. September Rehearing Order

19. The Commission clarified in the September Rehearing Order that KMPA and its members, Princeton and Paducah, should be considered Transition Customers for purposes of the Transition Mechanism. The Commission found that KMPA and its members are located in the LG&E/KU market and have invested significant resources to maintain the interconnection with LG&E/KU. In addition, the Commission found that KMPA relied on the De-pancaking Mitigation in a similar fashion to Kentucky Municipals, through KMPA's participation in Prairie State, as well as Princeton and Paducah's power sales contract for MISO hydroelectric generation. Therefore, the Commission clarified that KMPA meets the Commission's criteria for being eligible for the Transition Mechanism and should be considered a Transition Customer.[34]

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[33] 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 stylized 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.

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

b. Request for Rehearing

20. LG&E/KU argues that the Commission erred by reversing its decision and finding that Princeton and Paducah should be included in the Transition Mechanism. LG&E/KU's specific arguments are set forth below.

i. Whether the Commission failed to explain its decision that Princeton and Paducah should be included as Transition Customers.

21. First, LG&E/KU argues that the Commission's determination regarding Princeton and Paducah is an arbitrary and capricious reversal because the Commission failed to provide a reasonable basis to support its determination that Princeton and Paducah should be included as Transition Customers. LG&E/KU contends that, in the March Order, the Commission found Princeton and Paducah and the other members of the TVA Distributor Group to be outside of the LG&E/KU market and any reliance on the De-pancaking Mitigation to be unreasonable as a result. LG&E/KU suggests that the Commission does not explain how or why its position changed in the September Rehearing Order. LG&E/KU argues that the Commission points to Princeton and Paducah's current interconnection with the LG&E/KU system without explaining how or why this shows Princeton and Paducah were "in the market" for purposes of determining the scope of Transition Customers. LG&E/KU also asserts that the Commission finds that Princeton and Paducah relied on the De-pancaking Mitigation in a similar fashion to Kentucky Municipals without explaining what that reliance is, how Princeton and Paducah were similar to Kentucky Municipals, or if such reliance was reasonable. LG&E/KU argues that these conclusory statements are insufficient to justify the Commission's reversal in the September Rehearing Order.[35]

22. In addition, LG&E/KU argues that the record shows that Princeton and Paducah do not meet the criteria for the Transition Mechanism. First, LG&E/KU argues that Princeton and Paducah are not in the LG&E/KU market. LG&E/KU points out that, in the March Order, the Commission excluded the TVA Distributor Group from the Transition Mechanism because it would not have been reasonable for customers outside of the LG&E/KU market to have relied on a continuation of a tariff provision intended to preserve horizontal competition within the LG&E/KU market. LG&E/KU asserts that, given that the market power mitigation analysis of the Merger focused on the increasing ability of energy suppliers to reach certain customers, which would lower market concentration, the Commission's reference to "market" in the March Order was to those

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[35] LG&E/KU October 10, 2019 Request at 18-20.

energy purchasers whose supply choices were reasonably susceptible to change based on the De-pancaking Mitigation.[36]

23. LG&E/KU contends that, despite this connection, the Commission ignores evidence that supports the Commission's original conclusion that Princeton and Paducah were not in fact in the LG&E/KU market. LG&E/KU asserts that, in the context of this case, by definition, entities who were "in the market" refers to those who were subject to the mitigation at the time of the Merger and thus their supply choices were related to the mitigation. LG&E/KU argues that Princeton and Paducah were not such entities because: (1) Princeton and Paducah were never one of the KU Requirements Customers that the Commission sought to protect in LG&E/KU's Merger; (2) TVA, an entity outside of the LG&E/KU balancing authority area, provided Princeton and Paducah with their wholesale requirements service until December 2009 for Paducah and January 2010 for Princeton, after LG&E/KU had left MISO; and (3) Princeton and Paducah did not enter into transmission arrangements with LG&E/KU until 2008, after they had already made their decisions to source their supply in MISO, by investing in Prairie State and entering into arrangements to purchase from certain hydroelectric generation.[37]

24. LG&E/KU asserts that, based on this information, Princeton and Paducah were not part of the LG&E/KU system at the time they made their supply decisions and that the supply choices came first, which is in contrast to the Transition Customers, all of whom were part of the LG&E/KU balancing authority area at the time of the Merger and after. LG&E/KU thus contends that, although it may have been reasonable for the Commission to conclude in the March Order that the Transition Customers were in the LG&E/KU market for purposes of continuing the De-pancaking Mitigation, there is no factual basis in the record for the Commission's new determination that Princeton and Paducah meet this criterion, nor has the Commission articulated one.[38]

ii. Whether the record shows that Princeton and Paducah meet the criteria for the Transition Mechanism.

25. Second, LG&E/KU argues that the record does not support the conclusion that Princeton and Paducah reasonably relied on the De-pancaking Mitigation. LG&E/KU states that the Commission has held that, in order to establish reliance, an entity must demonstrate that: (1) it changed its position or took some action in reliance on the conduct of the party to be estopped; and (2) such reliance was reasonable. LG&E/KU

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[36] *Id.* at 20-22.

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

[38] *Id.* at 23-24.

posits that the Commission failed to explain why Princeton and Paducah meet this standard and argues that the record does not support such a conclusion. LG&E/KU asserts that the record shows only two things: (1) Princeton and Paducah invested in Prairie State; and (2) LG&E/KU provided the De-pancaking Mitigation. LG&E/KU maintains that, in their rehearing request, Princeton and Paducah merely assert that they made business decisions based on LG&E/KU's MISO membership and subsequently on the De-pancaking Mitigation, but they have provided no evidence in this proceeding to support these statements or to support a conclusion that the existence of the De-pancaking Mitigation was the deciding factor that led to their participation in Prairie State. LG&E/KU suggests that the Commission merely echoes Princeton and Paducah's assertions that they acted in reliance and points to no evidence.[39]

26. LG&E/KU maintains that it would not have been reasonable for Princeton and Paducah to rely on either LG&E/KU's MISO membership or the De-pancaking Mitigation. LG&E/KU contends that Princeton and Paducah did not meet the requirements for the "hold harmless" requirements under the MISO Transmission Owners Agreement and have no claim to de-pancaked transmission as mitigation for the Merger because they were not part of either LG&E's or KU's system at the time of the Merger. LG&E/KU thus argues that, if Princeton and Paducah relied on the De-pancaking Mitigation as a result of LG&E/KU's MISO membership, such reliance would have been unreasonable.[40]

27. According to LG&E/KU, Princeton and Paducah's reliance on the continuation of de-pancaked transmission under Rate Schedule No. 402 is misplaced for the same reason, i.e., they had no claim to it as Merger mitigation. LG&E/KU 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.[41] LG&E/KU contends that similarly LG&E/KU 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 was 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, a point made by the Commission in the March Order.[42] LG&E/KU argues that, more

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[39] *Id.* at 24-25.

[40] *Id.* at 25.

[41] *Id.* at 25-26 (referencing *N. Natural Gas Co.*, 135 FERC ¶ 61,024 (2011)).

[42] *Id.* at 26.

broadly, Princeton and Paducah's reliance claims are further undermined by the fact that LG&E/KU never promised them static transmission rates.[43]

iii. Whether it was not unduly discriminatory under section 205 to exclude Princeton and Paducah from the Transition Mechanism.

28. Third, LG&E/KU maintains that it was not unduly discriminatory under section 205 to exclude Princeton and Paducah from the Transition Mechanism. As a threshold matter to this point, LG&E/KU contends that the Commission did not state whether its clarification including Princeton and Paducah in the Transition Mechanism was a section 203 or section 205 decision. LG&E/KU argues that, if the Commission was addressing a section 203 issue, its decision was arbitrary and capricious for the reasons discussed above.[44]

29. LG&E/KU suggests that, for many of the same reasons, if the Commission was addressing a section 205 issue, its decision was also arbitrary and capricious. LG&E/KU contends that it is important to note that, in the March Order, the Commission rejected the section 205 aspect of LG&E/KU's proposal in its entirety because it did not include a Transition Mechanism. LG&E/KU points out that no party sought rehearing of this rejection. LG&E/KU maintains that there was no section 205 filing before the Commission in this proceeding to address on rehearing. LG&E/KU further points out that the Commission expressly stated that, if a Rate Schedule No. 402 Customer felt that it should be included if/when LG&E/KU submitted a new section 205 filing implementing the Transition Mechanism, it would be free to make any arguments that it was similarly situated to the Transition Customers identified in the March Order. LG&E/KU argues that, as a result, it was inappropriate for the Commission to address Princeton and Paducah's rehearing/clarification on a section 205 basis.[45]

30. LG&E/KU argues, nonetheless, that the record does not support Princeton and Paducah's allegations of undue discrimination. LG&E/KU asserts that the Commission has made clear that discrimination is only undue when customers are similarly situated. LG&E/KU contends that, because of the many differences between Princeton and Paducah and the other Transition Customers (including Owensboro), there is no basis

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

[44] *Id.* at 27; *see supra* PP 21-24.

[45] LG&E/KU October 10, 2019 Request at 27.

for concluding that excluding Princeton and Paducah from the Transition Mechanism is unduly discriminatory.[46]

31. In addition, LG&E/KU maintains that the prescribed characteristics of the Transition Mechanism do not apply to Princeton and Paducah. Specifically, LG&E/KU submits 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 Princeton and Paducah's decision to construct and finance Prairie State in MISO does not comport with either the Commission's express rationale for requiring the Transition Mechanism or with the Commission's prescription for what the Transition Mechanism must cover. LG&E/KU argues that Princeton and Paducah's assertions that their decision to construct and finance Prairie State to have the ability to make "Drive-In" sales into MISO without incurring pancaked transmission charges bears no relationship to retaining access to competitive supply arrangements.[47] LG&E/KU asserts that compelling LG&E/KU to include Princeton and Paducah in the Transition Mechanism on the basis of their investment in Prairie State ignores the Commission's principle that building new supply disciplines horizontal market power, which the De-pancaking Mitigation sought to mitigate.[48]

32. LG&E/KU argues further that the Commission made no effort to reconcile the fundamentally different circumstances of owning and financing a generation facility with the scope of the Transition Mechanism and the determination that the De-pancaking Mitigation must end. LG&E/KU posits that there is no applicable initial term or power purchase agreement associated with Princeton and Paducah's ownership and financing of Prairie State, so applying the Transition Mechanism to this scenario is inherently different from its application to other Transition Customers and in conflict with the Commission's directives. LG&E/KU also argues that including Princeton and Paducah as Transition Customers based on their construction and financing of Prairie State is arbitrary and capricious and irreconcilable with the Commission's prior determination that the De-pancaking Mitigation can be terminated.[49]

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

[47] *Id.* at 28-29.

[48] *Id.* at 29.

[49] *Id.* at 29-30.

iv. Whether Commission precedent supports including Princeton and Paducah in the Transition Mechanism.

33. Fourth, LG&E/KU contends that Commission precedent does not support including Princeton and Paducah in the Transition Mechanism. Specifically, LG&E/KU maintains that the Commission's decision conflicts with precedent regarding seams. LG&E/KU points to *Southwest Power Pool, Inc.*, in which it argues the Commission denied requests to implement a hold harmless requirement to de-pancake transmission rates for a new transmission seam that would arise between Central Power Electric Cooperative and an adjoining transmission system upon the former joining a regional transmission organization.[50] LG&E/KU argues that the Commission distinguished that case and other cases where de-pancaking had been required due to extraordinary operational issues.[51] According to LG&E/KU, as with *Southwest Power Pool, Inc.*, there are no allegations that excluding Princeton and Paducah from the Transition Mechanism will raise any operational issues, and Princeton and Paducah's only claims are financial, i.e., increased costs. LG&E/KU argues that this is not a basis for the Commission to depart from precedent and require that Princeton and Paducah be included in the Transition Mechanism.[52]

34. LG&E/KU argues that, as the Commission recognized in the March Order, the only de-pancaking requirements imposed when LG&E/KU left MISO were: (1) compliance with the MISO Transmission Owners Agreement; and (2) continued Merger mitigation. LG&E/KU maintains that Princeton and Paducah were not entitled to de-pancaked transmission under either of the above and that, accordingly, the Commission's finding that Princeton and Paducah should be included in the Transition Mechanism conflicts with precedent.[53]

c. Commission Determination

35. 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 fundamental 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

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[50] *Id.* at 30-31 (referencing *Sw. Power Pool, Inc.*, 155 FERC ¶ 61,259 (2016)).

[51] *Id.* at 31.

[52] *Id.*

[53] *Id.*

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. Below we address LG&E/KU's remaining arguments on this issue.

i. Whether the Commission failed to explain its decision that Princeton and Paducah should be included as Transition Customers.

36. First, we disagree with LG&E/KU's argument that the Commission failed to establish that Princeton and Paducah were "in the market" for purposes of determining Transition Customers and did not explain how Princeton and Paducah reasonably relied on the De-pancaking Mitigation. In the September Rehearing Order, the Commission determined that, based on KMPA's and Kentucky Municipals' explanation, KMPA and its members are located in the LG&E/KU market and have invested significant resources to maintain an interconnection with LG&E/KU.[54] In addition, the Commission determined that KMPA has relied on the De-pancaking Mitigation in a similar fashion to Kentucky Municipals, through KMPA's participation in Prairie State in MISO, as well as Princeton and Paducah's power sales contract for MISO hydroelectric generation.[55] In particular, the Commission found persuasive KMPA and Kentucky Municipal's explanation that, when Princeton and Paducah agreed to Rate Schedule No. 402 in 2006, they had already given notice to terminate their requirements service with TVA. In addition, the Commission found persuasive KMPA's explanation that both Princeton and Paducah are directly interconnected with LG&E/KU and have spent approximately $11.6 million and $10.8 million, respectively, to do so. The Commission also found persuasive KMPA's argument that both Princeton and Paducah purchased transmission service from LG&E/KU and, since 2010, Paducah specifically has operated its combustion turbine peaking plant at the interconnection with LG&E/KU and from which power is on occasion dispatched into the LG&E/KU transmission system.[56] For these reasons, the Commission had a sufficient basis to determine that Princeton and Paducah were in the LG&E/KU market as of the date of the March Order. The Commission also had a sufficient to basis to find that KMPA and Kentucky Municipals had relied on the De-Pancaking Mitigation as of the date of the March Order because they had both committed to obtaining power resources from MISO as of the date of the March Order.

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

[55] *Id*.

[56] *Id*. P 91; *see also* KMPA, Supplemental Protest, Docket Nos. EC98-2-001 & ER18-2162-000, at 5-6, 8-9, 10-11 (filed Oct. 2, 2018).

ii. Whether the record shows that Princeton and Paducah meet the criteria for the Transition Mechanism.

37. We disagree with LG&E/KU that Princeton and Paducah are not in the LG&E/KU market. LG&E/KU's argument that the customers that could be considered in the LG&E/KU market are limited to those customers who were subject to the mitigation at the time of the Merger is mistaken. 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 whether a customer was in the LG&E/KU market at the time of the Merger. The Commission did not state that customers in the LG&E/KU market were limited to the KU Requirements Customers, which were the only customers in the LG&E/KU market at the time of the Merger. If this were the case, the Commission would have excluded Owensboro from the Transition Customer group. Instead, the Commission included Owensboro as a Transition Customer because it 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. With respect to the facts at issue, LG&E/KU admits that Princeton and Paducah began taking transmission service from it in 2008 and LG&E/KU has not disputed that Princeton and Paducah are interconnected with LG&E/KU. Therefore, based on these facts, it was appropriate for the Commission to clarify in the September Rehearing Order that Princeton and Paducah were located in the LG&E/KU market as of the date of the March Order.

38. We disagree with LG&E/KU's contention that the Commission's reliance standard requires that Princeton and Paducah provide evidence that the De-pancaking Mitigation was a deciding factor that led to their participation in Prairie State. Rather, LG&E/KU incorrectly assumed that such evidence was required for the Transition Mechanism in contrast to what the Commission articulated in the March Order. In the March Order, the Commission conditionally approved terminating the De-pancaking Mitigation on LG&E/KU providing a Transition Mechanism for (1) those customers located in the LG&E/KU market that (2) *reasonably* relied on such mitigation as of the date of the March Order.[57] The Commission concluded that reasonable reliance on the De-

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[57] March Order, 166 FERC ¶ 61,206 at P 80 ("As a result, we condition our approval of the termination of the De-pancaking Mitigation on LG&E/KU providing a transition mechanism for those customers located in the LG&E/KU market that *reasonably* relied on such mitigation.") (emphasis added); *id.* P 82 ("We find that 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 and that a Transition

pancaking Mitigation was sufficient to qualify for the Transition Mechanism, and we note that LG&E/KU did not contest this standard.

39. We further 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. As the Commission explained in the September Rejection Order, LG&E/KU filed original Rate Schedule No. 402 in February 2006 *before* KMPA executed agreements committing to Prairie State in MISO.[58] Although the provisions of Rate Schedule No. 402 that were ultimately adopted represent 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.[59] For this reason, the Commission concluded in the September Rejection Order that KMPA reasonably could have relied on there being some form of transmission rate de-pancaking that would apply to the transmission from Prairie State located in MISO to the Princeton and Paducah load in the LG&E/KU market based on the requirements of the Merger Order and the MISO Withdrawal Order.[60]

40. Further, 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 not persuasive. LG&E/KU 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 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.[61] The current form of Rate Schedule No. 402 was ultimately the one accepted as part of LG&E/KU's compliance.[62] For these

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[C]ustomer entered into in reliance on the De-pancaking Mitigation prior to the issuance of this order.") (footnote omitted).

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

[59] *Id.* P 35.

[60] *Id.* PP 34-36.

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

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

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.

iii. Whether it was not unduly discriminatory under section 205 to exclude Princeton and Paducah from the Transition Mechanism.

41. We also disagree with LG&E/KU's contention that it was not unduly discriminatory under FPA section 205 to exclude Princeton and Paducah from the Transition Mechanism.[63] As explained above, we find that it was appropriate for the Commission to clarify that Princeton and Paducah should be Transition Customers because they met the criteria the Commission articulated in the March Order with respect to the Transition Mechanism. Regarding whether it was unduly discriminatory under FPA section 205 to exclude Princeton and Paducah, the Commission addressed this issue in the September Rejection Order by finding, as it did in the September Rehearing Order, that KMPA and its members are appropriately considered Transition Members based on the criteria of the March Order.[64] LG&E/KU has provided no arguments that were not already addressed in the September Rejection Order and the September Rehearing Order.

42. 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. 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, Princeton and Paducah sourced power in MISO and rely on the De-pancaking Mitigation under Rate Schedule No. 402. As KMPA has explained numerous times in this

[63] We also disagree with LG&E/KU's contention that it was arbitrary and capricious to include Princeton and Paducah as Transition Customers pursuant to section 203.

[64] September Rejection Order, 168 FERC ¶ 61,151 at PP 28-36.

proceeding, Prairie State is part of KMPA's power supply portfolio.[65] KMPA and its members made the decision to invest in that supply prior to the issuance of the March Order.[66] The transmission of power generated at Prairie State in MISO to Princeton and Paducah, both of which are located in the LG&E/KU market as discussed above, was and still is covered under the "Drive-Out" framework of the De-pancaking Mitigation as Rate Schedule No. 402 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, where 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.[67] Further, Princeton and Paducah both have power *sales* agreements with KMPA for the provision of power from Prairie State. In this regard, the Transition Mechanism applies to Princeton and Paducah as they are similarly situated with Kentucky Municipals.[68] For these reasons, we disagree with LG&E/KU.

43. However, we agree with LG&E/KU that it is difficult to apply the "initial term" framework of the Transition Mechanism to KMPA's ownership in Prairie State and the "take or pay" power sales agreements. Because the Transition Mechanism is designed to phase-out the De-pancaking Mitigation, it is ultimately limited to reimbursement for pancaked transmission costs for purchases of power from MISO and sales into MISO. With respect to the "take or pay" power sales agreements that the Commission clarified in the September Rehearing Order are subject to the Transition Mechanism, the Transition Mechanism would apply to power transmitted from Prairie State that involves pancaked transmission rates. We note that the Prairie State power sales agreements between KMPA and its members have no readily apparent "term" in the same sense

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

[66] *Id.*

[67] *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).

[68] KMPA, Supplemental Protest, Docket Nos. EC98-2-001 & ER18-2162-000, at 7-8 (filed Oct. 2, 2018).

as the power purchase agreements discussed by the Commission in the September Rehearing Order.[69]

44. As such, we set aside the September Rehearing Order, in part, to find that KMPA's Prairie State power sales agreement will be subject to the Transition Mechanism for a period of 10 years. We acknowledge that significant investments were made in reliance on the De-pancaking Mitigation; however, the Commission concluded that the De-pancaking Mitigation can terminate if LG&E/KU provides a Transition Mechanism for Transition Customers. The Commission has found that a 10-year temporary mitigation period is appropriate where future market conditions support a finding that mitigation need not be imposed indefinitely.[70] Here, we find a 10-year framework to be appropriate for the Transition Mechanism for power purchase or sales agreements with no initial term because, otherwise, the De-pancaking Mitigation would continue in perpetuity in contrast to the March Order, which directed that the De-pancaking Mitigation can terminate. We find that 10 years from the date of the issuance of the March Order is a reasonable period of time to allow KMPA to plan for alternative supply choices before its power supply agreement is no longer subject to the Transition Mechanism.

iv. **Whether Commission precedent supports including Princeton and Paducah in the Transition Mechanism.**

45. We find LG&E/KU's reliance on *Southwest Power Pool, Inc.* to support its argument that Princeton and Paducah should not be included as Transition Customers to be misplaced. The fact that the Commission declined to impose de-pancaking in *Southwest Power Pool, Inc*. does not make the Commission's determination to include Princeton and Paducah as Transition Customers incorrect or unsupported here. The circumstances of this case are different from those of *Southwest Power Pool, Inc*., where the Commission declined to impose a hold harmless condition, finding that there were seams agreements in place to address the loop flow and congestion issues that had been raised.[71] In contrast, here, the Commission used its discretion under section 203(b) to permit LG&E/KU to terminate the De-pancaking Mitigation, which had been required as

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[69] *See* KMPA, Supplemental Protest, Docket Nos. ER19-2396-000 and ER19-2397-000, at Ex. AMP-004 (Prairie State Project Power Sales Agreement) (filed Aug. 2, 2019).

[70] *See, e.g.*, *NextEra Energy, Inc.*, 165 FERC ¶ 61,199, at P 31 (2018) (finding that a 10-year temporary mitigation was appropriate where market changes would alter the long-term need for the mitigation).

[71] *Sw. Power Pool, Inc.*, 155 FERC ¶ 61,259 at P 25.

part of the Commission's authorization of the Merger and LG&E/KU's subsequent withdrawal from MISO, and conditioned the termination on LG&E/KU continuing to provide the De-pancaking Mitigation for a transition period to those customers in the LG&E/KU market that reasonably relied on the mitigation. Thus, we find that *Southwest Power Pool, Inc.* does not support LG&E/KU's argument that Princeton and Paducah should not be included as Transition Customers.

2. Transmission Service Reservations

a. September Rehearing Order

46. The Commission also clarified in the September Rehearing Order that the De-pancaking Mitigation should continue for other long-term financial commitments, such as firm point-to-point transmission service, which was provided under Rate Schedule No. 402. However, the Commission clarified that the Transition Mechanism will only cover TSRs so long as such service requests are used for the initial term of the power purchase or sales agreement covered by the Transition Mechanism (i.e., those entered into before the issuance of the March Order), which include imports to the LG&E/KU market from generation located on the MISO system and exports to the MISO market from generation located on the LG&E/KU transmission system.[72]

b. Request for Rehearing

47. Kentucky Municipals request that the Commission clarify that KYMEA's 100-megawatt (MW) TSR for firm point-to-point service from MISO (the KYMEA-CIN TSR) must be included in the Transition Mechanism. Kentucky Municipals explain 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."[73] Kentucky Municipals also point out that they explained that a portion of the KYMEA-CIN TSR is used to integrate KYMEA's power purchase agreements with Vistra, Paducah, Paris, and Ashwood 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.[74] Kentucky Municipals request the Commission to clarify that, because each of those power purchase agreements is covered by the Transition Mechanism and because the KYMEA-CIN TSR

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

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

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

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.[75]

48. Kentucky Municipals state that, although the September Rejection Order's determination that "additional services contracted for as of the date of the March Order, such as future backup supply service and economy energy purchases . . . are not eligible for the Transition Mechanism" is consistent with their requested clarification, it nonetheless introduces ambiguity. 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 in reliance on the availability of economy energy and backup service from MISO. Thus, Kentucky Municipals argue that 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, post-March Order power purchase agreements.[76]

49. Kentucky Municipals argue that, if the Commission does not grant their requested clarification, both the September Rehearing Order and September Rejection Order erred by excluding any portion of the KYMEA-CIN TSR from the Transition Mechanism. First, Kentucky Municipals assert that limiting the eligibility of TSRs only to the extent that such requests 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. Kentucky Municipals point out that the September Rehearing Order acknowledges that firm point-to-point transmission service is a long-term financial commitment and that there is no dispute that KYMEA entered into the KYMEA-CIN TSR in reliance on the De-pancaking Mitigation. Kentucky Municipals thus assert that the only logical conclusion is that the Transition Mechanism must account for that reliance at least through the initial term of the financial commitment (i.e., until April 1, 2027).[77]

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[75] *Id.* at 5.

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

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

50. 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"[78] is inconsistent with the Commission's determination that the Vistra, Paducah, Paris, and Ashwood Solar power purchase agreements should be included in the Transition Mechanism. Kentucky Municipals assert that these four power purchase agreements rely on the De-pancaking Mitigation because they are dependent on the availability of backup service and economy energy in the MISO market and that the Commission found that each of these power purchase agreements was entered into in reliance on the continued existence of the De-pancaking Mitigation. According to Kentucky Municipals, any interpretation of the September Rehearing Order and September Rejection Order that would exclude, through the definition of Covered TSRs,[79] the use of TSRs for needed backup service and economy energy associated with these power purchase agreements would render meaningless the decision to include these power purchase agreements as Covered Agreements.[80] 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.[81]

c. Commission Determination

51. We disagree with Kentucky Municipals' rehearing request. 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 or sales agreement covered by the Transition Mechanism.[82] 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. A TSR alone cannot extend the De-pancaking Mitigation under the Transition Mechanism given that the Transition Mechanism is term-limited by the power and sales agreements relating to resources in MISO. To find otherwise, as Kentucky Municipals request on rehearing,

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

[79] "Covered TSR" refers to TSRs that are subject to the Transition Mechanism.

[80] "Covered Agreement" refers to power purchase or sales agreements that are subject to the Transition Mechanism.

[81] Kentucky Municipals October 10, 2019 Request at 7-8.

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

would mean that 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.

52. As established in the March Order, the transition 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. Using the existing framework of Rate Schedule No. 402,[83] "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.

53. 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 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

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

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.

54. Similar to our 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, we find that the megawatts of the power purchase or sales agreement(s) covered by the Transition Mechanism is controlling as to the megawatts of the related 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.

3. Power Purchase and Sales Agreements

a. September Rehearing Order

55. The Commission clarified in the September Rehearing Order that the Transition Mechanism must continue for a transition period equal to the initial term of Benham's October 2018 contract for requirements service from May 1, 2019, to May 31, 2024. The Commission also clarified that the preceding contract between AMP and Benham for requirements service through April 20, 2019 was included in the scope of the Transition Mechanism and that the superseding contract for such requirements service should also be included because it was entered into prior to the issuance of the March Order. The Commission further clarified that its discussion of contracts in the March Order was not limited to the four contracts described and that, if other contracts were entered into prior to the issuance of the March Order, those contracts should be covered by the Transition Mechanism as well.[84]

56. The Commission also agreed with KMPA that the Transition Mechanism should apply to it and its members' participation in the Prairie State project, i.e., KMPA's ownership share of the Prairie State project and the "take or pay" power sales agreements.[85]

b. Requests for Rehearing and Clarification

57. LG&E/KU argues that the Commission's clarification unreasonably expands the scope of the Transition Mechanism to a potentially unbounded set of contractual arrangements that extend to transmission contracts, any other contracts, and exports into MISO. LG&E/KU contends that, under the new scope for the Transition Mechanism, a

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

[85] *Id.* P 112.

Transition Customer could request application of the de-pancaking benefit to purchase agreements that have no relationship to a resource in MISO other than through speculation about future supply and transmission decisions that could be made by the Transition Customer.[86]

58. LG&E/KU also contends that the September Rehearing Order is internally inconsistent. LG&E/KU argues that, although the Commission throughout the September Rehearing Order expressly recognizes that the De-pancaking Mitigation applies only to transmission from resources located in MISO, the Commission ultimately expands the Transition Mechanism to apply to contracts regardless of where the resources are located. LG&E/KU maintains that the Commission's clarification that the Transition Mechanism should apply to exports to the MISO market from generation located in the LG&E/KU system contradicts the Commission's conclusion that the De-pancaking Mitigation applies only to resources located in MISO, without explanation.[87]

59. According to LG&E/KU, there is no rational basis to expand the Transition Mechanism to non-MISO resources because doing so undermines the entire conclusion of the March Order, sustained by the September Rehearing Order, that there is no longer a need for the De-pancaking Mitigation to address horizontal market power concerns in the LG&E/KU market. LG&E/KU asserts that the Transition Customers' non-MISO purchase agreements are completely unrelated to the March Order's finding that a Transition Mechanism should be designed around supply arrangements that were made prior to the March Order in reliance on the horizontal mitigation provided by the De-pancaking Mitigation. LG&E/KU argues that the Commission has failed to explain how such a broad Transition Mechanism is in line with both the March Order's finding that horizontal market power mitigation is no longer necessary and its public interest finding that a limited Transition Mechanism is required.[88]

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[86] LG&E/KU October 10, 2019 Rehearing Request at 31-32. LG&E/KU argues that, in fact, Kentucky Municipals have taken this stance in response to the Transition Mechanism Agreement, which the Commission rejected in the September Rejection Order, arguing that such non-MISO purchase agreements are part of a portfolio of supply arrangements entered into in reliance on the De-pancaking Mitigation. LG&E/KU explains that it is seeking reversal on this issue in a request for rehearing of the September Rejection Order as it runs counter to the Commission's finding in the March Order that the De-pancaking Mitigation is no longer necessary to support future decisions. *Id.* at n.103.

[87] *Id.* at 33.

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

60. 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.[89] 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 inclusion as a Covered Agreement.[90]

c. Commission Determination

61. We disagree with Kentucky Municipals' contention that the Owensboro-Ashwood Solar power purchase agreement and KYMEA-Ashwood Solar power purchase agreement should be 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 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.[91] 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, 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, and its continuation in the form of the Transition Mechanism. Because the Owensboro-Ashwood Solar power purchase

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[89] 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.

[90] *Id.* at 9.

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

agreement and KYMEA-Ashwood Solar power purchase agreement are for power sourced in the LG&E/KU market, these power purchase agreements are not eligible for the Transition Mechanism. Any agreements that similarly do not require MISO transmission as of the date of the March Order are also not eligible for the Transition Mechanism.

62. In addition, we set aside the September Rehearing Order, in part, with respect to the specific contracts eligible for the Transition Mechanism. We agree with LG&E/KU that only where MISO transmission is required for the agreement should the agreement be eligible for the Transition Mechanism. However, we disagree as to whether to limit the eligible agreements to power purchase agreements associated with MISO *resources* for the reasons listed above. Both agreements that provide for purchases from or sales into MISO and thus require MISO transmission are eligible for the Transition Mechanism.

4. Exports

a. September Rehearing Order

63. In the context of whether the Transition Mechanism must cover TSRs, the Commission explained that the Transition Mechanism must cover power purchase or sales agreements, 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.[92]

b. Request for Rehearing

64. LG&E/KU argues that the Commission's determination that exports to MISO should be included in the Transition Mechanism is arbitrary and capricious and bears no relationship to the original Merger mitigation. LG&E/KU contends that the Commission's market power mitigation analysis of the Merger focused on the increased ability of energy suppliers to reach markets, which would lower market concentration. LG&E/KU specifically argues that the Commission's reference to "markets" in the Merger Order was to the KU Requirements Customers, i.e., the energy purchasers who would be impacted by the effects of increases in market concentration potentially caused by reduced energy supply options.[93] LG&E/KU contends that the Commission's understanding of mitigation as maintaining energy supply availability to the KU

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

[93] LG&E/KU October 10, 2019 Request at 34-35.

Requirements Customers did not change when it issued the MISO Withdrawal Order.[94] LG&E/KU contends that the March Order similarly made no mention of protecting exports to MISO; rather, LG&E/KU asserts that, in the MISO Withdrawal Order, the Commission clearly concluded that the Transition Mechanism addresses mitigation that was intended to preserve horizontal market power mitigation within the LG&E/KU market for KU Requirements Customers, i.e., supply commitments from MISO.[95]

65. LG&E/KU argues that, nevertheless, the Commission in the September Rehearing Order has found that exports should be included in the Transition Mechanism. According to LG&E/KU, if the only rationale is that LG&E/KU was waiving transmission charges for exports to MISO pursuant to Rate Schedule No. 402, then by this rationale a utility would never be able to change its rates, which is contrary to precedent. In addition, LG&E/KU asserts that, although the Commission qualified that the Transition Mechanism will only cover TSRs so long as such service requests are used for the initial term of power purchase or power sales agreements entered into before the issuance of the March Order, including exports, there is no evidence that any Transition Customer has binding obligations to make sales to customers in MISO that were entered into reliance on the De-pancaking Mitigation. LG&E/KU points out that only Owensboro has a single transmission reservation for sales into MISO, which will end on June 1, 2020. LG&E/KU thus contends that the clarification in the September Rehearing Order that exports to MISO are covered by the Transition Mechanism was arbitrary and capricious because it unreasonably expanded the scope of the Transition Mechanism with no rational basis.[96]

c. Commission Determination

66. We find that LG&E/KU's arguments with respect to this issue are misplaced. Although LG&E/KU is correct that the Commission's market power mitigation analysis of the 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. 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

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

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

[96] *Id.* at 37.

Commission's original directives regarding its market power analysis in the Merger Order.

67. 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.

68. 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 power sales agreements for exports into MISO should also be eligible for reimbursement. That LG&E/KU chose to misinterpret the "De-pancaking Mitigation" to be narrower than what is currently provided under Rate Schedule No. 402 is ultimately LG&E/KU's error, and not error on the part of the Commission.

69. We also find LG&E/KU's argument that it can never change its rates because it was previously waiving transmission charges for exports to be misplaced. LG&E/KU's obligation to de-pancake transmission between it and MISO originally stemmed from the Commission's directives in the Merger Order and subsequent commitments made by LG&E/KU when it withdrew from MISO. Each action taken by LG&E/KU regarding the De-pancaking Mitigation was and still is subject to Commission review under section 203(b). LG&E/KU could not have amended Rate Schedule No. 402 to remove the De-pancaking Mitigation without first receiving Commission authorization. Indeed, this is what LG&E/KU did. LG&E/KU may change its rates but, with respect to the De-pancaking Mitigation, must first receive the Commission's authorization under section 203(b).

5. Termination of Reimbursement Obligations

a. Request for Rehearing

70. 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 resources within MISO such that the transmission rate pancaking is eliminated, the de-pancaking reimbursement should be reduced commensurately. According to Kentucky Municipals, although the September Rejection Order used the example of load pseudo-tied to another

balancing authority area, it is equally true that a Transition Customer moving load into MISO 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 pseudo-tie.[97] Kentucky Municipals suggest that, in either case, the customer will still need LG&E/KU's point-to-point transmission service to export the resources 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 resource.[98] In the alternative, Kentucky Municipals request that, if this clarification is not provided, the Commission grant rehearing of the decision not to require continuation of the De-pancaking Mitigation during the transition period under the described circumstances.[99]

b. Commission Determination

71. Because Kentucky Municipals' arguments relate to the Commission's findings on this issue in the September Rejection Order, we address their arguments in the order addressing arguments raised on rehearing in that proceeding.[100]

The Commission orders:

In response to the requests for rehearing, the September Rehearing 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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[97] 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.*

[98] *Id.* at 11.

[99] *Id.* at 13.

[100] *Louisville Gas and* Electric *Company*, 172 FERC ¶ 61,227, at PP 99-101 (2020).