

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION INTO THE MEMBERSHIP	)	
OF LOUISVILLE GAS AND ELECTRIC	)	
COMPANY AND KENTUCKY UTILITIES	)	CASE NO. 2003-00266
COMPANY IN THE MIDWEST INDEPENDENT	)	
TRANSMISSION SYSTEM OPERATOR, INC.	)	

O R D E R

On June 23, 2006, the Midwest Independent Transmission System Operator, Inc. ("MISO") filed an application for rehearing under KRS 278.400 of the Commission's May 31, 2006 Order authorizing Louisville Gas and Electric Company ("LG&E") and Kentucky Utilities Company ("KU") to withdraw as members of MISO. In support of its request for rehearing, MISO: (1) challenges the Commission's findings that LG&E and KU were required by KRS 278.020(5) to obtain approval prior to joining MISO, and (2) requests an opportunity to present new evidence that was not in existence at the time of the last hearing, which was held on July 20, 2005. More specifically, MISO claims that the Commission erred in determining that KRS 278.020(5) was applicable to the transfer of control of transmission facilities by LG&E and KU to MISO, and that this error resulted in the Commission improperly shifting the burden of proof in this case from LG&E and KU to MISO. MISO also argues that the Commission has ratified this failure to obtain prior approval by not imposing penalties under KRS 278.990 and by authorizing LG&E and KU to include the MISO Schedule 10 charges in their existing rates.

Finally, MISO states that, since the time of the former hearing in this case, 1 year of actual data of the MISO market operations has become available. MISO requests a

rehearing to present this new data which it claims satisfies the evidentiary standard under KRS 278.400 because this new data could not have been offered with reasonable diligence at the former hearing.

LG&E and KU filed a detailed response in opposition to MISO's request for rehearing, and the Kentucky Industrial Utility Customers, Inc. filed a response adopting the LG&E and KU response in opposition. MISO also filed a reply to the LG&E and KU response.

Based on the petition for rehearing and being otherwise sufficiently advised, the Commission finds that MISO and other parties have previously filed briefs in this case on the proper interpretation of KRS 278.020(5) and whether that statute was applicable to the facts of this case. Those briefs were fully considered by the Commission in making the decision, set forth in the May 31, 2006 Order, that KRS 278.020(5) was applicable here. The arguments presented in MISO's petition for rehearing are unpersuasive.

MISO's claim that the Commission improperly shifted the burden of proof in this case to MISO is simply wrong. Even though this case was an investigation initiated by the Commission and there is no statutory directive on who bears the burden of proof, LG&E and KU presented clear and convincing evidence to support their request for authority to exit MISO. The Commission did not review the evidence in this case, as MISO suggests, from the perspective that, because the transfer of control of transmission facilities to MISO was unauthorized, MISO had the burden to demonstrate that LG&E and KU should remain and continue as MISO members. To the contrary, LG&E and KU carried their burden of proof by presenting clear and convincing evidence, and that evidence was more credible than MISO's evidence.

The Commission has not now ratified the unauthorized actions by LG&E and KU in 2002 with regard to the transfer of their transmission facilities. Neither MISO, the other intervenors, nor the Commission previously raised the issue of imposing penalties under KRS 278.990, and fundamental due process rights of LG&E and KU would be impinged had the Commission imposed such penalties without prior notice and an opportunity to be heard. As to MISO's claim that the Commission has authorized LG&E and KU to collect MISO Schedule 10 charges in existing rates, that authorization occurred almost 2 years ago in the last LG&E and KU rate cases. Because the issues reviewed in this investigation did not include the reasonableness of the electric rates of LG&E and KU, the Commission could not require a change in rates at this time. However, the May 31, 2006 Order did require LG&E and KU to record a deferred liability for the MISO Schedule 10 charges included in existing rates. This requirement will fully protect the interests of ratepayers by preserving for review in the next LG&E and KU rate cases the appropriate rate-making treatment of all MISO Schedule 10 charges included in rates but not paid to MISO.

Finally, MISO requests rehearing to present new data that did not exist at the time of the July 20, 2005 hearing. It has been almost 3 years since this investigation was opened, and most of the economic evidence of record is based on models, forecasts, and assumptions, not actual historic data. The parties, as well as the Commission, are quite familiar with this type of data and, if shown to be reliable, such data frequently forms the basis for major decisions by the Commission. At the time of the July 20, 2005 hearing, there were 3 months of actual data on the MISO market operations. Considering the arguments presented by MISO, the Commission is not persuaded to grant rehearing to consider an additional 9 months of actual data.

The Commission notes that, under the Supreme Court opinion in Stephens v. Kentucky Utilities Co., 569 S.W.2d 155 (Ky. 1978), evidence that could not have been obtained for use at the former hearing by the exercise of reasonable diligence does not encompass evidence that did not exist at the time of the former hearing. The Supreme Court rejected efforts in that case to equate “new evidence” with “newly-discovered evidence,” reasoning that, “in each case, the situation after the hearing would be the determining factor, and this would result in complete destruction of an orderly process in the legislative scheme for setting rates for utilities. Public policy dictates that these actions not be unnecessarily prolonged.”<sup>1</sup> Although this investigation was not a rate case, the Commission’s authorization for LG&E and KU to exit MISO should economically benefit ratepayers. Thus, the public policy considerations cited in Stephens are equally applicable here since a delay in exiting MISO will unnecessarily prolong the economic benefits for ratepayers.

The Commission further finds no merit in MISO’s request to present new evidence in this case on an issue that has been before the Commission for over 7 months in another case. That issue, which is whether LG&E and KU should be authorized to transfer control of their transmission facilities to the Tennessee Valley Authority to be Reliability Coordinator and to the Southwest Power Pool to be the Independent Transmission Organization, has been reviewed on its own merits and is the subject of a separate Order issued today in Case No. 2005-00471.<sup>2</sup> MISO’s request for rehearing on this new issue is more accurately characterized as a request for a new

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<sup>1</sup> Id. at 158.

<sup>2</sup> Case No. 2005-00471, The Application of Louisville Gas and Electric Company and Kentucky Utilities Company to Transfer Functional Control of Their Transmission Facilities.

hearing on an issue that was not previously determined in the May 31, 2006 Order.  
MISO's request is denied.

IT IS THEREFORE ORDERED that the application for rehearing filed by MISO is  
denied.

Done at Frankfort, Kentucky, this 6<sup>th</sup> day of July, 2006.

By the Commission

DISSENTING OPINION OF  
CHAIRMAN MARK DAVID GOSS

For the reasons set forth in the previous Order dated May 31, 2006, I respectfully  
dissent and would grant the rehearing on the issue of new data regarding MISO market  
operations.

ATTEST:

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above the title 'Executive Director'.

Executive Director