

**FAX**

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DATE: November 24, 2010  
TO: Docketing Division  
COMPANY: Kentucky Public Service Commission  
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NO. OF PAGES: 9 (including fax cover sheet)

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PUBLIC SERVICE  
COMMISSION**COMMENTS:**

- Case No. 2010-203
- In the Matter of the Duke Energy Kentucky, Inc.'s Application for Approval to Transfer Functional Control of its Transmission Assets from the Midwest Independent Transmission Assets from the Midwest Independent Transmission System Operator to the PJM Interconnection Regional Transmission Organization and Request for Expedited Treatment
- Filing of Duke Energy Kentucky's Memorandum Contra
- Ordinary Copy to Follow Via Overnight Mail

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**VIA HAND DELIVERY**

November 24, 2010

Mr. Jeff Derouen  
Executive Director  
Kentucky Public Service Commission  
211 Sower Blvd  
Frankfort, KY 40601

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PUBLIC SERVICE  
COMMISSION

**Re: Case No. 2010-00203**

Dear Mr. Derouen:

Enclosed please find an original and twelve copies of Duke Energy Kentucky Inc.'s Memorandum Contra of Midwest Independent Transmission System's Motion for Extension of Time to File its Post-Hearing Brief and Motion to Strike in the above captioned case.

Please date-stamp the two copies of the letter and Brief and return to me in the enclosed envelope.

Very truly yours,

Kristen Cocanougher

cc: Parties of Record (via electronic mail)

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PUBLIC SERVICE COMMISSION

**BEFORE THE  
KENTUCKY PUBLIC SERVICE COMMISSION**

In The Matter Of:

Duke Energy Kentucky, Inc.'s Application for Approval	)	Case No. 2010-203
To Transfer Functional Control of its Transmission Assets	)	
From the Midwest Independent Transmission System	)	
Operator to the PJM Interconnection Regional Transmission	)	
Organization And Request for Expedited Treatment	)	

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**DUKE ENERGY KENTUCKY, INC.'S MEMORANDUM CONTRA OF MIDWEST  
INDEPENDENT TRANSMISSION SYSTEM'S MOTION FOR EXTENSION OF TIME  
TO FILE ITS POST-HEARING BRIEF AND MOTION TO STRIKE**

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Now comes Duke Energy Kentucky, Inc. (Duke Energy Kentucky or Company), and hereby respectfully submits its Memorandum Contra of the Motion for Extension of Time to File (Motion of Extension) the Post-Hearing Brief (Brief) of the Midwest Independent Transmission System (Midwest ISO). The Midwest ISO neglected the filing deadline of its Brief, failed to seek prior approval to extend the filing deadline prior missing the deadline, and failed to provide the Kentucky Public Service Commission (Commission) with any explanation for its requested extension. For these reasons, Duke Energy Kentucky requests that Midwest ISO's Brief be excluded from the record.

Alternatively, should the Commission accept the Midwest ISO's untimely Brief, Duke Energy Kentucky submits that portions of said Brief must be stricken and disregarded by this Commission for purposes of deciding the merits of Duke Energy Kentucky's Application. Through its Brief, the Midwest ISO improperly seeks to inject issues into this matter that are not substantiated by the evidence of record in this proceeding.

**I. Midwest ISO Failed to Timely File its Post-Hearing Brief**

On November 3, 2010, the Commission ordered that post-hearing Briefs were to be filed no later than November 19, 2010. Significantly, counsel for all parties in this proceeding expressly consented to this filing deadline. Yet, despite its consent, the Midwest ISO filed its Brief after the Commission's business hours, attaching a Motion for Extension. But, in its Motion for Extension, the Midwest ISO failed to articulate any reason whatsoever for its inability to comply with the Commission's order. Rather, the Midwest ISO stated only that it could not complete the filing on time. Simply ignoring the agreed upon submittal date is not a reason to request an extension. More importantly, Midwest ISO did not first seek Commission approval to extend the deadline prior to its late submission. Duke Energy Kentucky and PJM Interconnection LLC (PJM) filed their Briefs on time and they were made publicly available on the Commission's website. Thus, the Midwest ISO had the opportunity to view the briefs of both Duke Energy Kentucky and PJM prior to filing its Brief. This unfair advantage, coupled with the lack of justification for an extension, supports striking the Midwest ISO's brief in its entirety.

**II. Motion to Strike New and Unsupported Allegations Contained in Midwest ISO's Brief**

If the Commission accepts the Midwest ISO's Brief as timely filed, Duke Energy Kentucky hereby moves this Commission to strike portions of the Brief that constitute unsupported allegations and attempts to offer direct evidence post evidentiary hearing, regarding an alleged shifting of capacity among Duke Energy utility affiliates, speculative implications to East Kentucky Power Cooperative (EKPC), unsupported assertions regarding the Joint Operating Agreement between the Midwest ISO and PJM and erroneous assertions regarding PJM's control over Duke Energy Kentucky's generation upon realignment. It is undeniable that through its Brief, the Midwest ISO is seeking to introduce new and unsupported arguments that it failed to

raise – as evidence – at the hearing of this matter and for which there is absolutely no support in the record.<sup>1</sup> The Brief filed by the Midwest ISO is self-serving in that it is a blatant attempt to recruit new members into its organization. The Midwest ISO had ample opportunity to present evidence on direct through a witness and with prefiled testimony under the procedural schedule set by this Commission. It did not. Moreover, the Midwest ISO had the opportunity to cross examine Duke Energy Kentucky on such issues. Again, it did not. The Commission should not permit the Midwest ISO to present any purported evidence at this late stage in the proceeding and after the hearing has been conducted and the Company effectively deprived of an opportunity to rebut such contentions.

The Midwest ISO's arguments regarding transferring transmission capacity among Duke Energy Corporation utility affiliates should be stricken. The basis for such claims is that Midwest ISO alleges it has identified such an option as part of supposed discussions with EKPC<sup>2</sup>. There is nothing in this record supporting such a claim. Further, there is no evidence in this proceeding to support that such a transfer is possible or practical. Not only is such a suggestion impractical as it actually involves transferring physical assets but, assuming *arguendo*, if such a transaction were possible, it would require regulatory approvals in multiple jurisdictions, increase costs for the party acquiring the assets, and likely create additional costs for that party's customers. For these reasons it should be stricken from the Brief.

Similarly, the Midwest ISO's allegations regarding EKPC becoming a member of the Midwest ISO should also be stricken. Although Midwest ISO's unsupported claims that EKPC was considering becoming a Midwest ISO member was brought up by Staff in a single discovery request, there is nothing in this record to support that EKPC is actually considering Midwest ISO

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<sup>1</sup> See e.g. *Midwest ISO Brief at B(1)(b)*.

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

membership.<sup>3</sup> Nor is there any evidence that Duke Energy Kentucky's withdrawal from the Midwest ISO has any impact on EKPC's supposed decision. If Duke Energy Kentucky's withdrawal from the Midwest ISO was a legitimate concern to EKPC, EKPC could have sought intervention.

Duke Energy Kentucky further observes that it attempted to inquire into EKPC's intentions toward joining the Midwest ISO through a timely data request to the Midwest ISO.<sup>4</sup> But the Midwest ISO refused to provide a complete response, vaguely stating that it had received inquiries from EKPC and that its understanding is that EKPC is evaluating its options.<sup>5</sup> The Midwest ISO refused to provide any specific information when asked even though the Company and the Midwest ISO had executed a reciprocal Confidentiality Agreement.<sup>6</sup> Yet despite its discovery responses, which failed to identify any issues relevant to the Company's Application, the Midwest ISO now contends that Duke Energy Kentucky's realignment should be delayed so that the Midwest ISO can possibly accommodate a new member that is merely "evaluating its options."

EKPC is directly interconnected to the Duke Energy Ohio transmission (as well as Kentucky Power Transmission, TVA, and Louisville Gas and Electric (LG&E) Transmission), but not Duke Energy Kentucky.<sup>7</sup> EKPC could just as easily decide to join PJM through any of its many interconnections through Kentucky Power's transmission system, or acquire firm transmission from LG&E and join the Midwest ISO.<sup>8</sup> Forcing Duke Energy Kentucky to remain a member of the Midwest ISO once Duke Energy Ohio realigns its transmission, will only harm

<sup>3</sup> See Response to Staff DR-02-005 filed August 25, 2010

<sup>4</sup> See Duke Energy Kentucky's Data Request No. 19 attached hereto.

<sup>5</sup> *Id.*

<sup>6</sup> See e.g. Letter filed October 27, 2010, indicating Discovery was provided to Midwest ISO pursuant to confidentiality agreement.

<sup>7</sup> See Response to Staff DR-02-005 filed August 25, 2010.

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

Duke Energy Kentucky. The Midwest ISO is seeking to use this proceeding to place EKPC in a bottom position to incentivize it to join the Midwest ISO at the expense of Duke Energy Kentucky. To stay in the Midwest ISO once Duke Energy Ohio withdraws, even for a brief period of time as the Midwest ISO suggests, forces Duke Energy Kentucky to make the commitment to pseudo-tie, thereby incurring all of the risks, inefficiencies and costs explained by the Company's witnesses. That is exactly what the Midwest ISO wants, as it is intent on advancing its own interests at the expense of its members and Kentucky's rate payers. The Commission should not be persuaded by the Midwest ISO's self-serving attempts at recruitment and undermining of the voluntary nature of RTO membership through its Brief and should be concerned with the Midwest ISO's true intentions at intervening in this proceeding. This is especially true considering one Kentucky utility has recently joined the Midwest ISO, and may someday choose to withdraw. And if one were to believe the Midwest ISO's unsupported claims in its Brief, another may be considering such membership.

The Midwest ISO also argues in its Brief that Duke Energy Kentucky *could* remain in Midwest ISO because of the Joint Operating Agreement provision 6.5.<sup>9</sup> Again, the Midwest ISO failed to bring up this evidence at the hearing and cannot now decide to do so in its Brief, absent any record support. There is no evidence to support the Midwest ISO's interpretation of the provision and whether it would, in fact, apply as the Midwest ISO suggests. The Commission should strike any claims by the Midwest ISO that were unsupported by any evidence or witness in the record of this proceeding.

Finally, Midwest ISO's allegation that participation in the PJM, Reliability Pricing Model (RPM) might constitute a change in control over the Company's generation should also be

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<sup>9</sup> Midwest ISO Brief at 25.

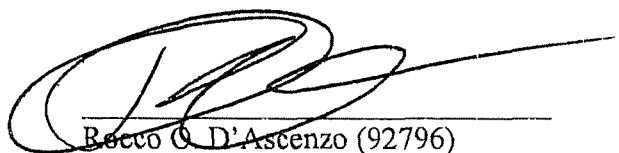
stricken as wholly unsupported.<sup>10</sup> There is no evidence that PJM will either control nor own Duke Energy Kentucky's generation once it realigns, irrespective of whether the Company elects the Fixed Resource Requirement (FRR) or Non-FRR alternatives. Duke Energy Kentucky's participation in PJM with respect to unit commitment of generation through transparent market signals is absolutely no different in concept than what occurs in the Midwest ISO.<sup>11</sup> Once in PJM, Duke Energy Kentucky will continue to control and operate its generation in the same manner as it does today in the Midwest ISO. Midwest ISO did not rebut that at the hearing and presented no evidence to the contrary. Both PJM and the FERC would take exception to Midwest ISO's erroneous and unsupportable claim that any RTO acquires functional control over a utility's generation upon membership.

### **III. Conclusion**

For the reasons more thoroughly discussed above, Duke Energy Kentucky respectfully requests that the Commission disallow Midwest ISO's Motion for Extension of Time to File its Post-Hearing Brief. Should the Commission allow the Brief, the new and unsupported arguments that Midwest ISO is attempting to introduce should be excluded from the record.

Respectfully submitted,

DUKE ENERGY KENTUCKY, INC.



Rocco Q. D'Ascenzo (92796)  
Senior Counsel  
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Associate General Counsel

<sup>10</sup> Midwest ISO Brief at 15.

<sup>11</sup> Direct Testimony of John Swez at 6-7.



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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing has been served via hand delivery to the following party on this 24<sup>th</sup> day of November 2010:

  
Rocco D'Ascenzo

<p>Hon. Dennis Howard Office of the Attorney General Utility Intervention and Rate Division 1024 Capital Center Drive Frankfort, Kentucky 40601</p>	<p>Katherine K Yunker John B. Park Yunker &amp; Park, PLC P.O. Box 21784 Lexington, KY 40522-1784</p>
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