

131 FERC ¶ 61,025
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

E.ON U.S. LLC

Docket Nos. ER10-295-000
ER10-298-000
ER10-298-001

Kentucky Municipal Power Agency and
Owensboro Municipal Utilities

EL10-38-000

v.

E.ON U.S. LLC

ORDER ACCEPTING AND SUSPENDING PROPOSED TARIFF REVISIONS,
SUBJECT TO REFUND, ESTABLISHING HEARING AND SETTLEMENT JUDGE
PROCEDURES AND CONSOLIDATING PROCEEDINGS

(Issued April 15, 2010)

1. In this order, we accept tariff revisions and service agreements submitted by E.ON U.S. LLC (E.ON) on behalf of its operating subsidiaries Louisville Gas and Electric Company and Kentucky Utilities Company (LG&E/KU), pursuant to section 205 of the Federal Power Act (FPA), in Docket Nos. ER10-295-000, ER10-298-000, and ER10-298-001, and suspend them for a nominal period, to become effective as discussed below, subject to refund.¹ In addition, we set for hearing a complaint filed by Kentucky Municipal Power Agency (KMPA)² and Owensboro Municipal Utilities (Owensboro) (together, the Kentucky Municipals), pursuant to section 206 of the FPA,³ in Docket No.

¹ 16 U.S.C. § 824d (2006).

² KMPA's members are Paducah Power System and the Electric Plant Board of the City of Princeton, Kentucky.

³ 16 U.S.C. § 824e (2006).

EL10-38-000. We also consolidate the proceedings and establish hearing and settlement judge procedures in order to explore disputed issues of material fact.

I. Background and Description of Filings

A. Docket Nos. ER10-298-000 and ER10-298-001

2. On November 20, 2009, E.ON submitted an unexecuted Network Integration Transmission Service Agreement (NITSA) and an unexecuted Network Operating Agreement (NOA) (together, the Service Agreements), providing for network integration service to Owensboro under the LG&E/KU joint Open Access Transmission Tariff (Tariff).⁴ Owensboro has requested service to three designated delivery points: (1) Green River Steel to Smith Line (69 kV), (2) Green River Steel to Smith Line (138 kV) and (3) Daviess County/Smith Line (345 kV). The network load at the three delivery points requested is expected to total between 193.8 MW and 214.1 MW during the five year service term extending from May 17, 2010 to May 17, 2015.

3. E.ON states that the Service Agreements deviate from the *pro forma* network integration agreement and operating agreement contained in the LG&E/KU Tariff. For instance, the NITSA contains deviations from the *pro forma* network integration agreement to allow for treatment of behind-the-meter generation in calculating network load and to allow for network credits for Owensboro's facilities. The NOA contains certain deviations from the *pro forma* operating agreement, including: (1) section 1 - Balancing - has been updated to reflect an obligation to adhere to the standards of the North American Electric Reliability Corporation (NERC) and the SERC Reliability Corporation (SERC); (2) section 2 - The Operating Committee - has been modified to fully specify important operating material to be reviewed by the Operating Committee; (3) section 3 - Redispatch Procedures - clarifies the procedures that will be followed prior to any curtailment of service; and (4) special operating provisions in sections 6, 7, and 8 of the NOA relating to the service E.ON will provide that address potential supply shortages in the event that a designated network resource is interrupted for supply or delivery issues and clarify that E.ON will provide ancillary services per the Tariff, but that it is not required to provide back-up energy. In addition, most relevant here, E.ON explains that Owensboro and E.ON are in disagreement over whether Owensboro should be subject to charges for transmission losses when Owensboro serves some of its

⁴ E.ON explained that it filed unexecuted service agreements because the parties had not been able to agree on all of the terms of the agreements. Filing Docket No. ER10-298-000, Transmittal Letter at 2-3.

designated network load from its behind-the-meter resources, Elmer Smith Unit 1 and Elmer Smith Unit 2, that have been identified as Designated Network Resources.⁵

4. On February 2, 2010, E.ON amended its filing by submitting executed Service Agreements stating that the parties have reached agreement on all the issues between them except the issue of the calculation of transmission losses. E.ON explains that the parties have agreed that the resolution of Docket No. ER10-295-000, described below, will determine the application of losses under the Service Agreements.⁶ Accordingly, E.ON requests that the executed Service Agreements become effective on May 17, 2010.

B. Docket No. ER10-295-000

5. On November 20, 2009, E.ON filed revisions to Schedule 11, Loss Compensation Service, of the Tariff to clarify the existing language regarding loss compensation service for both network integration service and point-to-point transmission service. Specifically, E.ON proposes revisions that clarify that network integration service customers will be charged for losses based on their actual hourly network load rather than their scheduled energy deliveries. E.ON notes that Owensboro argues that its losses should be based only upon the deliveries scheduled to its designated delivery points under its network integration service. It explains that it will continue to calculate losses based upon scheduled deliveries for point-to-point transmission service.⁷ E.ON also states that it is making the same conforming changes to its recently filed revised Tariff, Fifth Revised Volume No. 1, which is not proposed to take effect until September 1, 2010.⁸ E.ON requests that the Commission accept its proposed tariff sheets effective November 21, 2009 and September 1, 2010, and requests waiver of the Commission's regulations to the extent necessary to permit the requested effective dates. E.ON states that it is seeking to clarify the provisions of the Tariff relating to loss compensation service for network integration service to address the existence of Owensboro's behind-the-meter generation.⁹

⁵ *Id.* at 3-4, 7-8.

⁶ Filing Docket No. ER10-298-001, Transmittal Letter at 1, 3-4.

⁷ Filing Docket No. ER10-295-000, Transmittal Letter at 2.

⁸ E.ON's proposed revised Tariff is currently pending before the Commission in Docket No. ER10-191-000.

⁹ Filing Docket No. ER10-295-000, Transmittal Letter at 2-3.

C. Docket No. EL10-38-000

6. On January 29, 2010, the Kentucky Municipals filed a complaint alleging that Schedule 11 of the Tariff is unjust and unreasonable in that the existing 3 percent loss factor contained in the Tariff has no cost basis and exceeds the current level of actual losses indicated by E.ON in its most recent FERC Form No. 1 reports. In addition, the complaint states that E.ON has an unreasonable and unfiled business practice of rounding losses up to the next whole MW. The Kentucky Municipals request that the Commission establish a refund effective date of January 29, 2010. They further state that the complaint should be consolidated or otherwise linked with the proceedings in ER10-295-000 for purposes of decision or settlement.¹⁰

II. Notices of Filings and Responsive Pleadings**A. Docket Nos. ER10-295-000, ER10-298-000, and ER10-298-001**

7. Notices of E.ON's filings in Docket Nos. ER10-295-000, ER10-298-000, and ER10-298-001 were published in the *Federal Register*, 74 Fed. Reg. 64070 (2009) and 75 Fed. Reg. 6653 (2010), with interventions and protests due on or before December 11, 2009, and February 23, 2010. On December 11, 2009, the Kentucky Municipals filed a motion to intervene in Docket Nos. ER10-295-000 and ER10-298-000. On December 11, 2009, American Municipal Power, Inc. (AMP), on behalf of itself and its members, filed a motion to intervene and protest in Docket No. ER10-295-000 (AMP Protest).

8. On December 15, 2009, E.ON submitted a motion to defer action in Docket Nos. ER10-295-000 and ER10-298-000 until February 19, 2010 in order to afford it additional time to continue negotiating with Owensboro in an attempt to resolve the remaining issues in the proceedings. E.ON stated that, if negotiations were successful, it would submit revised service agreements and tariff sheets in the respective proceedings. E.ON also stated that, in the event that the parties were unable to resolve all issues, the parties would notify the Commission no later than January 15, 2010.¹¹

¹⁰ Complaint at 5-6.

¹¹ Motion to Defer at 3-4.

9. On December 22, 2009, E.ON filed a motion for leave to answer and answer AMP's protest (E.ON December 22 Answer). On January 29, 2010, the Kentucky Municipals submitted a protest in Docket No. ER10-295-000 (Kentucky Municipals Protest). On February 16, 2010, E.ON filed a motion for leave to answer and answer the protest of the Kentucky Municipals (E.ON February 16 Answer).

10. On February 16, 2010, E.ON submitted a motion requesting that the Commission end the deferral period. Accordingly, the Commission ended the deferral period and set the filing date for ER10-295-000 as February 16, 2010. On March 3, 2010, the Kentucky Municipals filed a response to E.ON's answer in Docket No. ER10-295-000 (Kentucky Municipals March 3 Answer).

B. Docket No. EL10-38-000

11. Notice of the Kentucky Municipals' complaint was published in the *Federal Register*, 75 Fed. Reg. 6376 (2010), with E.ON's answer and interventions and protests due on or before February 18, 2010. On February 16, 2010, AMP filed a motion to intervene. On February 18, 2010, E.ON filed an answer to the complaint (E.ON Answer to the Complaint). On March 3, 2010, the Kentucky Municipals filed a motion for leave to answer and answer to E.ON's Answer to the Complaint. On March 30, 2010, E.ON filed an answer to the Kentucky Municipals' answer (E.ON March 30 Answer). On April 9, 2010, the Kentucky Municipals filed an answer to E.ON's March 30 Answer (Kentucky Municipals April 9 Answer).

III. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene of AMP and the Kentucky Municipals serve to make them parties to the proceedings in which they intervened.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest and answer unless otherwise ordered by the decisional authority. We will accept the answers of E.ON and the Kentucky Municipals because they have provided information that assisted us in our decision-making process.

B. Substantive Matters**1. Docket Nos. ER10-298-000 and ER10-298-001****a. Filing**

14. E.ON explains that the executed NITSA contains several variations from the *pro forma* network integration agreement, but that these variations are consistent with Commission policy.¹² Most notably, section 6.1 of the NITSA provides that the net output of Elmer Smith Unit Nos. 1 and 2 will be added to the network load metered at Owensboro's delivery points for the purpose of determining network load, as the parties have agreed to meter Owensboro's behind-the-meter generation as part of network load.¹³ In addition, E.ON explains that the NITSA specifies that Owensboro will be entitled to \$505,109 in billing credits per year.¹⁴ Likewise, E.ON proposes certain non-conforming revisions to the *pro forma* NOA related to balancing and redispatch procedures as well as operating procedures in the event that Owensboro experiences a supply shortage. E.ON states that the revisions are superior to the *pro forma* operating agreement as they are designed to improve coordination with the network customer on issues of reliability standards responsibility as well as coordination in the event of a supply shortage.¹⁵

2. Docket No. ER10-295-000**a. Filing**

15. E.ON states that it is seeking to clarify the provisions of the Tariff relating to loss compensation service for network integration service to address the existence of Owensboro's behind-the-meter generation, which, it explains, is located off of Owensboro's transmission facilities that are integrated with the LG&E/KU transmission system. E.ON explains that Owensboro asserts that its losses should be based only upon deliveries to its designated delivery points and, therefore, Owensboro should not be charged for transmission losses for its entire actual hourly network load under the requested network integration service. E.ON states that calculating losses based on the full network load of a customer is consistent with Commission precedent regarding the

¹² Filing Docket No. ER10-298-001, Transmittal Letter at 3-4.

¹³ *Id.* at 3-4.

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 4-6; Filing Docket No. ER10-298-000, Transmittal Letter at 7.

use of the integrated transmission network and the purpose of network integration service.¹⁶

b. Protests and Answers

16. AMP argues that E.ON mischaracterizes the nature of its proposed revisions as merely a clarification because E.ON's proposal would modify the method used to determine the responsibility of network integration service customers for losses and could substantially increase a customer's responsibility for losses.¹⁷

17. AMP also argues that E.ON's proposal should be rejected because it offends accepted principles of cost causation by imposing charges on network integration service customers that use behind-the-meter generation to meet the entirety of their hourly energy needs despite the fact that such users do not create any losses on E.ON's system.¹⁸ AMP further argues that problems between E.ON and Owensboro should not be redressed by revisions to a tariff of general applicability and should be addressed in the service specifications of the customer's NITSA. Finally, AMP argues that E.ON's proposal is inconsistent with *Ameren Services Company*, where the Commission recognized that load served by behind-the-meter generation should be netted out of network load when assigning cost responsibility for transmission losses.¹⁹

18. In its answer to AMP's protest, E.ON argues that, contrary to AMP's assertions, assigning transmission losses based on total network load is consistent with Commission precedent that prohibits reducing transmission charges for network load by the amount of energy produced by behind-the-meter generation.²⁰ E.ON also maintains that its proposal

¹⁶ Filing Docket No. ER10-295-000, Transmittal Letter at 1-3.

¹⁷ AMP Protest at 4. The Kentucky Municipals also argue that E.ON mischaracterizes its revisions as clarifications. Kentucky Municipals Protest at 2-4.

¹⁸ AMP Protest at 5-9 (citing *Union Elec. Co. & Ctrl. Ill. Pub. Srvce. Co.*, 85 FERC ¶ 63,015 (1998)).

¹⁹ *Id.* at 9 (citing 97 FERC ¶ 61,067 (2001) (*Ameren*)).

²⁰ E.ON December 22 Answer at 3, 5-7 (citing *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 1614, 1619, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261, at P 965 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on reh'g*, Order No. 890-D, 129 FERC ¶ 61,126 (2009), 9-11 (citing *PacifiCorp*, 79 FERC ¶ 63,003, at 23-24 (1997); *Northern States*, 60 FERC ¶ 61,076, at 8 (1992) (*Northern States*)).

is more accurate from a cost causation standpoint than the current Tariff provisions.²¹ E.ON also asserts that its proposal is consistent with *Ameren* because E.ON will not be compensated twice for transmission losses in situations in which either a network integration service customer must pay for losses under the Tariff or a third-party customer who purchases behind-the-meter generation from one of its network integration service customers must pay for losses under the Tariff.²²

19. In their protest, the Kentucky Municipals argue that E.ON's proposal offends cost causation principles because it would require customers to pay E.ON "losses" on deliveries that occur outside the ambit of E.ON's facilities.²³ The Kentucky Municipals also argue that the orders cited by E.ON as well as more recent precedent recognize that a net load billing determinant is fully consistent with the principle that transmission losses should be calculated on the basis of a system-wide average where the base rate is calculated on the basis of a system-wide average.²⁴

20. The Kentucky Municipals also contend that E.ON has failed to demonstrate that an increase in loss charges is cost-justified and that the history of the loss factors and billing determinants used in providing network integration service over E.ON's facilities demonstrates: (1) the existing billing determinant for assessing losses for network integration service is energy delivered over E.ON's system and does not include behind-the-meter generation;²⁵ and (2) the existing loss factor is already overstated.²⁶ The Kentucky Municipals, citing the FERC Form No. 1 data of LG&E and KU and the loss factors used for the purpose of certain transactions by LG&E and KU, argue that the three percent loss factor continues to lack any cost basis.²⁷ Thus, they state that, rather than accepting E.ON's proposed tariff revisions, the Commission should initiate an investigation under section 206 of the FPA in light of the ample evidence demonstrating

²¹ E.ON December 22 Answer at 7-8.

²² *Id.* at 11-12.

²³ Kentucky Municipals Protest at 4-5.

²⁴ *Id.* at 8-12 (citing *Northern States*, 60 FERC ¶ 61,076 at 61,253 n.25; *Appalachian Power Co.*, 63 FERC ¶ 61,165 (1993) (*Appalachian*); *Pac. Gas & Elec. Co.*, 49 FERC ¶ 63,031, at 65,140 (1989) (*PG&E*); *Ameren*, 97 FERC ¶ 61,067 at 61,360-61,361; *Mont. Power. Co.*, 83 FERC ¶ 61,211 (1998) (*Montana Power*); *Arizona Public Service Co.*, 79 FERC ¶ 61,083 (1997) (*Arizona*)).

²⁵ *Id.* at 15-18.

²⁶ *Id.* at 15-20.

²⁷ *Id.*

that the three percent loss factor is already excessive. They further state that any such investigation should include reform of the unreasonable practice outlined in E.ON's business practices manual of rounding losses up to the next whole MW when calculating losses.²⁸

21. In its answer to the Kentucky Municipals' protest, E.ON argues that the Kentucky Municipals' proposal is inconsistent with requesting network integration service for their network load²⁹ and amounts to a collateral attack on Order Nos. 888 and 890.³⁰ It claims that Owensboro is acting inconsistently by requesting network credits for facilities between its Elmer Smith Units and its delivery points while arguing that deliveries over these facilities take place off of E.ON's system with no impact on network losses.³¹

22. In addition, while acknowledging that the Commission declined to rule on the issue of netting behind-the-meter losses on a generic basis in Order No. 890, E.ON asserts that the Commission has consistently refused to allow netting of behind-the-meter losses in individual cases and that the cases relied upon by the Kentucky Municipals do not support their position.³² Finally, E.ON argues that the loss factor was supported by testimony in Docket No. ER98-114-000 demonstrating that the loss factor was based on earlier loss studies.³³

23. In their answer to E.ON's answer, the Kentucky Municipals argue that the Commission has permitted netting of behind-the-meter losses and that the predominant practice is to apply the average loss factor to actual deliveries at the point of delivery as reflected in current language of the Tariff.³⁴ They state that E.ON fails to recognize that the real issue is how to measure the usage to which the loss factor applies. Moreover, the

²⁸ *Id.* at 4, Attachment A.

²⁹ E.ON February 16 Answer at 7-9.

³⁰ *Id.* at 9, 15-20.

³¹ *Id.* at 10-11. E.ON explains that Owensboro has requested billing credits for its facilities that are integrated into E.ON's transmission system. Filing Docket No. ER10-298-000, Transmittal Letter at 5.

³² E.ON February 16 Answer at 11, 13-18 (citing *Appalachian*, 63 FERC ¶ 61,165; *Northern States*, 64 FERC ¶ 61,324 (1993); *NSP*, 30 F.3d 177 (D.C. Cir. 1994); *Ameren*, 97 FERC ¶ 61,067; *PG&E*, 49 FERC ¶ 63,031; *Arizona*, 78 FERC ¶ 61,083 (1997); *Montana Power*, 83 FERC ¶ 61,211).

³³ E.ON February 16 Answer at 19-20.

³⁴ Kentucky Municipals March 3 Answer at 14-15.

Kentucky Municipals argue that E.ON misrepresents their position by claiming that Owensboro is proposing to pay average losses only when it is exporting its generation when Owensboro is actually proposing to pay (i) the average loss factor multiplied by its network integration service deliveries whenever, but only when, such deliveries are actually made, plus (ii) the average loss factor multiplied by the point-to-point schedules that are required whenever Owensboro exports its generation to a customer other than an E.ON network transmission load.

24. The Kentucky Municipals also state that they cited the Commission's policy prohibiting the netting of behind-the-meter generation, explained its basis, and demonstrated that the policy goes to base transmission access charges, not loss charges.³⁵ The Kentucky Municipals argue that, regardless of whether Owensboro receives investment credits, losses experienced on Owensboro's transmission facilities should not be factored into the losses on the E.ON-owned transmission system.³⁶ Additionally, they state that E.ON's assertion that Owensboro should not sign up for network integration service overlooks the fact that network integration service is meant to be available for load-serving entities regardless of whether they own behind-the-meter generation.³⁷

3. Docket No. EL10-38-000

a. Complaint

25. The Kentucky Municipals claim that their protest in Docket No. ER10-295-000 demonstrates that the existing three percent loss factor is unjust and unreasonable because it has no cost basis and the actual, current cost-based level appears to be 2.2 percent or less, and that a nondiscriminatory, pro-competitive application of a loss factor comparable to that which E.ON applies at retail suggests an even lower loss factor.³⁸ The Kentucky Municipals also allege that E.ON has an unreasonable and unfiled business practice of rounding losses up to the next whole higher MW, rather than rounding down to the nearest whole MW or otherwise eliminating the effects of rounding, and, therefore, ask that the Commission disallow E.ON's practice. The Kentucky Municipals further explain that they filed their complaint in order to eliminate any technical barrier to a just and reasonable loss factor and loss factor application under the "last clean rate doctrine"

³⁵ *Id.* at 17-18 (citing Kentucky Municipals Protest at 6; *Cent. Hudson Gas & Elec. Corp.*, 86 FERC ¶ 61,062 (1999); *NSP*, 30 F.3d at 182; *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 947 (D.C. Cir. 1999)).

³⁶ Kentucky Municipals March 3 Answer at 18-19.

³⁷ *Id.* at 20-21.

³⁸ Complaint at 5-6.

and note that they unsuccessfully attempted to negotiate an amicable resolution regarding loss charges with E.ON.

b. Answers

26. E.ON argues that the complaint should be rejected as failing to meet the procedural requirements of Rule 206 of the Commission's Rules of Practice and Procedure³⁹ because the Kentucky Municipals have failed to (1) make a good faith effort to quantify the financial impact or burden on the complainant resulting from the action or inaction alleged to violate applicable statutory standards; (2) identify the resulting practical, operational, or other nonfinancial impacts; (3) explain why timely resolution of the issues raised in the complaint cannot be achieved through Docket No. ER10-295-000; (4) include all documents that support the facts in the complaint;⁴⁰ (5) state whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used as required; (6) include a form of notice of the complaint suitable for publication in the *Federal Register*; and (7) state the specific relief or remedy requested.⁴¹

27. E.ON also argues that the Commission should reject the complaint because the Kentucky Municipals have failed to demonstrate that the three percent loss factor is unjust and unreasonable and that there is a new rate that is just and reasonable, as required by section 206 of the FPA.⁴²

28. E.ON states that while the Kentucky Municipals must provide more than just suggestions and speculation to demonstrate that E.ON's loss factor is unjust and unreasonable, the complaint only includes general statements that the existing loss factor is baseless, out of date, and excessive. In addition, it maintains that the Kentucky Municipals cannot challenge the loss factor as out of date because the three percent loss factor is the rate that is in effect and on file with the Commission. Further, with respect to the Kentucky Municipals' reliance on the data in LG&E's and KU's FERC Form No. 1 filings, E.ON states that the Kentucky Municipals fail to identify the actual current losses

³⁹ 18 C.F.R. § 385.206 (2009).

⁴⁰ E.ON Answer to the Complaint at 7, 13 (citing *San Diego & Electric Co.*, 122 FERC ¶ 61,274, at P 33 (2008) (*SDG&E*)); *also see* E.ON March 30 Answer at 9-10.

⁴¹ E.ON Answer to the Complaint at 5-8, 14.

⁴² *Id.* at 9 (citing *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009)); *see also* E.ON March 30 Answer at 5, 8-11.

reported and that any data reported is governed by the definitions and requirements of the Commission for such filings.⁴³ E.ON further states that the Kentucky Municipals have failed to propose a new loss factor.⁴⁴

29. Finally, E.ON states that, in order to be consistent with charging transmission losses based upon actual load, E.ON will not round losses up to the next whole MW but instead will calculate losses based upon actual kilowatt hours of load in each hour and divide such amount by .97 with the resulting loss amount identified to three decimal places. E.ON states that it hereby submits that it will request Southwest Power Pool, Inc., its Independent Transmission Organization, to post a proposed change to its business practices manual to reflect this revised practice for comment as soon as practicable.⁴⁵

30. In their answer, the Kentucky Municipals argue that the complaint satisfies the elements of Rule 206 and that the underlying purposes of the rule require that the Commission address the complaint on the merits.⁴⁶

31. Regarding E.ON's allegation that they have failed to make a good faith effort to quantify the burden on them as a result of the existing loss factor, the Kentucky Municipals state that the purpose of the requirement, and of Rule 206 more generally, is to put the respondent on notice of the allegation and that the requirement's purpose has been satisfied here because the burden is obvious: the customer must replace the additional transmission losses in accordance with the Tariff. With respect to the practical, operational, or nonfinancial impacts or burdens that result from application of the three percent loss factor, the Kentucky Municipals assert that the burden of using the three percent loss factor is that an excessive loss factor is being applied to the applicable billing determinants. As far as E.ON's practice of rounding is concerned, they state that the resulting burden is unknown and not reasonably knowable because it is an unfiled practice and E.ON has not revealed either its frequency or its consequences. They argue that E.ON is better positioned than they are to estimate the MW burden at issue in the complaint, as the burden associated with the loss factor depends on the outcome of

⁴³ E.ON Answer to the Complaint at 11-12.

⁴⁴ *Id.* at 13-14. *See also* E.ON February 16 Answer at 20 n.47.

⁴⁵ E.ON Answer to the Complaint at 12.

⁴⁶ Kentucky Municipals March 3 Answer at 9 (citing *Complaint Procedures*, Order No. 602, FERC Stat. & Regs. ¶ 31,071, at 30,756, *order on reh'g and clarification*, Order No. 602-A, FERC Stat. & Regs. ¶ 31,076, *order on reh'g*, Order No. 602-B, FERC Stat. & Regs. ¶ 31,083 (1999)).

Docket No. ER10-295-000 and E.ON has been provided with exhaustive information on their actual and projected gross and net loads.⁴⁷

32. As far as their alleged failure to explain why timely resolution cannot be achieved in Docket No. ER10-295-000, the Kentucky Municipals state that they filed their complaint in order to eliminate any technical barrier to a just and reasonable loss factor under the last clean rate doctrine⁴⁸ or otherwise, as explained in the complaint. Moreover, they state that, despite E.ON's assertion that they have failed to state whether informal dispute resolution procedures were used, they note that the complaint made clear that informal dispute resolution procedures were used but did not yield an agreement. Finally, while conceding that they inadvertently omitted a draft federal register notice, the Kentucky Municipals argue that this was harmless error because E.ON had actual notice of the complaint and all other parties have inquiry notice of the complaint as a result of the Commission's publication of its own notice.⁴⁹

33. The Kentucky Municipals maintain that, contrary to E.ON's assertion, there is no rule that precludes incorporation by reference. The Kentucky Municipals state that the Commission requires that complaints be distinguished from protests so that it is not required to comb through the latter to ascertain whether they include the former and that the Commission frequently accepts information incorporated by reference.⁵⁰ They argue that they have met their burden under section 206 of the FPA by making a substantial prima facie case along with ample supporting data that E.ON's transmission losses are no more than approximately 2.2 percent and well below three percent.⁵¹

⁴⁷ Kentucky Municipals March 3 Answer at 10.

⁴⁸ *Id.* at 11 (citing *FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 22-25 (1968), *Xcel Energy Servs. Inc.*, 109 FERC ¶ 61,294, P 21 (2004), *Me. Pub. Utils. Comm'n v. Cent. Me. Power Co.*, 111 FERC ¶ 61,283 (2005)).

⁴⁹ Kentucky Municipals March 3 Answer at 12.

⁵⁰ *Id.* at 11 (citing *Entergy Servs., Inc.*, 52 FERC ¶ 61,317 (1990)). The Kentucky Municipals argue that E.ON's reliance on *SDG&E*, 122 FERC ¶ 61,274, is misplaced because that case involved an attempt by a party to incorporate an unspecified subset of arguments that it had made in a separate proceeding months earlier and that were interwoven with unrelated arguments that had been resolved in the interim, whereas, here, the protest and complaint were filed the same day, no Commission order has issued in either docket, and every argument made in the protest regarding the loss factor and E.ON's rounding practice was and remains relevant to the complaint. Kentucky Municipals March 3 Answer at 11 n.25.

⁵¹ Kentucky Municipals March 3 Answer at 2-5. The Kentucky Municipals argue

(continued...)

34. The Kentucky Municipals reject as contrary to law E.ON's contention that the loss factor cannot be out of date on the basis that it is the rate on file because, using E.ON's reasoning, no rate that has become excessive over time could be restored to a just and reasonable level through a complaint under section 206 of the FPA. They note that the Commission has the duty to reform rates that are no longer just and reasonable by virtue of changed circumstances.⁵² They further note that E.ON's practice of rounding up is not part of the filed rate and should be remedied.

35. Finally, with respect to E.ON's commitment to change its business practices manual, the Kentucky Municipals state that calculating future losses through simple division without rounding is an acceptable alternative. Yet, they note that the alternative is not applicable yet and the proposed change to E.ON's business practices manual has not been posted. They argue that the fact is that E.ON has long been implementing an unfiled practice that biases the outcome upwards and conflicts with E.ON's tariff, which provides for unbiased division without rounding. They state that merely suggesting that the tariff violation may eventually cease is not a full remedy and argue that the violation should cease immediately and that all past and future overcharges should be remedied in full.⁵³

36. In its March 30 Answer, E.ON argues that Docket Nos. EL10-38-000 and ER10-295-000 should not be consolidated because the proceedings have neither been set for hearing nor do they involve common issues of law.⁵⁴ E.ON also claims that it does not round losses for the purpose of charging customers. According to E.ON, the rounding referred to by the Kentucky Municipals in E.ON's business practices manual applies only to self-schedules for losses to E.ON because the tags cannot be accepted for less than one MW.⁵⁵ E.ON claims that it does not round to the nearest MW for billing purposes and, instead, calculates losses out to the thousandths-place decimal point. E.ON contends that its practice is reasonable and notes that it has already changed and posted its business practices to clarify its billing according to the Tariff. E.ON argues that this action has

that, to the extent it can be relied upon, the testimony actually supports their argument because the caption to the table points the reader to Docket No. ER95-854-000 where a study showed a cumulative energy loss factor for transmission of 2.35 percent on the more loss-intensive portion of what is now the combined LG&E/KU system.

⁵² *Id.* at 6 (citing *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999)).

⁵³ Kentucky Municipals March 3 Answer at 22.

⁵⁴ E.ON March 30 Answer at 6-7.

⁵⁵ *Id.* at 5-6, 11.

rendered the Kentucky Municipals' complaint moot on this issue and maintains that no Commission order is necessary.⁵⁶

37. In their April 9 Answer, the Kentucky Municipals argue that E.ON's demand for an affidavit attesting to the truth of its own data is meant to distract the Commission from the fact that E.ON has not provided a response to the facts or on the merits. So as to prevent the Commission from being misled, the Kentucky Municipals verify, pursuant to 18 C.F.R. § 385.2005 (2009), that the facts regarding E.ON's actual energy loss factor set forth in their prior pleadings are true as stated, to the best of their knowledge and belief. The Kentucky Municipals state that while E.ON's clarification of its rounding practice is welcome, its explanation does not comport with what the business practices manual actually says. The Kentucky Municipals state that there should be no difference between E.ON's posted practices, E.ON's actual practices, and the requirements of the tariff; therefore, E.ON's clarification does not fully moot the Complaint's allegations respecting E.ON's practice of rounding.⁵⁷

4. Commission Determination

38. Upon review, we find that the proposed tariff revisions and Service Agreements raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Our preliminary analysis indicates that E.ON's proposed tariff sheets and Service Agreements have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful.

39. Accordingly, we will accept E.ON's proposed Service Agreements, suspend them for a nominal period, make them effective, May 17, 2010, subject to refund, and set them for hearing and settlement judge procedures.

40. We will also accept E.ON's proposed tariff sheets for filing, suspend them for a nominal period, make them effective, January 20, 2010, which is after 60 days notice from when E.ON submitted the proposed tariff sheets, and September 1, 2010,⁵⁸ subject to refund, and set them for hearing and settlement judge procedures. We deny E.ON's

⁵⁶ *Id.* at 6, 11-12.

⁵⁷ Kentucky Municipals April 9 Answer at 2-3

⁵⁸ We note that we will accept E.ON's proposed tariff sheets modifying the revised Tariff filed in Docket No. ER10-191-000 subject to the outcome of that proceeding.

request for waiver of the Commission's prior notice requirement to permit an effective date of November 21, 2009 because E.ON has failed to demonstrate good cause.⁵⁹

41. In addition, we find that the Kentucky Municipals' complaint in Docket No. EL10-38-000 raises issues of material fact that cannot be resolved based upon the record before us and are more appropriately addressed in the hearing and settlement judge procedures ordered below.⁶⁰ Accordingly, we will set the complaint for investigation and a trial-type evidentiary hearing under section 206 of the FPA.

42. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b), as amended by section 1285 of the Energy Policy Act of 2005, requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers,⁶¹ we will set the refund effective at the earliest date possible, i.e., the date of the filing of the complaint, which is January 29, 2010.

43. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of hearing procedures, or, if the case were to go to hearing immediately, by January 15, 2011. Thus, we estimate that if the case were to go to hearing immediately, we would be able to issue our decision within approximately six months of the filing of briefs on and opposing exceptions, or by August 15, 2011.

⁵⁹ See *Central Hudson Gas and Electric Co.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

⁶⁰ Contrary to E.ON's arguments, the Kentucky Municipals' complaint substantially complies with the requirements of Rule 206(b), and we deny E.ON's request to dismiss the complaint. Similarly, we agree with the Kentucky Municipals' that E.ON's reliance on *SDG&E*, 122 FERC ¶ 61,274, is misplaced.

⁶¹ See, e.g., *Seminole Elec. Coop., Inc. v. Florida Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

44. We will consolidate Docket Nos. ER10-295-000, EL10-38-000, ER10-298-000, ER10-298-001 for the purposes of hearing and decision because the proceedings present common issues of law and fact.

45. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2009). If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁶² The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) E.ON's proposed tariff sheets in Docket No. ER10-295-000 are hereby accepted for filing and suspended for a nominal period, to become effective January 20, 2010 and September 1, 2010, subject to refund, as discussed in the body of this order.

(B) E.ON's request for waiver of the 60-day notice requirement is hereby denied.

(C) E.ON's proposed Service Agreements in Docket Nos. ER10-298-000 and ER10-298-001 are hereby accepted for filing and suspended for a nominal period, to become effective May 17, 2010, as requested, subject to refund, as discussed in the body of this order.

⁶² If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their backgrounds and experience (www.ferc.gov – click on Office of Administrative Law Judges).

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning E.ON's proposed tariff sheets in Docket No. ER10-295-000, the Service Agreements filed in Docket Nos. ER10-298-000 and ER10-298-001, and the complaint filed in EL10-38-000. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (E) and (F) below.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2009), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(F) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(G) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(H) The refund effective date established pursuant to section 206(b) of the Federal Power Act is January 29, 2010.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.