

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

Duke Energy Kentucky, Inc.'s Application
for Approval to Transfer Functional Control
of Certain Transmission Assets from the
Midwest Independent Transmission System
Operator to the PJM Interconnection
Regional Transmission Organization and
Request for Expedited Treatment

Case No. 2010-00203

**The Midwest ISO's Motion to Compel
Responsive Information from Duke Energy Kentucky, Inc.**

Midwest Independent Transmission System Operator, Inc. ("the Midwest ISO"), hereby requests an order from the Commission compelling responses to data requests from Duke Energy Kentucky, Inc. ("DEK"). In support of this motion, the Midwest ISO states as follows:

1. As the applicant for a Commission order approving a change in the *status quo*, DEK bears the burden of persuasion and of going forward with the evidence. Furthermore, DEK has requested expedited treatment of its application, and so should be prompt and forthcoming with any and all supporting information.

2. In July 2010, the Commission staff and the Midwest ISO propounded initial data requests on DEK. The DEK answers thereto were not fully responsive, and the August 2010 supplemental data requests by the Commission staff and the Midwest ISO were in part devoted to attempting to obtain information sought in the initial requests. Although DEK provided some information in response to each set of data requests, there was still much left unanswered.

3. After receipt of the DEK responses (filed August 25, 2010), the Midwest ISO began working informally with DEK to obtain fuller responses to its initial and supplemental

data requests. Those efforts yielded a Confidentiality Agreement between the parties and some, limited supplementation by DEK of its responses; however, the Midwest ISO discovery issues were not adequately addressed by DEK by these informal, voluntary means.

4. The Midwest ISO now requests that complete responses be compelled to its supplemental data requests (2 MISO).¹

Mis-Matched Responses

5. DEK garbled the Midwest ISO's supplemental requests, scrambling their context and cross-references, and then responded to its own version of the requests.

a. To assist DEK in the word-processing tasks of preparing responses, the Midwest ISO sent a text file of the requests to DEK for both its initial and supplemental requests — in addition to the paper copy served on the parties and filed with the Commission.

b. The outline format of the supplemental requests was lost in DEK's "translation" of the text for its response. Request sub-parts became independent questions, and independent questions were mixed together into one part; a comparison with what the Midwest ISO filed and served shows that the requests were significantly altered on 2 MISO 2-5 and 12.

c. The Midwest ISO called the problem to DEK's attention and asked that it revise its 8/19/10 response to address the data requests as served and filed. DEK responded with a revision to 2 MISO 5 served and filed on September 15, 2010; it added text to what it labels as 5.C.2 — but the new text appears to be a response to 2 MISO(5)(c)(iii).

6. DEK's responses to 2 MISO 2, 3, 4, and 12 remain incomplete and, where arguably complete, the responses are confusing or confused because they are not addressed to the questions asked. For example:

¹ In this Motion, initial requests to DEK (or responses thereto) are referred to as 1 PSC Staff # or 1 MISO #; supplemental requests, as 2 PSC Staff # or 2 MISO #.

a. In what it labels as MISO-DR-02-002(b), DEK responds with an assertion about the effect on customers rather than with the revenue requirement impact specifically requested by 2 MISO 2(b)(i).

b. In what it labels as MISO-DR-02-003(c) and (d), DEK gives a general descriptive response apparently covering the Rider PSM in general, rather than providing the information addressing the particulars of Off-System Sales and Capacity revenues as requested in 2 MISO 3(a)(iii) and (b), respectively.

c. In what it labels as MISO-DR-02-004(B)(4), DEK makes an assumption that the request calls for information about a 7/14/10 report; as the overarching text for 2 MISO 4 reinforces, the request in subpart (c) sought information about Duke Energy entities' voting or taking a position on the issues raised by the IMM's recommendations in that report.

d. In what it labels as MISO-DR-02-012(d) and (e), DEK conflates the related, but separate requests in 2 MISO 12(b)(ii) and (iii) — thereby responding to neither.

7. The Midwest ISO moves that, as to 2 MISO 2, 3, 4, and 12, DEK be compelled to (a) revise its responses so that their numbering matches the associated request² and (b) provide complete responses to each part of the request propounded by the Midwest ISO.

Analyses and Studies

8. DEK responds to numerous requests for analyses, studies, or other support for various assertions of costs or risks in remaining a Midwest ISO member and claims of increased revenues or estimated benefits to realigning with PJM with a statement that DEK has not performed such a study or analysis. *See, e.g.,* 1 PSC Staff 10; 1 MISO 2(b)&(c), 13, 14, 16(f)(iii); 2 PSC Staff 9; 2 MISO 7.

² It would be helpful if DEK would do this as to all of its supplemental responses to Midwest ISO requests that have subparts.

9. In a confidential response to 2 PSC Staff 9, DEK did provide the results of what it characterized (in the public version) as an analysis performed by DEK “of its generation portfolio to determine potential capacity payments in PJM.” The Commission granted the accompanying Petition for Confidential Treatment by Order dated September 10, 2010.³

a. After the Midwest ISO contacted DEK, the two parties entered into a Confidentiality Agreement that covers the confidential response to 2 PSC Staff 9. On September 20, 2010, the Midwest ISO received the confidential DEK response.

b. Upon the Midwest ISO’s pointing out to DEK that 2 MISO 7 requested not only the results of such analysis, but also the study itself and other supporting data and calculations, DEK supplemented its response to 2 MISO 7(c) with printed-out material for which it concurrently sought confidential treatment in a Petition filed September 28, 2010.

c. On a further request, DEK last week provided Midwest ISO counsel with the electronic file that is purportedly the source for the print-out provided as a supplemental response to 2 MISO 7(c).

d. DEK counsel has represented to the undersigned that, although the materials provided do not show the source or calculation of all the numbers appearing therein:

i. there are no other records, files, or documents relating to the analysis provided as a supplemental response to 2 MISO 7(c) and the results of which were reported in the confidential version of 2 PSC Staff 9; and

ii. this one analysis is the only analysis or study prepared by DEK relating to realignment.

³ The undersigned accepts DEK’s representation that the failure to serve this Petition on the Midwest ISO was inadvertent.

10. DEK apparently takes the position that an analysis, study, calculation, document, estimate, etc. need not be provided in response to a request unless it relates only to DEK and was prepared by DEK. This is most clearly illustrated by its response to 2 PSC Staff 9:

a. The Commission asks whether “the Duke companies [emphasis added] have performed or reviewed” any analyses about what “Duke Kentucky and Duke Ohio could earn....” DEK responds by limiting “the Duke companies” to itself and Duke Energy Ohio, and then that DEK “has not performed an analysis of Duke Energy Ohio’s ... potential capacity payments....” 2 PSC Staff 9(a).⁴ This still leaves unanswered (i) whether any other Duke company performed a combined (or separate) analysis and (ii) whether DEK or another Duke company has reviewed one or more of such analyses.

b. DEK suggests that there are analyses other than the one provided in response to 2 PSC Staff 9(a) and (eventually) 2 MISO 7(c) and that it has (or has had) possession of them, because it avers that “it cannot authorize the release of confidential and proprietary business information of another entity that operates in a competitive market in another state.” 2 PSC Staff 9(c).

c. See also DEK’s responses to the requests listed in paragraph 8 above.

11. It cannot be argued that any information relating to other Duke Energy entities or that they gathered or prepared is beyond the relevant scope or jurisdiction of this proceeding. The Application, testimony, and responses all show that the decision to realign DEK and the claimed costs and benefits of maintaining or changing RTO membership cannot be isolated or compartmentalized in that way. For example:

⁴ *Contrast with* 2 PSC Staff 10, in which DEK responds to a question about “the Duke Companies” with information that “the Duke Companies” have not performed and “Duke has not performed any analyses.”

- a. The decision to realign DEK resulted from the decision to switch Duke Ohio's membership to PJM. *See* 1 MISO 21; 2 MISO 7(b).
- b. Alternatives to DEK's realignment if Duke Ohio switches membership are similar to those considered and proposed for Duke Indiana and Duke Ohio generation. *See* 2 MISO 10, 11.
- c. Functions and activities (*e.g.*, transmission, off-system sales) for which there are claimed benefits or costs avoided by realigning with PJM include those handled for DEK by its affiliates. *See* 2 MISO 5, 11.
- d. PJM membership is "shared" among Duke Energy entities and voting participation is held by one of the affiliated companies (as yet unspecified). *See* 2 MISO 4.
- e. The decision to realign DEK's RTO affiliation "was made by the Duke Energy executive management team." *See* 2 MISO 7(a).

12. Furthermore, even if DEK actually accepted on faith other Duke Energy companies' conclusions about the effects of realigning (or not) with PJM, neither the Commission nor other parties are required to be so credulous about claimed benefits and costs. In a recent order, the Commission ruled on a similar failure to provide data with which to test a party's conclusions:

[I]f Stand wishes to use its testimony regarding savings to support its position that competition will provide benefits to Kentucky consumers, the testimony must be subject to cross-examination. If the requested information is not provided, the Commission will, on its own motion, consider whether the testimony related to the requests should be stricken from the record.

10/6/10 Order, Adm. Case No. 2010-00146, pp. 2-3.

13. The Midwest ISO moves that DEK be compelled to provide all analyses, studies, memos, information, and other data requested relating to realignment (or not) and the effects of realignment (or its alternatives) that:

- were prepared by or on behalf of DEK; or
- affected the decision to realign DEK or was reviewed or considered in the course of making the decision; or
- relate (in whole or in part) to the decision regarding DEK or to the effects on DEK of realignment or its alternatives; or
- were considered or relied upon (by someone other than DEK’s counsel)⁵ in preparing DEK’s application, testimony, or data responses filed in this proceeding.

Other Incompleteness

14. There are also DEK responses (some overlapping with those discussed in ¶¶ 5 – 13 above) in which only part of the request is answered or DEK has redefined the request and then answered the improperly redefined request. For example, DEK was asked for “an estimate of the number of years that payments will be made for the RTEPP costs of projects currently underway,” 2 MISO 6(a) (emphasis added)⁶; DEK’s answer assumes “that the grid will always require upgrades and modifications” and omits any response as to projects currently underway.

15. This incompleteness or evasiveness is exhibited as to the following Midwest ISO supplemental requests:⁷

⁵ Material considered or reviewed solely by DEK counsel is thus not sought to be compelled. In addition, the Midwest ISO does not seek to compel core work product — *i.e.*, “the mental impressions, conclusions, opinions, or legal theories” of DEK counsel — even if that information prepared by DEK counsel was shared with or relied upon by non-attorneys within DEK.

⁶ This information initially was requested in 1 PSC Staff 4(e).

⁷ Material in brackets, *e.g.*, “[4B4],” show DEK’s designation for a response (if significantly different from the request designation).

1(c)(iii)	3(c)(i) [3e(i)]
2(a)	4(c) [4B4]
2(b)(i) [2b]	6(a)
2(b)(iii) [2d]	12(b)(ii), (iii) [12d,e]
2(d)(i) [2h]	

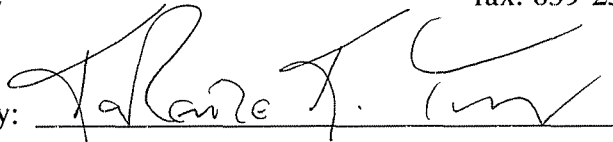
The Midwest ISO moves that DEK be compelled to provide complete responses these supplemental requests.

WHEREFORE, the Midwest ISO respectfully requests that the Commission enter an order compelling DEK to provide complete responses to data requests.

Respectfully submitted,

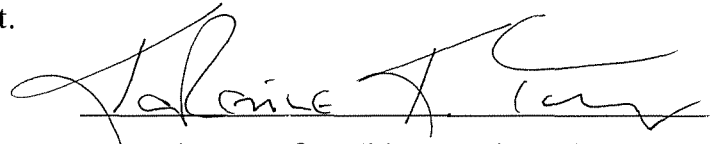
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CERTIFICATE of FILING and SERVICE

I hereby certify that on this the 12th day of October, 2010, the original and ten (10) copies of the foregoing were hand delivered (or sent via overnight carrier) to the Commission for filing, and a copy was served, via U.S. Mail, first-class, postage prepaid, on each person at the address shown on the attached Service List.


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