

D.C. Circuit Vacates FERC's Orders that had Increased Transmission Costs to Kentucky Municipals

August 5, 2022 | *Thomas C. Trauger, David E. Pomper*

On August 5, 2022, the U.S. Court of Appeals for the D.C. Circuit vacated Federal Energy Regulatory Commission (FERC) orders “re-pancaking” electric transmission rates across the seam between the Midcontinent Independent System Operator (MISO) transmission grid and that of Louisville Gas and Electric Company and Kentucky Utilities Company (together, LG&E/KU). *Ky. Mun. Energy Agency v. FERC*, Nos. 19-1236 *et al.*, 2022 U.S. App. LEXIS 21732 (D.C. Cir. Aug. 5, 2022). Rate “pancaking” is the generally disfavored practice of charging customers multiple, “pancaked” transmission charges for electricity deliveries crossing multiple transmission systems, which increases costs to consumers by millions of dollars.

The seam has been depancaked since the late nineties, when Louisville Gas and Electric merged with Kentucky Utilities. FERC imposed the condition as part of its merger review process in response to concerns about excessive market concentration. In that proceeding, Spiegel attorney Tom Trauger represented a coalition of KU-customer municipal utilities concerned about preserving competitive power supply opportunities. In the depancaked ecosystem, the KU municipal customers and certain other transmission-dependent municipal utilities (collectively, Kentucky Municipals) moved to arrange for new power supplies that depended on non-pancaked access over LG&E/KU's grid to the MISO market. And in 2014 nine of KU's eleven municipal customers gave five years' notice to terminate their power purchase contracts.

In 2018, on the eve of those contract terminations, LG&E/KU filed at FERC to eliminate depancaking. The Kentucky Municipals, represented by Spiegel attorneys Tom Trauger, David Pomper, Latif Nurani, and Gwen Hicks, litigated the matter through several rounds of rehearings. FERC finally concluded that the relevant market had diversified since 2005 and would remain sufficiently competitive even without depancaking, but required continued depancaking for certain of the Kentucky Municipals' existing, binding power supply contracts through the ends of their initial terms (a Transition Mechanism), in recognition of the Kentucky Municipals' reliance interests. The parties reached a settlement regarding the terms of the Transition Mechanism in early 2022, while still disagreeing over the fundamental question of whether FERC should permit LG&E/KU to re-pancake the seam.

In 2021 the Kentucky Municipals and LG&E/KU separately challenged FERC's orders in the D.C. Circuit. In the August 5 opinion, the court agreed with the Kentucky Municipals' position that it was arbitrary for FERC to have refused to consider the rate impacts of re-pancaking. (FERC had considered only the impact on competition.) The court vacated FERC's orders, because ignoring the rate impacts to consumers of re-pancaking—a public-interest factor central to the Federal

Power Act's purpose—was a major shortcoming that went to the heart of the agency's decision. The court also largely sided with the Kentucky Municipals on questions of the Transition Mechanism's appropriate scope, including by rejecting LG&E/KU's arguments that some of the Kentucky Municipals (Kentucky Municipal Power Agency and its members) should be excluded. A copy of the opinion can be found at the link below.

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