

157 FERC ¶ 61,039  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, and Colette D. Honorable.

East Kentucky Power Cooperative, Inc.

Docket No. EL16-8-001

v.

Louisville Gas & Electric Company/Kentucky Utilities  
Company

ORDER DENYING REHEARING

(Issued October 20, 2016)

1. In an order dated February 26, 2016, the Commission denied a complaint filed by East Kentucky Power Cooperative, Inc. (EKPC) against Louisville Gas & Electric Company (LG&E) and Kentucky Utilities Company (KU) (collectively, LG&E/KU) alleging that their failure to accept EKPC's designation of new Network Load under the parties' Network Integration Transmission Service Agreement (NITSA) was contrary to the terms of the LG&E/KU Open Access Transmission Tariff (Tariff)<sup>1</sup> and the Commission's policies concerning open access transmission. In its complaint, EKPC also sought waiver of LG&E/KU's Tariff to adopt an amended NITSA as a non-conforming agreement to LG&E/KU's Tariff.<sup>2</sup>

2. In denying EKPC's complaint, the Commission found that EKPC had neither supported its request for a NITSA which differs significantly from the LG&E/KU Tariff and the Commission's policies on open access transmission, nor shown, pursuant to

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<sup>1</sup> In this order, we use the term "Tariff" or "LG&E/KU Tariff" to represent LG&E/KU's Open Access Transmission Tariff (OATT) and "*pro forma* OATT" to represent the tariff promulgated by the Commission under Order Nos. 888 and 890. We also capitalize the terms "Network Load," "Point-to-Point," and "Network Resource" as those terms are capitalized and identified in LG&E/KU's Tariff.

<sup>2</sup> *E. Ky. Power Coop., Inc. v. Louisville Gas & Elec. Co./Ky. Utils. Co.*, 154 FERC ¶ 61,144, at PP 1-2 (2016) (February 26 Order).

section 206 of the Federal Power Act (FPA), that LG&E/KU's Tariff was unjust and unreasonable as it related to EKPC. The Commission also denied EKPC's waiver request because, in the circumstances presented, EKPC had not shown that its waiver request would be limited in scope or would not cause harm to third parties.<sup>3</sup>

3. On March 28, 2016, EKPC timely filed a request for rehearing of the February 26 Order. For the reasons discussed below, we deny EKPC's request for rehearing.

## **I. Background**

4. EKPC, an exempt generation and transmission cooperative,<sup>4</sup> is a transmission owning member of PJM Interconnection L.L.C (PJM). Approximately 80 percent of EKPC's member load is physically connected to transmission facilities owned by EKPC and located within the PJM footprint in the EKPC Zone.

5. LG&E and KU are both public utilities, and serve customers in Kentucky and Virginia. LG&E/KU are outside the PJM footprint and do not participate in a Regional Transmission Organization. LG&E/KU operate under a combined Commission-approved Tariff.<sup>5</sup>

6. The LG&E/KU and EKPC transmission systems and service territories are intertwined and share 66 interconnection points. Each uses the other's facilities to serve a portion of their native-load customers through these interconnection points. The small portion of EKPC's load that is physically connected to the LG&E/KU transmission system is pseudo-tied<sup>6</sup> to PJM and is treated as part of EKPC's internal zone load in PJM.

7. EKPC acquired the Bluegrass station in December 2015. In its complaint, EKPC asserted that it expected to use output from the Bluegrass station as a Network Resource chiefly to serve that portion of its member load which is connected to LG&E/KU's transmission facilities.<sup>7</sup> The Bluegrass station is a three-unit, 495-MW (summer

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<sup>3</sup> *Id.* P 2.

<sup>4</sup> *See* 16 U.S.C. § 824(f) (2012).

<sup>5</sup> *See Louisville Gas & Elec. Co.*, 114 FERC ¶ 61,282, *order on reh'g sub nom. E.ON U.S., LLC*, 116 FERC ¶ 61,020 (2006).

<sup>6</sup> A pseudo-tied resource is a resource (i.e., generation unit or load) that is functionally transferred from the Balancing Authority (BA) in which the resource is physically located to another BA that has operational responsibility for the resource.

<sup>7</sup> Complaint at 12.

capacity) natural gas-fired peaking facility, which is located within LG&E/KU's footprint. One unit of the Bluegrass station, Unit 3, is subject to a power purchase contract with LG&E/KU until May 1, 2019, so it will not be available to serve EKPC's load until after that date. EKPC has expected to deliver any excess output produced by the station to EKPC's load connected to LG&E/KU's transmission facilities.

8. In order effectuate this arrangement, EKPC alleged that it submitted a transmission service request to TranServ International, Inc. (TranServ), LG&E/KU's Independent Transmission Organization, to designate the Bluegrass station as a Network Resource under EKPC's NITSA with LG&E/KU.<sup>8</sup> TranServ permitted EKPC to add the Bluegrass station as a new Network Resource, and the parties reached agreement regarding the delivery of the Bluegrass station output to EKPC's Network Load on the LG&E/KU system. But a dispute arose with regard to the charges for delivering the Bluegrass station's output over LG&E/KU's transmission system to EKPC's load on the EKPC system.<sup>9</sup>

9. EKPC sought to modify the existing NITSA to: (1) establish the Point of Delivery as one or more points of interconnection between EKPC's system and LG&E/KU's system; and (2) designate a portion of EKPC's member load connected to EKPC's transmission facilities as new Network Load under the EKPC-LG&E/KU NITSA, with the amount of that load stated as the output of the Bluegrass station in any hour minus the aggregate EKPC member load served from the LG&E/KU transmission facilities.<sup>10</sup> EKPC's proposed amended NITSA would determine EKPC's monthly coincident peak load on the LG&E/KU system, which is the demand used for billing for network service under the LG&E/KU Tariff, based on the sum of the delivery point requirements in each hour.

10. According to the complaint, LG&E/KU rejected this proposal and stated that, if EKPC intends to deliver any of the Bluegrass station output to service EKPC's load on the EKPC transmission system, EKPC may purchase Point-to-Point service for the full amount of the Bluegrass station output, less the anticipated minimum load physically connected to the LG&E/KU system. EKPC asserted that LG&E/KU also suggested that EKPC could designate delivery points currently served from EKPC's own transmission system as delivery points under the LG&E/KU NITSA, in sufficient amounts so that EKPC's minimum load on LG&E's system would always be at least equal to the nominal nameplate rating of the Bluegrass station.

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<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.* at 9.

<sup>10</sup> *Id.*

11. In EKPC's view, this arrangement would force it to designate several hundred megawatts of load served by EKPC's own transmission facilities as Network Load on the LG&E/KU transmission system. EKPC contends that LG&E/KU's approach – which would increase EKPC's network service payments to approximately \$17 million per year --is unreasonable, expensive, and excessive in part because the resulting charges are for an amount of transmission service that LG&E/KU would not provide.<sup>11</sup>

12. In the February 26 Order, the Commission denied EKPC's complaint. The Commission found that LG&E/KU's Tariff requires EKPC either to designate its entire load as Network Load in all hours or to arrange for alternative transmission service. Thus, EKPC's request to designate Network Load based on EKPC's use of the LG&E/KU system on a sporadic basis for the delivery of excess generation from the Bluegrass station was not contemplated by LG&E/KU's Tariff (which adopts the Commission's *pro forma* Open Access Transmission Tariff (OATT) nearly verbatim) or Commission policy. The Commission therefore denied EKPC's request to split its load in lieu of designating EKPC's entire load served at discrete points of delivery.<sup>12</sup> The Commission found EKPC failed to meet its burden to show that LG&E/KU's Tariff was unjust and unreasonable as applied to EKPC.<sup>13</sup> The Commission also denied EKPC's request for waiver of LG&E/KU's Tariff because EKPC's proposed amended NITSA could negatively affect other transmission customers by reducing transmission capacity and impairing efficient use of LG&E/KU's system.<sup>14</sup>

## II. Discussion

13. On rehearing, EKPC alleges several errors in the February 26 Order. For the reasons discussed below, we deny rehearing of the February 26 Order.

14. Under the Commission's *pro forma* OATT attached to Order Nos. 888 and 890, customers of transmission owners may sign up for Network Integration Transmission Service (Network service), under which they receive firm transmission service to serve their designated Network Load.<sup>15</sup> Alternatively, such customers may take Point-to-Point

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<sup>11</sup> *Id.* at 10-11.

<sup>12</sup> February 26 Order, 154 FERC ¶ 61,144 at P 56.

<sup>13</sup> *Id.* P 64.

<sup>14</sup> *Id.* P 66.

<sup>15</sup> Section 28.3 of the *Pro Forma* OATT defines Network Integration Transmission Service as a firm service under which a transmission customer delivers “capacity and energy from its designated Network Resources to service its Network

(continued ...)

Transmission Service, which the *pro forma* OATT defines as “reservation and transmission of capacity and energy on either a firm or non-firm basis from the Point(s) of Receipt to the Point(s) of Delivery.”<sup>16</sup> Because EKPC has customers on LG&E/KU’s system, EKPC has subscribed to Network service for all of its load within LG&E/KU’s system. EKPC’s payment for such service is based on the proportionate share of its customers’ use of the LG&E/KU system.<sup>17</sup> EKPC has acquired the Bluegrass station located inside LG&E/KU’s transmission footprint. As long as EKPC uses that facility to serve its customer load inside of LG&E/KU’s transmission system, EKPC can do so under its current NITSA.

15. EKPC, however, also wants to use the Bluegrass station to serve load on its own transmission facilities during those periods in which the output of the Bluegrass station exceeds EKPC’s load on the LG&E/KU system. LG&E/KU is willing to accommodate this use of the Bluegrass station if EKPC either expands its NITSA to accommodate the extra load or if EKPC wants to enter into a Point-to-Point service agreement to export the extra power from the Bluegrass station. EKPC contends that these two options are unjust and unreasonable and maintains LG&E/KU is required to accommodate the export use under a firm NITSA as long as EKPC pays a rate only for the hours in which it uses the facility to export.

16. We affirm the Commission’s conclusion that LG&E/KU has not acted in an unjust and unreasonable manner in refusing to enter into such an agreement. Under the *pro forma* OATT, Network service must be purchased to serve a customer’s full load throughout the year.<sup>18</sup> When servicing load outside of a transmission owner’s footprint,

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Loads on a basis that is comparable to the Transmission Provider’s use of the Transmission System to reliably serve its Native Load Customers.” *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299, app. B, *Pro Forma* OATT, §28.3 (2008) (*Pro Forma* OATT), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

<sup>16</sup> *Pro Forma* OATT, § 1.37.

<sup>17</sup> *See id.* § 1.17 (defining a transmission customer’s Load Ratio as the “Ratio of a Transmission Customer’s Network Load to the Transmission Provider’s total load computed in accordance with Sections 34.2 and 34.3 of the Network Integration Transmission Service under Part III of the Tariff and calculated on a rolling twelve month basis.”).

<sup>18</sup> *Id.* § 29.2(vii) (The minimum term for Network Integration Transmission Service is one year.”).

the *pro forma* OATT requires that the customer either elect to include the entire load as Network Load for all purposes or to exclude that entire load from its Network Load and purchase firm or non-firm Point-to-Point Transmission Service.<sup>19</sup> If LG&E/KU were required to revise the NITSA as proposed by EKPC, LG&E/KU would have to reserve transmission service to deliver the maximum excess output from the Bluegrass station. Such a commitment would tie-up firm transmission service that could be sold to others and compensate LG&E/KU only for service limited to the hours when EKPC exports power outside of the LG&E/KU system. These are not options that the *pro forma* OATT requires LG&E/KU to afford to customers.

17. EKPC contends that requiring it to purchase additional Network service or Point-to-Point service would result in increasing its costs for the use of the Bluegrass station.<sup>20</sup> While paying for Network or firm Point-to-Point service could be more expensive than EKPC's proposal, that cost reflects the firm quality of the service and LG&E/KU's obligation to provide that service any hour of the entire year. Requiring LG&E/KU to adopt EKPC's proposal would result in LG&E/KU having to provide such firm service based on payments only for service limited to EKPC's use of the Bluegrass station to export power at the time of the LG&E/KU coincident peak.

18. We address below EKPC's specific rehearing arguments.

A. **Whether EKPC's Proposed Amended NITSA Constitutes Load-Splitting Prohibited by LG&E/KU's Tariff and the Commission's *pro forma* OATT**

19. EKPC argues that the Commission erred in treating EKPC's proposed NITSA arrangement for the Bluegrass station as "load-splitting," which is prohibited by the LG&E/KU Tariff and the Commission's *pro forma* OATT attached to Order No. 888-A. EKPC states that its proposal did not qualify as "load-splitting" because its proposed amended NITSA did not entail combining network and point-to-point transmission service at a single point of delivery to reduce Network Service Charges.<sup>21</sup> EKPC argues that its proposed amended NITSA instead increases its load ratio share of LG&E/KU transmission costs whenever the Bluegrass station output exceeds EKPC's load connected to LG&E/KU. EKPC further asserts that it would never pay less than its coincident peak load-based share of the LG&E/KU transmission system costs – EKPC

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<sup>19</sup> *See id.* § 31.3.

<sup>20</sup> EKPC could reduce its costs further by purchasing non-firm service under which it would pay for service only during the hours it requires the service.

<sup>21</sup> Rehearing Request at 6, 8, 10-13.

asserts that, in fact, EKPC's coincident peak share would increase whenever the Bluegrass station output exceeds that load at the time of the coincident peak. EKPC states that as a result of this, all load is paid through network integration transmission service billing, which should not be seen as any kind of "load-splitting."<sup>22</sup>

20. EKPC argues that its proposed amended NITSA does not improperly combine Network and Point-to-Point service at a single Delivery Point because all of EKPC's load, including load at Delivery Points connected to the LG&E/KU transmission system, is currently designated Network Load under PJM's OATT.<sup>23</sup> EKPC asserts that the Commission has forced EKPC to choose between two inefficient and costly options, even when EKPC is not using the LG&E/KU transmission system: (1) paying for new Point-to-Point LG&E/KU service pancaked on Network service already paid to LG&E/KU and PJM or (2) re-segmenting EKPC's load by designating some of EKPC's PJM Delivery Points as LG&E/KU Delivery Points.<sup>24</sup> EKPC argues that the Commission erred in relying on select portions of *Duke* to reject EKPC's designation of Network Load.<sup>25</sup> EKPC argues that because EKPC's proposed amended NITSA would not amount to load-splitting and EKPC's proposed amended NITSA would save EKPC between \$5 and \$10 million per year in additional costs and operational burdens, the Commission was wrong to declare reasonable LG&E/KU's interpretation of its Tariff.<sup>26</sup> We disagree.

21. As explained in the February 26 Order,<sup>27</sup> where a Network Customer, such as EKPC, wishes to obtain transmission service for load outside the Transmission Owner's Transmission System, Section 31.3 of LG&E/KU's Tariff (which adopts the *pro forma* OATT discussed in Order Nos. 888 and 890 almost verbatim) provides the Network Customer the choice of either:

(1) electing to include the entire load as Network Load for all purposes under Part III of the Tariff and designating Network

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<sup>22</sup> *Id.* at 13.

<sup>23</sup> *Id.* at 14.

<sup>24</sup> *Id.* at 15.

<sup>25</sup> *Id.* at 6, 8-9, 16-18 (citing *Duke Power Co.*, 81 FERC ¶ 61,010 (*Duke*), *reh'g denied*, 81 FERC ¶ 61,312 (1997), *order rejecting compliance filing*, 84 FERC ¶ 61,136 (1998), *order dismissing compliance filing and accepting settlement sub nom. Duke Energy Corp.*, 86 FERC ¶ 61,220 (1999)).

<sup>26</sup> *Id.* at 7, 9, 30-32.

<sup>27</sup> February 26 Order, 154 FERC ¶ 61,144 at PP 55-56.

Resources in connection with such additional Network Load, or (2) excluding that entire load from its Network Load and purchasing Point-to-Point Transmission Service under Part II of the Tariff.<sup>28</sup>

Section 1.25 of LG&E/KU's Tariff (which also adopts the *pro forma* OATT discussed in Order Nos. 888 and 890 almost verbatim) permits a Network Customer to choose to designate less than its total load as Network Load. Section 1.25, however, prohibits a Network Customer from designating "only part of the load at a discrete Point of Delivery."<sup>29</sup> This tariff language unambiguously sets up a choice for transmission customers to choose between two types of transmission service: Network or Point-to-Point service.<sup>30</sup>

22. EKPC proposes to designate Network Load at a new Delivery Point that reflects less than EKPC's entire load at the Delivery Point and thus violates the prohibition on designating part of its load at a discrete Delivery Point. At this new Delivery Point, the output from the Bluegrass station in excess of EKPC's Network Load would be delivered to EKPC's Network Load on EKPC's transmission system.<sup>31</sup> The Commission, in the

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<sup>28</sup> Louisville Gas and Electric Company, Transmission, Part III\_31, Part III\_31 Designation of Network Load, 10.0.0.

<sup>29</sup> Louisville Gas and Electric Company, Transmission, Part 1\_01, Part 1\_01 Definitions, 10.0.0.

<sup>30</sup> See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,260, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002) ("The bottom line is that all potential transmission customers, including those with generation behind the meter, must choose between network integration transmission service or point-to-point transmission service. . . . For the reasons stated above, a network customer will not be permitted to take a combination of both network and point-to-point transmission services under the *pro forma* tariff to serve the same discrete load."); cf. *Koch Gateway Pipeline Co.*, 136 F.3d 810, 814-15 (D.C. Cir. 1998) ("We first look to see if the language of the tariff is unambiguous—that is, if it reflects the clear intent of the parties to the agreement. If the tariff language is ambiguous, we defer to the Commission's construction of the provision at issue so long as that construction is reasonable.").

<sup>31</sup> See Rehearing Request at 2 n.4.

February 26 Order, was therefore correct in finding that EKPC's proposed amended NITSA would split EKPC's load at discrete Delivery Points to designate less than its full load at such Delivery Points, a practice not contemplated by LG&E/KU's Tariff.<sup>32</sup> Where a Network Customer declines "to designate a particular load at discrete points of delivery as Network Load," Section 1.25 of LG&E/KU's Tariff holds the Eligible Customer "responsible for making separate arrangements under Part II of the Tariff for any Point-To-Point Transmission Service that may be necessary for such non-designated load."<sup>33</sup> Instead of allowing EKPC to split its Network Load between Network and Point-to-Point service, LG&E/KU's Tariff requires EKPC to choose one or the other and to make separate arrangements for Point-to-Point service rather than combining these types of transmission service.

23. EKPC asserts both that its proposed amended NITSA would ensure EKPC is paying the proper Load Ratio when output from the Bluegrass station exceeds EKPC's Network Load under the NITSA and that EKPC's proposed amended NITSA would exempt it from paying "inefficient" and "needlessly costly" pancaked transmission charges. LG&E/KU's Tariff (and the *pro forma* OATT) establishes a bright line between Network and Point-to-Point transmission service. EKPC's proposal would not ensure that EKPC is contributing the correct Load Ratio of LG&E/KU's transmission system's costs because EKPC would reserve and pay for Network transmission service at an amount less than EKPC's entire load at a discrete Delivery Point. Similarly, requiring EKPC to pay for Network service provided by both PJM and LG&E/KU ensures EKPC pays for the distinct transmission services it receives from both LG&E/KU and PJM.<sup>34</sup> The charges that EKPC describes as "inefficient" and "needlessly costly" are in fact charges that the Commission has long recognized as appropriate for the type of use EKPC seeks to make of LG&E/KU's transmission system: Network service. EKPC's proposal would evade these charges based on EKPC's Load Ratio on LG&E/KU's

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<sup>32</sup> February 26 Order, 154 FERC ¶ 61, 144 at P 57.

<sup>33</sup> Louisville Gas and Electric Company, Transmission, Part 1\_01, Part 1\_01 Definitions, 10.0.0.

<sup>34</sup> See Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,255 ("NRECA and TDU Systems, however, argue that network customers located in multiple control areas should not have to pay for any additional point-to-point transmission service to make sales to non-designated load located in a separate control area. We disagree. Because the additional transmission service to non-designated network load outside of the transmission provider's control area is a service for which the transmission provider must separately plan and operate its system beyond what is required to provide service to the customer's designated network load, *it is appropriate to have an additional charge associated with the additional service.*") (emphasis added).

system, in derogation of the LG&E/KU's Tariff and the Commission's *pro forma* OATT.<sup>35</sup> Therefore, in contrast to EKPC's assertions,<sup>36</sup> the Commission did not err in treating LG&E/KU's interpretation of its Tariff as reasonable and finding that EKPC had not met its burden of proof.

24. We reject the contention that the Commission erred in relying on *Duke* in the February 26 Order to find that EKPC was seeking improperly to split its Network Load.<sup>37</sup> In *Duke*, the Commission rejected a bilateral contract for network transmission service and required ancillary services to deliver power to Southeastern Power Administration's (SEPA's) preference customers, finding that these services could be unbundled and provided under Duke Power Company's OATT. As explained in the February 26 Order,<sup>38</sup> the Commission in *Duke* acknowledged that "[O]rder Nos. 888 and 888-A do not permit a network customer to take a combination of both network and point-to-point transmission service to serve the same discrete load."<sup>39</sup> The Commission found, however, that SEPA's preference customers could be served through Duke's OATT because:

the fact that the portion of the preference customers' loads met by their SEPA allocation would be served under Duke's open access transmission tariff, while the remainder of the load continues to be met by bundled service, *would not alter the network nature of the service. The entire load would be served on a network basis, but payment would be made to Duke by SEPA for the SEPA preference customers'*

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<sup>35</sup> See February 26 Order, 154 FERC ¶ 61,144 at P 57 (finding that EKPC's proposal to "split its load on a sporadic basis" would "*limit its transmission payments based on its hourly use for such deliveries.*") (emphasis added); see also Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,259 ("The concept of allowing a 'split system' or splitting a discrete load is antithetical to the concept of network service. A request for network service is a request for the integration of a customer's resources and loads. Quite simply, a load at a discrete point of delivery cannot be partially integrated. Furthermore, such a split system creates the potential for a customer to 'game the system' thereby evading some or all of its load-ratio cost responsibility for network services").

<sup>36</sup> Rehearing Request at 7, 9, 30-32.

<sup>37</sup> *Id.* at 6, 8-9, 16-18 (citing *Duke*, 81 FERC ¶ 61,010).

<sup>38</sup> February 26 Order, 154 FERC ¶ 61,144 at P 58 n.71.

<sup>39</sup> *Duke*, 81 FERC ¶ 61,010 at 61,047.

allocation, and by the preference customers for the remainder of their loads.<sup>40</sup>

In *Duke*, the Commission found Network and Point-to-Point service would have been permissibly combined because all of SEPA's preference customers' load was served on a network basis. Here, by contrast, EKPC's proposed amended NITSA expressly contemplates designating Network Load at a new Delivery Point in an amount equal to the output from the Bluegrass station that *exceeds* EKPC's Network Load on LG&E/KU's system and is delivered to EKPC's system, rather than the entire load located at the Delivery Point.<sup>41</sup> Consistent with *Duke*, the Commission in the February 26 Order was therefore correct to find that EKPC's proposed amended NITSA would split EKPC's load at the Delivery Point and would therefore violate LG&E/KU's Tariff and the *pro forma* OATT.

### **B. Comparison to Other NITSAs**

25. EKPC argues that the Commission erred by rejecting EKPC's reliance on NITSAs accepted by the Commission between South Mississippi Electric Power Association (SMEPA) and Midcontinent Independent System Operator, Inc. (MISO) (SMEPA-MISO), and SMEPA and Southern Company Services (Southern) (SMEPA-Southern), which EKPC claims are similar to EKPC's proposed amended NITSA.<sup>42</sup> EKPC argues that giving no weight to the SMEPA-Southern NITSA, which was uncontested and approved by delegated authority, contravenes the Commission's obligations under the FPA to ensure just and reasonable rates and suggests that the Commission and its staff did not adequately scrutinize the SMEPA-Southern NITSA.<sup>43</sup> EKPC argues that the Commission also erred in distinguishing EKPC's proposed amended NITSA in this case from the SMEPA-MISO NITSA, which was approved by the Commission and modeled on the SMEPA-Southern NITSA. EKPC argues that, contrary to the Commission's assertions, the SMEPA-Southern NITSA, not the SMEPA-MISO NITSA, represents a

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<sup>40</sup> *Id.* (emphasis added).

<sup>41</sup> See Complaint at 9 (“propos[ing] to modify [EKPC's] existing NITSA with [LG&E/KU] to add a new delivery point at one or more points of interconnection between the [LG&E/KU] and [EKPC] systems” and “further propos[ing] that the designated Network Load at that new delivery point would in each hour be the difference between the output of Bluegrass and [EKPC's] Network Load on the [LG&E/KU] system.”).

<sup>42</sup> Rehearing Request at 6, 9, 19-30.

<sup>43</sup> *Id.* at 23-26.

“less than entire load’ designation,” and the SMEPA-MISO NITSA represents an analogous “efficient and cost-effective” mechanism for integrating EKPC’s Bluegrass station into PJM.<sup>44</sup> EKPC contends that the Commission should have focused on the “dynamic relationship between Network Resource output and Network Load, rather than focusing on delivery point alone” to compare the SMEPA NITSA with EKPC’s proposed amended NITSA in this proceeding.<sup>45</sup> We disagree.

26. We reaffirm that the SMEPA-Southern NITSA is not precedent binding on the Commission because the SMEPA-Southern NITSA was a bilateral agreement acceptable to both parties, which was accepted via delegated letter order.<sup>46</sup>

27. We reject EKPC’s attempt to equate its proposed amended NITSA with the SMEPA-MISO NITSA. In that proceeding, Section 31.3 of MISO’s Tariff deviated from Section 31.3 of the *pro forma* OATT by requiring all Network Load to be connected physically to MISO’s transmission system.<sup>47</sup> The Commission, in approving the SMEPA-MISO NITSA, approved a request to designate load not physically connected with MISO’s transmission system as Network Load.<sup>48</sup> MISO’s Tariff itself did not conform to the *pro forma* OATT and both SMEPA and MISO apparently consented to this arrangement. Here, by contrast, Section 31.3 of LG&E/KU’s Tariff conforms to the *pro forma* OATT, which prohibits a Network service customer from designating only part of its load at a discrete Delivery Point, and LG&E/KU objects to EKPC’s proposed deviation from the *pro forma* OATT.

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<sup>44</sup> *Id.* at 23, 26-28.

<sup>45</sup> *Id.* at 28.

<sup>46</sup> See February 26 Order, 154 FERC ¶ 61,144 at P 61 n.76; see also *Gas Transmission Nw. Corp. v. FERC*, 504 F.3d 1318, 1320 (D.C. Cir. 2007) (acceptance of uncontested filings does not establish policy or precedent); 18 C.F.R. § 35.4 (2016) (“The fact that the Commission permits a rate schedule or tariff, tariff or service agreement or any part thereof . . . to become effective shall not constitute approval by the Commission of such rate schedule or tariff, tariff or service agreement or part thereof . . .”).

<sup>47</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,242 at PP 4, 11 (2013).

<sup>48</sup> *Id.* P 11.

**C. Whether EKPC's Proposed Amended NITSA Promotes Commission Policies**

28. EKPC argues that the Commission in the February 26 Order failed to identify which specific Commission policy matched its interpretation of LG&E/KU's Tariff and that the February 26 Order itself would require load-splitting. EKPC argues that the February 26 Order disregards the Commission's "requirement that a transmission owner make its system available to the same extent, and subject to the same or comparable terms and conditions, as govern the transmission owner's own use of its system" given how LG&E/KU and Tennessee Valley Authority (TVA) implement their Contingency Reserve Sharing Agreement.<sup>49</sup> EKPC argues that the February 26 Order will exacerbate seams between regional transmission organization (RTO) areas and between RTO-areas and non-RTO areas, especially given LG&E/KU's withdrawal from MISO and the additional transmission charges EKPC faces due to the February 26 Order.<sup>50</sup> We disagree.

29. As discussed above, the February 26 Order followed Commission policy articulated in the *pro forma* OATT and the preamble to Order Nos. 888 and 888-A, which generally mirror the LG&E/KU Tariff. On a practical level, the Commission explained why following this policy was important: EKPC's proposed amended NITSA would "limit its transmission payments based on its hourly use for" deliveries from the Bluegrass station to the EKPC system.<sup>51</sup> The Commission further explained that because of LG&E/KU's "difficulty predicting in advance the amount of transmission that EKPC would use for such deliveries in any hour, [LG&E/KU] would have to hold transmission service for EKPC for which it may not receive compensation."<sup>52</sup> The Commission also found that other customers on LG&E/KU's system would be harmed through reduced transmission capacity and inefficient use of LG&E/KU's transmission system.<sup>53</sup> In Order No. 888-A, the Commission described the burden that load-splitting imposes on other network customers: "[b]ecause network and native load customers bear any residual system costs on a load-ratio basis, any cost responsibility evaded by a network customer in this manner would be borne by the remaining network customers and native load."<sup>54</sup>

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<sup>49</sup> Rehearing Request at 7, 9, 32-33.

<sup>50</sup> *Id.* at 34-35.

<sup>51</sup> February 26 Order, 154 FERC ¶ 61,144 at P 57.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* P 66.

<sup>54</sup> Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,259-30,260.

Requiring that EKPC take either Network or Point-to-Point transmission service on LG&E/KU's transmission system while EKPC also pays for Network transmission service from PJM does not split EKPC's load—rather, it compensates LG&E/KU for the service LG&E/KU provides in a manner that accurately reflects EKPC's load ratio on LG&E/KU's system, minimizes harm to other customers, and uses LG&E/KU's system more efficiently.

30. The February 26 Order rejected EKPC's preferred interpretation LG&E/KU's Tariff and the *pro forma* OATT and denied EKPC's request for waiver of LG&E/KU's Tariff. LG&E/KU's nonparticipation in MISO and EKPC's participation in PJM are voluntary. To the extent that EKPC wishes to address broader seams issues between LG&E/KU and PJM, or the consequences of LG&E/KU's withdrawal from MISO on EKPC's participation in PJM, these concerns are outside the scope of EKPC's complaint and request for waiver in this proceeding. Regardless of LG&E/KU's withdrawal from MISO exacerbating seams confronting EKPC, we have not required elimination of rate-pancaking between LG&E/KU and PJM,<sup>55</sup> except with respect to certain hold-harmless commitments associated with their withdrawal from MISO,<sup>56</sup> and LG&E/KU's OATT reflects this policy. EKPC has also not explained how the Commission's endorsement of LG&E/KU's position violates the requirement that LG&E/KU provide service comparable to the service LG&E/KU and TVA impose on themselves through their Contingency Reserve Sharing Agreement.<sup>57</sup>

**D. Whether EKPC's Proposal would Cause LG&E/KU to Suffer Inadequate Compensation for Use of its Transmission System**

31. EKPC argues that the Commission erred in finding that EKPC's proposed amended NITSA would deprive LG&E/KU of adequate compensation for use of its transmission system in light of EKPC's use of that system and LG&E/KU's inability to obtain revenues from transmission service provided to other customers.<sup>58</sup> EKPC explains that its proposed amended NITSA would define the Network Load at the Bluegrass station in each hour as equal to the difference between the Bluegrass station's output and EKPC's Network Load on the LG&E/KU system, and that the sum of EKPC's Delivery Point requirements in each hour (including the Bluegrass station Delivery Point) would

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<sup>55</sup> See *Louisville Gas & Elec. Co.*, 114 FERC ¶ 61,282 at P 111 n.67.

<sup>56</sup> *Id.* P 45.

<sup>57</sup> See *City of Vernon v. FERC*, 845 F.2d 1042, 1047 (D.C. Cir. 1988) (“the Commission cannot be asked to make silk purse responses to sow's ear arguments”).

<sup>58</sup> Rehearing Request at 6, 9, 35-36.

be used to determine EKPC's monthly aggregate coincident peak demand on the LG&E/KU system. According to EKPC, that monthly aggregate coincident peak demand is used to determine a Network Customer's monthly charge for Network Service and would fairly compensate LG&E/KU for EKPC's use of LG&E/KU's transmission system consistent with how LG&E/KU charges all other Network Customers. EKPC represents that, under its proposed amended NITSA, EKPC would never pay less than its share of the costs for EKPC's load connected to LG&E/KU's system and would pay more than its share of system costs whenever the Bluegrass station's output exceeds its other load connected to LG&E/KU's system during coincident peaks.<sup>59</sup>

32. EKPC also argues that its proposed amended NITSA would not preclude LG&E/KU from obtaining revenues from transmission service provided to other customers. Specifically, EKPC states that "LG&E/KU receives on an ongoing basis detailed forecasts of EKPC load and generation that allow it to predict—for both operational and planning purposes—the amounts of transmission service likely to be needed each day to serve EKPC's load at the Bluegrass Delivery Point."<sup>60</sup> EKPC therefore reasons that its proposed amended NITSA "would not prevent LG&E/KU from calculating and posting Available Transmission Capability ('ATC') or from selling unscheduled firm transmission service for non-firm use."<sup>61</sup> EKPC argues that these forecasts will enable LG&E/KU to release transmission capacity EKPC is not expected to use to serve its load on LG&E/KU's system and to sell such capacity as non-firm ATC to enable LG&E/KU to meet its annual transmission revenue requirement. Using such forecasts to serve Network Load at the Bluegrass station Delivery Point, according to EKPC, would be no different than how LG&E/KU uses other customers' forecasted Network Load because all forecasts necessarily reduce a Transmission Provider's firm and non-firm ATC.<sup>62</sup> EKPC argues that rejecting its proposed amended NITSA would discriminate against EKPC because LG&E/KU should be allowed to sell non-firm ATC no longer needed by EKPC in the same way as LG&E/KU sells non-firm ATC from other Network Customers.<sup>63</sup> We disagree.

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<sup>59</sup> *Id.* at 36-39.

<sup>60</sup> *Id.* at 39.

<sup>61</sup> *Id.* In Order No. 890, the Commission amended the *pro forma* OATT to change the common abbreviation "ATC" from Available Transmission Capability to Available Transfer Capability. *See* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 2 n.3.

<sup>62</sup> Rehearing Request at 40-41.

<sup>63</sup> *Id.* at 41-42.

33. Defining EKPC's Network Load on LG&E/KU's system as the difference between the Bluegrass station's output in any hour minus the aggregate EKPC member load on the LG&E/KU system in that hour is based on two different variables: the Bluegrass station's output in any hour and EKPC's Network Load on the LG&E/KU system during that hour. This is less than EKPC's full load at a discrete Delivery Point and would effectively narrow the amount of Network Load contributing to EKPC's total Load Ratio Share. In contrast, other Network Customers' Network Load is calculated under LG&E/KU's Tariff using those Network Customers' respective total Load Ratio Shares reflecting their entire loads at discrete Delivery Points on a rolling twelve month basis.<sup>64</sup> Although EKPC and all other Network Customers have forecasting abilities, EKPC's proposal would give an undue preference to EKPC to the detriment of other Network Customers whose Network Load is measured by their proportional use of LG&E/KU's system based on their entire loads at discrete designated Delivery Points in relation to LG&E/KU's total load. EKPC would enjoy this undue preference under its proposed amended NITSA because EKPC would only have to pay for the portion of its load at designated Delivery Points that is served with the Bluegrass station's excess output during the coincident peak hour. As discussed in the February 26 Order, this would require LG&E/KU to reserve ATC for EKPC when that ATC could be available to other Network Customers and would distort every Network Customer's Load Ratio Share. We therefore reaffirm the finding that EKPC's proposed amended NITSA would inadequately compensate LG&E/KU for use of its transmission system.

**E. Whether EKPC Demonstrated that the LG&E/KU Tariff is Unjust and Unreasonable as Applied to EKPC**

34. EKPC argues that the Commission did not explain sufficiently how LG&E/KU's Tariff is just and reasonable as applied to EKPC and did not apply LG&E/KU's Tariff with flexibility similar to other NITSAs. EKPC argues that the Commission has not addressed the operational burdens and excessive charges identified by senior EKPC personnel in affidavits filed in this proceeding. For example, EKPC states that rejecting EKPC's proposed amended NITSA would force EKPC to arrange for separate Point-to-Point service on top of Network service EKPC already pays LG&E/KU. Alternatively, EKPC states that it would have to designate Delivery Points on EKPC's own system to add several hundred additional megawatts of Network Load under the LG&E/KU NITSA, which would force EKPC to pay for service to load that is not connected to the LG&E/KU system. EKPC asserts that this additional Network service charge is duplicative of what EKPC already pays LG&E/KU annually, increasing that amount from \$7 million to \$17 million. EKPC represents that the February 26 Order has caused EKPC to explore constructing a new transmission line to connect the Bluegrass station directly

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<sup>64</sup> See *Pro Forma* OATT, § 1.17.

to EKPC's system.<sup>65</sup> EKPC asserts that its proposed amended NITSA "would not restrict LG&E/KU's transfer capacity, affect timely exchange of information with LG&E/KU, or produce any material difference in variability of dispatched generation."<sup>66</sup> We disagree.

35. Again, the terms of LG&E/KU's Tariff, the Commission's *pro forma* OATT, and Commission precedent provide EKPC a distinct choice of taking Network or Point-to-Point service to serve EKPC's Network Load on LG&E/KU's system and do not allow EKPC to split that Network Load.<sup>67</sup> While selecting either of these choices might cost EKPC more than its proposed amended NITSA would, that does not mean such costs are duplicative or unjustified as applied to EKPC. Arranging Point-to-Point service for the Bluegrass station or designating EKPC's entire load to be served by the Bluegrass station at a discrete Delivery Point ensures that EKPC pays for the services it receives and its Network Load is correctly incorporated into EKPC's Load Ratio on LG&E/KU's system. Moreover, LG&E/KU need not create separate services to accommodate EKPC's unusual circumstances.<sup>68</sup>

**F. Whether LG&E/KU's Position Results in Undue Discrimination in Favor of LG&E/KU's Affiliated Load-Serving Entity**

36. EKPC contends that rejecting its proposed amended NITSA would allow LG&E/KU to discriminate unduly against EKPC's Network Load in favor of LG&E/KU's affiliated load-serving entity. According to EKPC, LG&E/KU and TVA have entered into an agreement that "is expressly aimed at lowering the generation reserve margin needed to ensure continuity of service to native load customers during unplanned outages of either party's generating facilities."<sup>69</sup> EKPC states that both parties are setting aside such ATC without compensation despite needing that capacity less frequently than the Bluegrass station would need capacity on LG&E/KU's system and that EKPC's proposed amended NITSA would not disrupt operation of LG&E/KU's

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<sup>65</sup> *Id.* at 44-46.

<sup>66</sup> *Id.* at 46.

<sup>67</sup> *See supra* PP 14-17, 21-23, 27, 29; *see also* February 26 Order, 154 FERC ¶ 61,114 at PP 55-64.

<sup>68</sup> February 26 Order, 154 FERC ¶ 61,144 at P 64 (citing *Fla. Power & Light Co.*, 116 FERC ¶ 61,012, at P 14 (2006); *Fla. Power & Light Co.*, 113 FERC ¶ 61,290, at P 6 (2005)).

<sup>69</sup> Rehearing Request at 48.

system any more than that arrangement.<sup>70</sup>

37. The proposed NITSA amendment requiring LG&E/KU to keep ATC available for Network transmission service for EKPC's Bluegrass station's intermittent output is not comparable to an agreement relating to contingency reserves needed to meet North American Electric Reliability Corporation (NERC) reliability standards.<sup>71</sup> Because we find that these uses of transmission are not comparable, their different treatment by LG&E/KU is not unduly discriminatory.<sup>72</sup>

**G. Whether the Commission Should Have Granted EKPC's Waiver Request and/or Set this Matter for Hearing**

38. EKPC argues that, in denying EKPC's request for waiver of LG&E/KU's Tariff, the Commission lacked substantial record evidence to conclude that EKPC's proposed amended NITSA would harm third-party customers and erred in relying only on that

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<sup>70</sup> *Id.*

<sup>71</sup> *See* EKPC December 9, 2015 Answer, attach. 7, LG&E/KU Transmission Reliability Margin Implementation Document (TRMID) (effective Nov. 10, 2015) (noting that Transmission Reliability Margins are "reserved to preserve transmission capacity on each identified Flowgate in the operating and planning horizons to model uncertainty in system conditions and for delivery of energy as required under generator Contingency Reserve Sharing Agreements"). LG&E/KU's agreement with TVA defines a Contingency Reserve Sharing Agreement as:

Sharing between two or more Balancing Authorities that collectively maintain, allocate, and supply operating reserves required for each Balancing Authority's use in recovering from contingencies by the provision of capacity deployed by the Balancing Authority to meet the Disturbance Control Standard (DCS) and other NERC and Regional Reliability Organization contingency requirements.

*Id.* *See also* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 273 (defining uses of Transmission Reliability Margins).

<sup>72</sup> *Am. Elec. Power Serv. Corp.*, 67 FERC ¶ 61,168 at 61,490, *clarified*, 67 FERC ¶ 61,317 (1994) ("an open-access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system.").

waiver criterion. EKPC states that the Commission neither responded to EKPC's arguments nor cited evidence upon which the Commission relied. EKPC argues that given the affidavits presented by the parties, the Commission should have at least set this matter for hearing to determine whether waiver of the LG&E/KU Tariff would harm others and whether LG&E/KU was providing to itself preferential service.<sup>73</sup> EKPC argues that its waiver request is consistent with Commission policy to promote open access through Order No. 888 and the *pro forma* OATT by adding the Bluegrass station's capacity to the PJM market through reliable and lowest cost service to EKPC's member cooperatives. In contrast, EKPC describes the Commission in the February 26 Order as rewarding LG&E/KU for providing no additional service and for operating outside an RTO.<sup>74</sup> We disagree.

39. As described above,<sup>75</sup> EKPC's requested waiver, complaint, and proposed amended NITSA are inconsistent with the plain meaning of LG&E/KU's Tariff and Commission policy and precedent. There are thus no material disputes of fact that would require setting this matter for hearing. Accordingly, the Commission was well within its discretion to decide this matter on the submissions already filed.<sup>76</sup>

40. In doing so, the Commission gave "meaningful consideration"<sup>77</sup> to EKPC's waiver request: by explaining how EKPC's proposed amended NITSA would require LG&E/KU to reserve ATC for EKPC in an inefficient way and in finding that EKPC's proposed amended NITSA would be inconsistent with LG&E/KU's Tariff, Order Nos. 888 and 888-A, and the *pro forma* OATT. The Commission adequately described the harm to other transmission customers in denying EKPC's requested waiver.<sup>78</sup> The

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<sup>73</sup> Rehearing Request at 50-53.

<sup>74</sup> *Id.* at 53-56.

<sup>75</sup> *See supra* PP 14-17, 21-23, 27, 29, 35.

<sup>76</sup> *See, e.g., Woolen Mill Assocs. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990) (citing *Pa. Pub. Util. Comm'n v. FERC*, 881 F.2d 1123, 1124, 1126 (D.C. Cir. 1989); *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 128-29 (D.C. Cir. 1982)); *State of Cal. ex rel. Lockyer v. FERC*, 329 F.3d 700, 713 (9th Cir. 2003) (citing *Friends of the Cowlitz v. FERC*, 253 F.3d 1161, 1173 (9th Cir. 2001); *Pac. Gas & Elec. Co.*, 746 F.2d 1383, 1387 (9th Cir. 1984); *Sierra Ass'n for the Environment v. FERC*, 744 F.2d 661, 663 (9th Cir. 1984)).

<sup>77</sup> *United Gas Pipe Line Co. v. FERC*, 707 F.2d 1507, 1511 (D.C. Cir. 1983).

<sup>78</sup> February 26 Order, 154 FERC ¶ 61,144 at P 57.

Commission did not need to repeat in detail those findings in denying waiver. Because the Commission found that one element dispositive, the Commission did not need to address the other aspects of EKPC's waiver request.

The Commission orders:

EKPC's request for rehearing of the February 26 Order is hereby denied, as described in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.