

122 FERC ¶ 61,182
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Duke Energy Kentucky, Inc.

Docket No. ER08-403-000

ORDER ACCEPTING AND SUSPENDING PROPOSED AGREEMENT AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued February 29, 2008)

1. In this order we accept for filing Duke Energy Kentucky, Inc.'s (Duke Energy) unexecuted Wholesale Distribution Service Agreement (Agreement) between Duke Energy and the City of Williamstown, Kentucky (Williamstown), subject to refund, suspend it for a nominal period to become effective December 1, 2007, and set it for hearing and settlement judge procedures.

Background

2. On December 31, 2007, Duke Energy filed, under section 205 of the Federal Power Act,¹ the unexecuted Agreement for service over Duke Energy's wholesale distribution facilities. Duke Energy states that Cinergy Operating Companies (Cinergy Operating) procured transmission service from the Cinergy Services, Inc. (Cinergy Services) in order to sell Williamstown delivered energy under a service agreement and confirmation letter.² Duke Energy adds that Cinergy Operating and Cinergy Services entered into a service agreement in order to allow Cinergy Operating to obtain the transmission service necessary to sell delivered energy, and this Cinergy network integration transmission service agreement (NITSA) was filed with the Commission.

¹ 16 U.S.C. § 824d (2000 & Supp. V 2005).

² In *Duke Energy Corp.*, 113 FERC ¶ 61,297 (2005), *reh'g denied*, 118 FERC ¶ 61,077 (2007), the Commission granted a merger application filed by Duke Energy Corp. and Cinergy Corp., finding that the merger was consistent with the public interest. Duke Energy (f/k/a Union, Light, Heat and Power Company) is one of the former Cinergy Operating Companies, and Cinergy Services is now known as Duke Energy Shared Services.

Duke Energy states that included in the Cinergy NITSA was a charge of \$.26/kW for direct assignment facilities, and that the \$.26/kW rate was passed on to Williamstown through the confirmation letter between Cinergy Operating and Williamstown.

3. Duke Energy states that as of February 1, 2002, Cinergy Services assigned all of the NITSAs under which it provided transmission service, including the Cinergy NITSA, to Midwest Independent Transmission System Operator, Inc. (Midwest ISO).³ It states that Williamstown subsequently applied for network transmission service from Midwest ISO, and that Midwest ISO signed a NITSA with Williamstown. Duke Energy asserts that the Williamstown NITSA indicated that any wholesale distribution service necessary would be in accordance with Exhibit WDS, although there was no such document attached. Duke Energy adds that on April 26, 2006, Williamstown submitted to Midwest ISO a Transaction Specification Sheet (Specification Sheet) for network transmission service to begin on January 1, 2008, and that Williamstown indicated that its resource would be “service by Cinergy.” Duke Energy notes that it did not receive the Specification Sheet, or it would have indicated that wholesale distribution service would be needed to complete the path from Midwest ISO to Williamstown’s load delivery points. Duke Energy further asserts that in 2007, Williamstown changed its power supplier effective December 1, 2007 from Cinergy Operating to a new supplier, but that Williamstown did not revise its Specification Sheet accordingly.

Description of Filing

4. Duke Energy states that it used Midwest ISO’s *pro forma* Exhibit WDS as the basis for the Agreement. Duke Energy adds that the monthly demand charge for the “wholesale distribution service” previously provided to Cinergy Operating under the Cinergy NITSA was \$.26/kW, and that Duke Energy is not proposing a change in that rate. It also notes that the same rate was reflected in the confirmation letter between the Cinergy Operating and Williamstown. Therefore, Duke Energy asserts that its filing should be treated as a rate schedule change rather than a rate increase under 18 C.F.R. § 35.13(a)(2)(iii) (2007).

5. Duke Energy adds that it seeks any waivers necessary to permit this Agreement to become effective December 1, 2007, the effective date of the Williamstown NITSA. It argues that it learned late in 2007 that power would no longer be delivered to Williamstown under the Cinergy NITSA, and thus asked Midwest ISO about Williamstown’s transmission arrangements. Duke Energy states that it was then informed about the Williamstown NITSA and the Specification Sheet and those

³ The Cinergy NITSA became Service Agreement No. 5 under the Midwest ISO Open Access Transmission and Energy Market Tariff (TEMT) (FERC Electric Tariff, Vol. No. 1).

documents' omission of arrangements regarding wholesale distribution service. Duke Energy explains that it informed Midwest ISO that wholesale distribution service was needed, and Midwest ISO indicated to Duke Energy that its policy is for the owner of the facilities to file with the Commission any wholesale distribution agreements that are exhibits to Midwest ISO NITSA as two-party agreements. Duke Energy asserts that had it become aware of the Williamstown NITSA earlier, it would have presented Williamstown a draft of the Agreement before the December 1, 2007 effective date of its NITSA. Duke Energy also asserts that it had no way of knowing that the Williamstown NITSA had been signed several years before Williamstown's need for the service because Midwest ISO did not put the Williamstown NITSA into effect either by filing it or listing it on its Electric Quarterly Report (EQR).

Notice of Filing and Responsive Pleadings

6. Notice of Duke Energy's filing was published in the *Federal Register*, 73 Fed. Reg. 2238 (2008), with interventions and protests due on or before January 22, 2008. A timely motion to intervene was filed by American Municipal Power-Ohio, Inc. (AMP-Ohio). Williamstown also filed a timely protest, motion to intervene, and conditional request for hearing. On January 31, 2008, Williamstown filed a supplement to its protest. On January 31, 2008, Midwest ISO filed a motion to intervene out-of-time and comments. On February 5, 2008, Duke Energy filed a motion for leave to answer and answer.

7. In its protest, Williamstown objects to Duke Energy's request for waiver of the Commission's notice requirement, and conditionally requests a hearing if the issues presented by Duke Energy's filing are not resolved. Williamstown states that its review of the filing is continuing, and that it is attempting to resolve the issues with Duke Energy, and adds that it will supplement its protest if there is additional information or settlement progress to report. Williamstown notes that since December 1, 2007, it has been purchasing full requirements electric power supply service from AMP-Ohio, and before that, Duke Energy Ohio, Inc. (DE Ohio), an affiliate of Duke Energy, was its requirements supplier.

8. Williamstown asserts that it has the following concerns with Duke Energy's filing: (1) the origin and derivation of the proposed charge of \$.26/kW a month and cost support for this charge; (2) whether the proper procedures were followed and filings made in connection with the proposed charge in the past and the proposed retroactive collection of the charge to December 1, 2007; and (3) the extent to which the proposed charge may duplicate other, as yet not clearly understood, charges that Williamstown understands Duke Energy or one of its affiliates may seek to recover, directly or indirectly, from Williamstown in connection with the termination of service from DE Ohio.

9. With respect to (3) above, Williamstown states that it understands that DE Ohio plans to charge Williamstown's new power supplier, AMP-Ohio, a fee for certain services for the period from December 1, 2007 through February 29, 2008, and that AMP-Ohio will seek reimbursement from Williamstown of these charges. Williamstown asserts that the basis for these charges relates to the apparent failure of Midwest ISO to include the new arrangements for service to Williamstown in the Midwest ISO market model in time to fully implement the transition as of the date when service from AMP-Ohio began. Williamstown claims that it provided all of the information requested by Midwest ISO on a timely basis to accomplish the transition. Williamstown states that it is exploring with Midwest ISO why the necessary changes were not made. It adds that regardless of the outcome of that effort, it has received no documentation supporting the cost of the services purportedly being provided by DE Ohio, and how they relate to the proposed charge from Duke Energy under the Agreement.

10. Williamstown says that a further issue raised by Duke Energy's filing concerns the delivery arrangements depicted in the diagrams attached to the filed Agreement. Williamstown notes that the diagrams show that deliveries are proposed at the Grant substation and the Dry Ridge substation. Williamstown states that without informing Williamstown, Duke Energy has switched a portion of its load to be served from the Dry Ridge substation. Williamstown argues that apart from safety issues, this switch raises additional concerns about the basis for the proposed charges under the Agreement and the potential effect of this change on the Midwest ISO market model.

11. Williamstown asks that the Commission: (1) grant Williamstown's motion to intervene; (2) suspend the filing and place it into effect, if at all, subject to refund; (3) deny Duke Energy's request for a waiver of the Commission's notice requirements; and (4) unless settlement can be reached promptly, grant Williamstown's request for a hearing to determine the justness and reasonableness of Duke Energy's proposed Agreement.

12. On January 31, 2008, Williamstown filed a supplement to its protest in which it asserts that since its prior filing, it has had multiple discussions with Duke Energy and Midwest ISO regarding: (1) the charges set forth in the Agreement; (2) the additional charges that Williamstown understands an affiliate of Duke Energy will seek to recover for December 1, 2007 through February 29, 2008, associated with delivering power from AMP-Ohio; and (3) the delivery arrangements for Williamstown from the Duke Energy system. Specifically, Williamstown notes that it has discovered that Williamstown had, on January 4, 2008, signed an Exhibit WDS for wholesale distribution service and sent it to Midwest ISO. Williamstown states that while similar to the Exhibit WDS filed by Duke Energy on December 31, 2007, this document includes different terms. The existence of two different versions of Exhibit WDS raises the question of which one is operative – the Duke Energy unexecuted version or the one signed by Williamstown but

apparently not executed by Midwest ISO or filed by it. Williamstown asks that the Commission reject Duke Energy's filing to provide the parties an opportunity to resolve these issues.

13. On January 31, 2008, Midwest ISO filed a motion to intervene and comments, arguing that good cause exists to permit its intervention out-of-time, since it has a significant interest in this proceeding. It points out that as the regional transmission organization responsible for overseeing the wholesale distribution service arrangements necessary to complete the path from the Midwest ISO grid to Williamstown's load delivery points, it has a significant interest in this proceeding. In response to Duke Energy, Midwest ISO states that the Cinergy/Duke Energy service agreements under which transmission service was provided to Williamstown were reported in Midwest ISO's EQR. Midwest ISO asserts that it could not report the Williamstown NITSA in Midwest ISO's EQR before Williamstown's December 1, 2007 start date, since Williamstown was not the transmission customer. Thus, and in compliance with the Commission's EQR standards, the Williamstown NITSA was reported in Midwest ISO's 4Q 2007 EQR with a service commencement date of December 1, 2007. Midwest ISO also assures Duke Energy that it is reviewing its internal processes to ensure that the transmission owners are timely notified of any changes relating to network customers interconnected to their systems.

14. In response to Williamstown's protest that Midwest ISO failed to fully implement the transition to service from AMP-Ohio on a timely basis, Midwest ISO submits that its Customer Service Group began working with Williamstown in May 2006 and followed the protocol in Midwest ISO's Business Practices Manual for market registration. Midwest ISO asserts that Williamstown was advised of Midwest ISO's deadlines for providing the necessary information for Williamstown to be a load serving entity starting on December 1, 2007. Midwest ISO claims that it never received the required information from Williamstown, and thus could not include Williamstown in the commercial model starting on December 1, 2007.

15. Midwest ISO adds that in late November 2007, when Williamstown inquired about its inclusion in the December 1, 2007 commercial model, Midwest ISO informed Williamstown that since it had not received the information before the deadline, the soonest Williamstown could be included in Midwest ISO's commercial model was March 1, 2008, because Midwest ISO updates its commercial model quarterly. Midwest ISO asserts that this information was consistent with the information provided to Williamstown before the deadline for inclusion in the December 1, 2007 commercial model. Midwest ISO argues that if it had included Williamstown in its commercial model starting on December 1, 2007, Midwest ISO would have been treating Williamstown differently than other market participants.

16. On February 5, 2008, Duke Energy filed a motion for leave to answer and answer. Duke Energy states that it hopes that the parties can resolve the issues and is willing to extend the 60-day time period for Commission action by two weeks (to March 14, 2008) as long as the Commission makes the Agreement effective December 1, 2007. Duke Energy attempts to clarify which Exhibit WDS is effective, the one filed by Duke Energy on December 31, 2007 or the one that Williamstown executed on January 4, 2008.

17. Duke Energy describes the sequence of events as follows. In mid-November 2007, it finally became aware that Williamstown was changing power suppliers to AMP-Ohio, and would no longer receive transmission and wholesale distribution service under its requirements contract with DE Ohio. (Duke Energy notes that while DE Ohio may have learned of the change earlier, it was not the responsibility of the merchant function of DE Ohio to inform its affiliated transmission function of such a change.) Duke Energy reiterates that Williamstown should have provided a revised Specification Sheet to Midwest ISO, and that Midwest ISO should have provided the Specification Sheet to Duke Energy.

18. Duke Energy further states that it recognized the need to ensure that it could continue to collect its rate for wholesale distribution service, previously collected from DE Ohio, because Williamstown would need this service because it is not connected to the Midwest ISO grid directly. Duke Energy asserts that in mid-December 2007, it was given the Specification Sheet and concluded that Midwest ISO was providing Williamstown network service as of December 1, 2007, without a Specification Sheet that accurately reflected the network resources, the effective date, or the need for wholesale distribution service. In order to avoid time value penalties for not timely filing Exhibit WDS, and with the 30-day “after service commences” clock running, Duke Energy states that it took the *pro forma* Exhibit WDS in the TEMT, filled in the rate using the existing rate charged to DE Ohio, and filed it with the Commission on December 31, 2007.

19. In addition, Duke Energy argues that it is not seeking to impose charges retroactively. It contends that the Commission automatically waives the 60-day prior notice requirement of the Federal Power Act as long as an agreement for new service under an existing tariff is filed within 30 days of service beginning. It notes that Duke Energy requested that the Agreement become effective December 1, 2007, exactly thirty days before the filing date and the date on which Midwest ISO made Williamstown’s NITSA effective. Alternatively, Duke Energy says that if this waiver policy does not apply, it was justified in not filing at an earlier date, since it could not have known before October 1, 2007, about the change to Williamstown’s energy provider, Williamstown’s decision to commence network service, and the termination of the NITSA under which DE Ohio previously took network service on behalf of Williamstown. Duke Energy asserts that it did not get this information until November 2007.

20. Duke Energy notes that Williamstown did not send the Specification Sheet reflecting the new transmission service arrangements to Midwest ISO until January 3, 2008. Duke Energy asserts that although Williamstown included the executed Exhibit WDS in its supplemental protest, Duke Energy as the public utility service provider had already filed Exhibit WDS. Duke Energy argues that the Commission can only accept the Exhibit WDS filed by it. It notes that one minor modification is necessary; the Exhibit WDS termination date should match the January 2008 Specification Sheet termination date of December 31, 2009.

21. Duke Energy adds that the Commission should not reject the filing. Duke Energy argues that it would have to file a new Exhibit WDS well after December 31, 2007, which could make it subject to penalties. Since Williamstown had just submitted a Specification Sheet for network service that it began receiving more than a month ago, punishing Duke Energy would be inequitable.

22. Duke Energy also responds to Williamstown's protest regarding Duke Energy's wholesale distribution charge. It asserts that it did not file cost support because the \$.26/kW month charge had already been accepted by the Commission and, thus, detailed cost support is not required. Duke Energy also explains that AMP-Ohio and DE Ohio entered into an Interim Service Agreement effective December 1, 2007. Under that agreement, AMP-Ohio agreed to reimburse DE Ohio for payments made by DE Ohio to Midwest ISO for settlements associated with Williamstown's load that is served by AMP-Ohio. It also provided for an administrative charge to reflect costs incurred by DE Ohio to separate out the Williamstown-related charges from the charges of its customers in order to bill AMP-Ohio for the correct charges. Duke Energy states that the Interim Agreement terminates on February 29, 2008, the date on which Midwest ISO should make the necessary changes to have Williamstown load transferred to AMP-Ohio. Duke energy maintains that the changes in the Agreement and the Interim Agreement are not duplicative, since the Agreement and the Interim Agreement are for different services provide by different entities.

23. With respect to the additional substation to serve Williamstown's load, Duke Energy explains that had Midwest ISO provided a Specification Sheet in a timely fashion, Duke Energy would have made sure that the delivery points for Williamstown's network service were listed correctly. Duke Energy adds that the moved delivery point would have no effect on Midwest ISO's commercial model because both substations serving Williamstown's load are served from the same 69 kV line, there are no safety issues with the use of an additional substation to serve the load, and due to reliability and load growth issues, Duke Energy needed to add an additional substation to serve load in the region.

Discussion

Procedural Matters

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant Midwest ISO's untimely motion to intervene, given its interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Duke Energy's answer because it has provided information that assisted us in our decision-making process.

Waiver of Prior Notice Requirements

26. Duke Energy asks that the Commission waive the 60-day prior notice requirement so that the Agreement will be made effective on December 1, 2007. We will grant Duke Energy's request.⁴

Hearing and Settlement Judge Procedures

27. Duke Energy's filing raises issues of material fact that cannot be resolved on the record before us, and that are more appropriately addressed through hearing and settlement judge procedures.

28. Our preliminary analysis indicates that Duke Energy's proposed Agreement has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Duke Energy's proposed Agreement for filing, suspend it for a nominal period, subject to refund, and set it for hearing and settlement judge procedures.

29. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before the hearing

⁴ See *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at p. 61,984, *order on reh'g*, 65 FERC ¶ 61,081 (1993) (waiver of prior notice will be granted if service agreements are filed within 30 days after service commences); *accord Southern Company Services, Inc.*, 102 FERC ¶ 61,319, at P 12 (2003), *reh'g denied*, 109 FERC ¶ 61,049 (2004); *Elkem Metals Company-Alloy, L.P.*, 114 FERC ¶ 61,181, at P 8 (2006).

procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁵ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁶ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Duke Energy's proposed Agreement is hereby accepted for filing and suspended for a nominal period, to become effective December 1, 2007, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter 1), a public hearing shall be held concerning Duke Energy's proposed Agreement. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2007), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all the powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

⁵ 18 C.F.R. § 385.603 (2007).

⁶ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202)502-8500 within five days of this order. The Commission's web site contains a list of Commission judges and a summary of their background and experience (<www.ferc.gov> – click on Office of Administrative Law Judges.)

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural date and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.