

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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COMMISSION

In the Matter of:

Investigation into the Membership of
Louisville Gas and Electric Company
and Kentucky Utilities Company in the
Midwest Independent Transmission
System Operator, Inc.

Case No. 2003-00266

**Motion to Strike and
to file Additional Testimony**

The Midwest Independent System Operator, Inc. ("the Midwest ISO") hereby moves to strike all or part of the supplemental rebuttal testimonies of Mathew J. Morey, David S. Sinclair, Martyn Gallus, and Paul W. Thompson, filed on behalf of Louisville Gas and Electric Company and Kentucky Utilities ("LG&E/KU" or "the Companies") on January 10, 2005, because their allegations of error clearly contradict information previously verified by LG&E/KU pursuant to an agreement with the Midwest ISO as to discovery matters. The Midwest ISO also hereby moves for an opportunity to file additional testimony in this matter in the nature of surrebuttal or of a supplement to its existing testimony.

A. Motion to Strike.

In its Supplemental Rebuttal Testimony, LG&E/KU is for the first time alleging errors with respect to model inputs that, pursuant to a discovery agreement, had previously been reviewed and verified as reasonable by the Companies. The Midwest ISO reasonably relied on LG&E/KU's representation and prior review of its modeling inputs to its detriment, and the Companies are estopped from now alleging errors in model inputs that they verified more than thirteen months ago.

One difference between the Midwest ISO and LG&E/KU benefit cost studies is that Midwest ISO has included in LG&E/KU's generation the Coleman, Green, Reid,

Wilson, and Henderson II generating units, all of which are operated by Western Kentucky Energy (“WKE”), a corporate affiliate of LG&E/KU. WKE leases the Coleman, Green, Reid, and Wilson units and presumably benefits from power sales made by those units. The units in question are operated by an affiliated company, located on or near LG&E/KU transmission lines, and could be jointly dispatched and, if necessary, dynamically scheduled with other LG&E/KU units.¹ A second difference is that the Midwest ISO has included Green River Units 1 and 2 as LG&E/KU generation. LG&E/KU now allege that these units have been retired. These differences form the core of the LG&E/KU’s Supplemental Rebuttal Testimony — differences said to lead to “gross and fatal error” in the Midwest ISO analysis. Supplemental Rebuttal Testimony of Paul W. Thompson at p. 3.

In his Supplemental Rebuttal Testimony, at p.18, Mathew J. Morey suggests the Midwest ISO ought to have inquired of LG&E/KU “as to whether the assumptions for MISO’s analysis were accurate.” The Midwest ISO did check with LG&E/KU about these assumptions. It used these units in its study because they were included in the modeling inputs that the Companies verified during the initial discovery portion of this proceeding.

On October 30, 2003, the Midwest ISO submitted Supplemental Data Requests to LG&E/KU. Several of these requests asked for input data for the Midwest ISO’s modeling runs. For example, supplemental request number 22 asks for specific data on LG&E/KU generating units for “each generating unit (or station if not available on a

¹ These units could be included in the Midwest ISO’s energy markets if they were in the LG&E/KU control area or if they were dynamically scheduled based on affiliate ownership such that they were effectively treated as part of the LG&E/KU control area. Under either of these circumstances, there could be economic benefits for Kentucky. The division of such benefits is an issue of local regulation and contract.

unit level)” and supplemental request number 24 asks LG&E/ KU to “identify LG&E/ KU’s forecast ... of its system load – resource balance.” If the Companies had simply responded to these requests in the normal course, they would have provided a list of LG&E/ KU units.² By such requests, the Midwest ISO simply sought to determine what resources should be included in the LG&E/ KU control area.

LG&E/ KU objected to these requests on the grounds that providing these necessary modeling inputs was too burdensome. To address LG&E/ KU’s objections, as well as other concerns, the Commission scheduled an informal conference on November 6, 2003. At that conference, the Midwest ISO and LG&E/ KU reached an agreement with respect to Midwest ISO supplemental requests 20, 22, and 24. Under that agreement, the Midwest ISO would supply LG&E/ KU with its modeling inputs; and, LG&E/ KU — in lieu of providing detailed responses to the data requests — would review the model inputs, verify their reasonableness, comment on any inputs that should be modified. This agreement is reflected in the memorandum of the pre-hearing conference filed by Commission Staff on November 17, 2003, which states:

After an extended break in the conference, LG&E/ KU and MISO reached an agreement, which was to be reduced to writing, which will provide for MISO to withdraw a number of its supplemental data requests, LG&E/ KU to respond a number of the objected-to data requests, and LG&E/ KU to subsequently provide verification to MISO regarding certain numbers that it intends to utilize in its testimony.

A copy of this memorandum is attached hereto as Exhibit A. The requests in question fell into the category of the data for which LG&E/ KU was to provide verification.

This agreement was the basis for a November 7, 2003 email from counsel for the Midwest ISO to counsel for the Companies, which states:

² If LG&E/ KU had supplied a list of units that did not include units operated by its WKE affiliate, this certainly would have elicited additional inquiries to clarify the relationships between LG&E/ KU and WKE related to the control and dispatch of these facilities.

In reliance on the oral agreement reached yesterday, Nov. 6 (which reliance is necessitated in the absence of the letter you all are to provide memorializing that agreement), attached are two Excel spreadsheet workbooks containing the bulk of the proxy data, the values for which were the object of Midwest ISO's Supplemental Requests 20, 22, and 24. There are a few such data which have not yet been received from the modelers; these will be sent to you by separate e-mail when they are available. Please note that the values shown for non-LG&E/KU-owned units are taken from published sources.

Pursuant to our agreement, please have the spreadsheets reviewed for the reasonableness of the values and respond to me by 5 p.m., Monday, November 10, 2003.

A copy of this email is attached hereto as Exhibit B. One of the files sent via this email message provided detailed data on each unit that the Midwest ISO intended to model as part of the LG&E/KU control area. The first worksheet of that file, entitled "Unit Characteristics LGE/KU Control Area," provides a list of units that are identified as LGE/KU control area units and includes the Coleman, Green, Reid, Wilson, and Henderson II units — which the Companies now allege should not have been modeled as part of their control area.³ Additionally, the worksheet included Green River Units 1 and 2. The worksheet explicitly includes values for the retirement dates for Green River Units 1 and 2. The date listed for these units is January 1, 2099, which is identified in the spreadsheet as the default value for units with no planned retirement date.

The agreement was later acknowledged in a November 10, 2004 letter written by LG&E/KU counsel after he had received the information that LG&E/KU agreed to verify. A copy of this letter is attached hereto as Exhibit C. The letter confirmed that Midwest ISO Supplemental Data Requests 20, 22, and 24 were to be addressed "informally" between LG&E/KU and the Midwest ISO.

³ The list also included diesel units owned by the City of Paris, a full requirements customer of Kentucky Utilities and three combustion turbines owned by Dynergy. These units are in the LG&E/KU control area and are forecast to supply an insignificant amount of total energy, less than 5,000 MWh per year.

On November 12, 2003, LG&E/KU sent the Midwest ISO comments on the data that had been attached to the November 7, 2003 email. The LG&E/KU comment about Data Requests 22(a) was only that the Pineville 3 unit had been retired in 2002;⁴ no comment suggested that the Coleman, Green, Reid, Wilson, and Henderson II units were not LG&E/KU control area units, as indicated on the Midwest ISO spreadsheets, and the Companies did not indicate any actual or projected retirement dates for Green River Units 1 and 2. A copy of this November 12, 2003 email is attached hereto as Exhibit D.

If LG&E/KU knew when it verified the unit data submitted by the Midwest ISO that such data was incorrect, or subsequently discovered that the information it verified was, in fact, incorrect, it had a duty to seasonably supplement its response to the Midwest ISO's data requests. This duty is well-recognized in both Kentucky and federal courts, *see* KY. R. CIV. P. 26.05(b) and FED. R. CIV. P. 26(e)(2). In addition, this duty is set out plainly in the instructions to the Midwest ISO's supplemental data requests. *See* Instruction "b" of the 10/30/03 Supplemental Data Requests. At no time did the Companies seek to correct the list of units that the Midwest ISO had supplied or provide supplemental discovery responses modifying the list of units in the LG&E/KU control area or indicating that its resources should include contracts with EEI and OVEC. Thus, LG&E/KU violated its obligations to provide complete and accurate discovery and to supplement that discovery if it subsequently discovered that material information was incorrect. For this reason, the Commission should strike the LG&E/KU supplemental rebuttal testimony that criticizes the Midwest ISO's testimony

⁴ The retirement date for the Pineville 3 unit was provided in a spreadsheet attached to the email titled "Comments on MISO data.xls."

and benefit-cost analysis for its use of the information LG&E/KU verified for the Midwest ISO.

The Midwest ISO agreed to this substitute discovery process in good faith for the specific purpose of confirming modeling inputs and accommodating LG&E/KU. The compromise was intended to narrow issues and, consistent with basic professional courtesy, avoid precisely the type of dispute now before the Commission. The process has been subverted and abused by LG&E/KU's knowing failure to disclose in a timely manner what it now criticizes as errors in the inputs that it undertook to verify. "Bait and switch" tactics that effectively deny one party the opportunity to present its case on a common set of facts — whether intentional or the result of the other party's oversight — undermine due process and the role of pre-hearing conferences in Commission proceedings. If LG&E/KU is permitted to introduce this supplemental rebuttal testimony in question, and the Midwest ISO cannot supplement its findings, it will distort the record of this proceeding and allow LG&E/KU to reap an unfair advantage of having denied full and accurate discovery to the Midwest ISO while verifying what it knew to be incorrect information for the Midwest ISO to use in its studies. In addition, leaving LG&E/KU with the last word on this matter would prevent the Commission from reaching an informed decision and deny the Midwest ISO a fair opportunity to present relevant facts.

LG&E/KU is also equitably estopped from now disputing the information it verified under its agreement with the Midwest ISO. LG&E/KU either knew or should have known at the time it responded to Midwest ISO's request for verification that the information was incorrect and that the Midwest ISO would rely on it in preparing its benefit-cost studies. The Midwest ISO prepared its first and second benefit-cost studies in reliance on this verification by LG&E/KU, at a cost to the Midwest ISO. LG&E/KU

cannot be permitted, over one year after the Midwest ISO submitted its first set of supplemental data requests, to dispute the accuracy of the information that it undertook to verify. See *Weiland v. Bd. of Trustees of Ky. Retirement Systems*, 25 S.W.3d 88, 91 (Ky. 2000) (discussing the elements to establish equitable estoppel). For these reasons, LG&E/KU should be foreclosed from attacking the veracity of those portions of the Midwest ISO's benefit-costs analyses that relied on the data that it verified by agreement of the parties and upon which the Midwest ISO relied.

WHEREFORE, for the reasons set out above, the Midwest ISO requests that the entire Supplemental Rebuttal Testimony of Mr. Morey, Mr. Sinclair, Mr. Gallus, and Mr. Thompson be struck. In the alternative, the Midwest ISO requests that the Commission strike at least the following portions of LG&E/KU Supplemental Rebuttal Testimony and any related exhibits or workpapers:

- Morey at p.3 lines 3 – 15; p.4 line 1 through the bottom of p. 11; p. 13 lines 1 – 16; p. 14 line 13 through p. 24, line 3; p. 26 line 20 through p. 27, line 5; p. 29, line 11 through p. 30, line 15; and p. 33, line 1 through p. 34 line 16;
- Sinclair at p. 11 line 20 through p. 16 line 14;
- Gallus at p. 9, line 13 through p. 10, line 9;
- Thompson at p.3, line 1 through p. 4, line 20.

B. Motion to File Additional Testimony.

The Midwest ISO further seeks a reasonable opportunity in which to submit additional testimony so as to show a direct comparison to LG&E/KU's study based on the same generating resources that LG&E/KU included as its own resources. This additional testimony and supporting analysis would be in the nature of surrebuttal or of a supplement to existing testimony, in order to provide the best available information to the Commission on the benefits and costs of LG&E/KU's remaining in the Midwest

ISO or pursuing other options. If the Commission proceeds on the basis of the record currently before it, it will be left comparing study results that, to an unnecessary degree, are not comparable.

Given that LG&E/KU will remain members of the Midwest ISO until at least 2006, there is no need for the Commission to act hastily and reach a decision on the current, flawed record. Although LG&E/KU has pressed to both have the last word and to complete the hearing before March 1, 2005, it is responsible for what it now claims is a "gross and fatal error." It had an ongoing obligation to correct its apparently-erroneous verification of the modeling inputs to be used by the Midwest ISO. To this day, it has not done so. There is thus no equitable basis on which LG&E/KU can object to the Midwest ISO having a reasonable opportunity to provide the Commission with a record that is as complete and accurate as possible.

The Midwest ISO will prepare and file such additional testimony as soon as possible, and proposes that the study to be undertaken include the complete results of the FTR allocation process (to be filed with FERC at the end of this month). It may also be prudent at this point to have the additional testimony address the actual experience and operation of the Energy Markets (to start March 1, 2005). The Midwest ISO is willing both to respond to written data requests addressed thereto and for LG&E/KU to have the opportunity to submit written testimony responding to that additional testimony. Although these steps will require significant changes to the existing procedural schedule, they are fundamental both to due process and to providing the Commission with actual data (e.g., FTR allocations) and uncontested inputs (e.g., generating resources) on which it may base its decision.

WHEREFORE, because the Commission has an interest in accepting all information presented by the parties that may aid it in determining the public interest

in proceedings before it, the Midwest ISO respectfully requests that the Commission allow it to file and serve additional testimony including an analysis with corrected and updated inputs.

Respectfully submitted,

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By: 

ATTORNEYS FOR MIDWEST INDEPENDENT
TRANSMISSION SYSTEM OPERATOR, INC.

CERTIFICATE OF FILING AND SERVICE

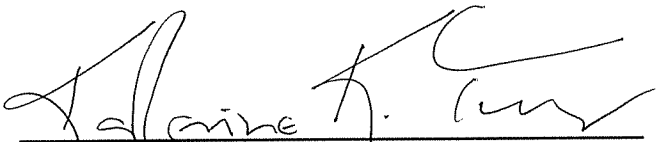
I hereby certify that on this the 19th day of January, 2005, the original and ten (10) copies of the foregoing, were hand-delivered to the Commission for filing. A copy of the foregoing has also been sent by first-class U.S. mail to:

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Transmission System Operator, Inc.



Paul E. Patton, Governor

**Janie A. Miller, Secretary
Public Protection and
Regulation Cabinet**

**Thomas M. Dorman
Executive Director
Public Service Commission**

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**Martin J. Huelsmann
Chairman**

**Gary W. Gillis
Vice Chairman**

**Robert E. Spurlin
Commissioner**

November 17, 2003

PARTIES OF RECORD

**Re: Case No. 2003-00266
Louisville Gas and Electric Company
Kentucky Utilities Company**

Attached is a copy of the memorandum which is being filed in the record of the above referenced case. If you have any comments you would like to make regarding the contents of the informal conference memorandum, please do so within five days of receipt of this letter. If you have any questions, please contact Richard Raff at 502/564-3940, Extension 260.

Sincerely,

(for) Thomas M. Dorman
Executive Director

Attachment



AN EQUAL OPPORTUNITY EMPLOYER M/F/D

Exhibit A

INTRA-AGENCY MEMORANDUM

KENTUCKY PUBLIC SERVICE COMMISSION

TO: Case File No. 2003-00266
LG&E/KU MISO Membership

FROM: Richard Raff, Staff Attorney 

DATE: November 17, 2003

SUBJECT: Informal Conference

Pursuant to Commission Staff's notice, an informal conference was held on November 6, 2003 at the Commission's offices. A list of the attendees is attached hereto.

The purpose of the conference was to discuss the pending motion filed by MISO requesting to revise the existing procedural schedule to provide additional time for MISO to file its prepared direct testimony, and the objection thereto filed by LG&E/KU. MISO stated at the conference that it originally anticipated its role to be complementary to LG&E/KU, but it decided that it was necessary for it to prepare and file its own cost-benefit analysis of MISO membership due to what it perceived to be as shortcomings in the analysis filed by LG&E/KU. MISO further stated that it now had the ability to perform economic modeling and intended to do so as part of its Kentucky-specific cost-benefit analysis to be prepared for this case. Due to the number of scenarios that needed to be modeled, MISO asserted that the current due date of November 25, 2003 for intervenor testimony needed to be extended until January 16, 2004.

LG&E/KU stated a number of concerns regarding MISO's requested extension of time, but specifically focused on its belief that delaying this pending case resulted in significant uncertainty to LG&E/KU regarding its planning functions. Staff indicated that the issue would be referred to the Commission for a decision as quickly as possible.

In addition, some discussion was held on the objections filed by LG&E/KU to MISO's supplemental data request. After a brief discussion, the affected parties believe that they could resolve the objections among themselves. After an extended break in the conference, LG&E/KU and MISO reached an agreement, which was subsequently to be reduced to writing, which will provide for MISO to withdraw a number of its supplemental data requests, LG&E/KU to respond a number of the objected-to data requests, and LG&E/KU to subsequently provide verification to MISO regarding certain numbers that it intends to utilize in its testimony.

cc: Parties of record

From: Katie Yunker <yunker@desuetude.com>
Subject: proxy data
Date: November 7, 2003 4:57:37 PM EST
To: kriggs@ogdenlaw.com, linda.portasik@lgeenergy.com
Cc: MAllen@midwestiso.org, BAllen@desuetude.com

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In reliance on the oral agreement reached yesterday, Nov. 6 (which reliance is necessitated in the absence of the letter you all are to provide memorializing that agreement), attached are two Excel spreadsheet workbooks containing the bulk of the proxy data; the values for which were the object of Midwest ISO's Supplemental Requests 20, 22, and 24. There are a few such data which have not yet been received >from the modelers; these will be sent to you by separate e-mail when they are available. Please note that the values shown for non-LG&E/KU-owned units are taken from published sources.

Pursuant to our agreement, please have the spreadsheets reviewed for the reasonableness of the values and respond to me by 5 p.m., Monday, November 10, 2003.

This message has the following attachments: file://localhost/Users/Ben/Library/Mail/Attachments/02-327dk.pdf
file://localhost/Users/Ben/Library/Mail/Attachments/Load-Res.xls



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DIRECT FAX (502) 627-8722

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November 10, 2003

Thomas M. Dorman
Executive Director
Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602

RE: *In the Matter of: Investigation Into the Membership of Louisville Gas and Electric Company and Kentucky Utilities Company in the Midwest Independent Transmission System Operator, Inc.*
KPSC Case No. 2003-00266

Dear Mr. Dorman:

I am writing to advise that Louisville Gas and Electric Company ("LG&E"), Kentucky Utilities Company ("KU") (collectively, the "Companies") and the Midwest Independent Transmission System Operator, Inc. ("MISO") resolved their discovery dispute by agreement at the informal conference at the Commission's office on November 6, 2003.

The Motion of Louisville Gas and Electric Company and Kentucky Utilities Company to Strike Supplemental Data Requests of the Midwest Independent Transmission System Operator, Inc. filed on November 5, 2003 is withdrawn.

Of those questions posed by MISO in its Supplemental Data Requests to which LG&E and KU objected in their Motion to Strike, the Companies will provide responses to Data Request Nos. 11, 12a, 12c, 12d, 13, 14, 15, 23, 25, 26, 27, 28 and 29. MISO has agreed to withdraw its Supplemental Data Request Nos. 8, 9, 10, and 21. Finally, the Companies and MISO have agreed to address informally the information requested in MISO Data Request Nos. 20, 22 and 24.

LG&E and KU do not require an extension of time in which to provide the responses, or any amendment to the current procedural schedule.

Exhibit C

Thomas M. Dorman
November 10, 2003
Page 2

Should you have any questions or need any additional information, please contact me at your convenience.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kendrick R. Riggs". The signature is fluid and cursive, with a long horizontal stroke at the end.

Kendrick R. Riggs

KRR/ec

cc: Michael E. Allen
Katherine K. Yunker
Elizabeth E. Blackford
Michael L. Kurtz
Linda S. Portasik

290519.02

From: "Kendrick R. Riggs" <kriggs@ogdenlaw.com>
Subject: **Re: Comments on proxy data: S MISO Data Request Nos. 20, 22 and 24**
Date: November 12, 2003 2:11:36 PM EST
To: <yunker@desuetude.com>, <linda.portasik@lgeenergy.com>
Cc: <BAllen@desuetude.com>, <Conroy.Robert@lgeenergy.com>, <Jason.Knoy@lgeenergy.com>, <Mike.Dotson@lgeenergy.com>, <MAllen@midwestiso.org>

Katie

Supplemental MISO Data Request Number 20.

20(a) (b) and (c) The information you provided in your email for fuel prices does not appear to be accurate with the respect to the historical information.

Under separate cover, I have sent you copies of the monthly FERC 423s for Louisville Gas and Electric Company and Kentucky Utilities Company for the twelve month period October 2002 September 2003. Information responsive to 20(a), (b) and (c) can be found in the monthly filings. Attached to this email is a worksheet for the natural gas purchased for the combustion turbines.

S MISO 20 did not request information on projected fuel prices. Therefore, we have no comment on the projected fuel forecast.

S MISO 20 (d)

LG&E and KU do not use residual oil to generate power.

Supplemental MISO Data Request Number 22.

22(a) The information on future units is correct; current units are operational; the retirement dates are incorrect. The correct retirement date for the one unit that is retired is provided.

22(b) The data looks reasonable.

22(c) LG&E and KU need to know how the variable O&M costs were calculated before they can comment on whether the data is reasonable.

22(d) The information does not appear reasonable. Attached to this email is proxy information. The maximum heat rate provided in blocks in the second email makes us assume

Exhibit D

that the data had the same errors of magnitude.

22(e) The information does not appear reasonable.

22(f) This information is not reasonable. We need additional information on what is included in the data in order to comment.

22(g) This information was provided yesterday afternoon. Please see the attachment to this email which shows the ramp rates which are not reasonable and proxy ramp rates that are reasonable.

22(h) The information does not appear reasonable.

22(i) The information is generally reasonable.

22(j) The information has errors with respect to the combustion turbines, especially the winter rating.

Supplemental MISO Data Request Number 24.

24(a) Is within reason.

24(b) System coincident peak is within reason. The system energy is still under review.

24(c) No information was provided. Therefore, we have no comment.

24(d) No information was provided. Therefore, we have no comment.

24(e) No information was provided. Therefore, we have no comment.

24(f) The information is wrong. The margin is too high.

Should you have any questions or wish to discuss this information further, please contact me at your convenience.

Yours very truly,
Kendrick R. Riggs
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In reliance on the oral agreement reached yesterday, Nov. 6 (which reliance is necessitated in the absence of the letter you all are to provide memorializing that agreement), attached are two Excel spreadsheet workbooks containing the bulk of the proxy data, the values for which were the object of Midwest ISO's Supplemental Requests 20, 22, and 24. There are a few such data which have not yet been received from the modelers; these will be sent to you by separate e-mail when they are available. Please note that the values shown for non-LG&E/KU-owned units are taken from published sources.

Pursuant to our agreement, please have the spreadsheets reviewed for the reasonableness of the values and respond to me by 5 p.m., Monday, November 10, 2003.