

FILE

BEFORE

RECEIVED-DOCKETING DIV

THE PUBLIC UTILITIES COMMISSION OF OHIO

2004 MAY 24 PM 5:15
2004 MAY 24

PUCO

In the Matter of the Application of)
The Cincinnati Gas & Electric Company)
To Modify its Non-Residential Generation)
Rates to Provide for Market-Based)
Standard Service Offer Pricing and to)
Establish an Alternative Competitively-Bid)
Service Rate Option Subsequent to the)
Market Development Period.)

Case No. 03-93-EL-ATA

In the Matter of the Application of)
The Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Certain Costs Associated)
With The Midwest Independent)
Transmission System Operator.)

Case No. 03-2079-EL-AAM

In the Matter of the Application of)
The Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Capital Investment in its)
Electric Transmission and Distribution)
System and to Establish a Capital)
Investment Reliability Rider to be Effective)
After The Market Development Period.)

Case No. 03-2080-EL-AAM
Case No. 03-2081-EL-ATA

MEMORANDUM OF INDUSTRIAL ENERGY USERS-OHIO
IN OPPOSITION TO MEMORANDUM IN SUPPORT OF
ALLOWING THE ORAL TESTIMONY OF
RONALD R. MCNAMARA ON CROSS-EXAMINATION

On May 6, 2004, the Ohio Marketers Group ("OMG") filed a request for subpoena requiring Mr. Ronald R. McNamara to testify in the hearing in the above-referenced proceedings regarding The Cincinnati Gas & Electric Company's ("CG&E") rate stabilization plan application. May 6, 2004 was also the deadline for parties in this proceeding to file expert testimony. See Entry at 2 (April 7, 2004).

(C15537:) This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business
Technician Ann Date Processed 5/24/04

The OMG filed the return of service for the subpoena on May 13, 2004. The hearing commenced on May 17, 2004, and was recessed to allow additional time for settlement discussions. On May 19, 2004, at a pre-hearing conference, OMG announced that Mr. McNamara would testify at the hearing, but it was unclear whether OMG intended Mr. McNamara to be an expert witness. The Industrial Energy Users-Ohio ("IEU-Ohio") expressed concerns about Mr. McNamara's testimony as OMG had not prefiled written testimony in accordance with Rule 4909-1-29, O.A.C. In accordance with a request from the Attorney Examiners that parties file legal memoranda on this issue, IEU-Ohio submits the following response to OMG's Memorandum in Support of Allowing the Oral Testimony of Ronald McNamara on Cross-Examination ("OMG Memo") to oppose the oral testimony of Mr. McNamara for the following reasons.

OMG, consisting of Constellation NewEnergy, Inc., Constellation Power Source, Inc., MidAmerican Energy Company, Strategic Energy, LLC and WPS Energy Services, Inc., stated that a delineation of the responsibilities in the event of a competitive retail electric service ("CRES") provider's failure to maintain reliability and supply power (default) and the effect of the development of the regional transmission organization ("RTO"), the Midwest Independent Transmission System Operator, Inc. ("MISO"), on those responsibilities is an important issue in this proceeding. Consequently, OMG proposes to call MISO's Vice President of Regulatory Affairs and Chief Economist to testify and to elicit such testimony through cross-examination as though Mr. McNamara is hostile to the positions of OMG. OMG states that "Mr. McNamara is the officer at MISO who signed the tariff filed at

the Federal Energy Regulatory Commission ("FERC") for MISO Day 2 and should be able to answer questions on how that tariff will operate." OMG Memo at 2. As OMG is aware, the tariff filed by MISO¹ is several hundred pages long with extensive comments and protests filed by numerous parties including OMG members.² See *Midwest Independent Transmission System Operator, Inc.*, FERC Docket No. EL04-169-000. The final MISO tariff depends on FERC approval based on the protests filed in the proceeding and FERC's resolution of the issues raised by the numerous protests including protests by members of OMG. Thus, at this moment, no one can say as a matter of fact what the tariff will look like or how Day 2 will be implemented.

Nonetheless, OMG asserts that they will offer Mr. McNamara's testimony at the hearing as a fact witness and that it was not required, under the Commission's rules, to be reduced to writing and prefiled. It appears that OMG has misinterpreted the Commission's rules regarding expert testimony.

OMG implies that Mr. McNamara is not an expert witness by stating that Rule 4901-1-29, O.A.C., only applies to expert testimony. OMG Memo at 3. If Mr. McNamara is simply a member of the public, he had an opportunity to present oral testimony (sworn or unsworn) at the public hearings held in Cincinnati on April 22, 2003 in accordance with the February 18, 2004 Entry and Rule 4901-1-27 (C), O.A.C., which states in pertinent part, "The presiding hearing officer shall permit

¹ The MISO tariff at issue was filed in FERC Docket No. 03-35-000. MISO subsequently withdrew the tariff and refiled it on March 31, 2004 in FERC Docket No. 04-691-000.

² In fact, WPS Energy Services, Inc., as part of WPS Resources Corporation, has filed comments seeking to delay development of MISO by phasing in the functionality. See *WPS Resources Corporation Intervention, Protest and Request for Hearing and Phased Implementation of the Day 2 Market*, FERC Docket No. 04-691-000 (May 7, 2004).

members of the public to offer sworn or unsworn testimony at the portion or session of the hearing designated for the taking of public testimony."

It is clear to IEU-Ohio, even based on the assertions of OMG, that Mr. McNamara's testimony would be that of an expert. OMG stated that it will question Mr. McNamara on his personal *and professional* knowledge regarding the complex and ongoing matters concerning the implementation of MISO proposed tariff and Day 2 functionality. OMG Memo at 2. If Mr. McNamara is presented as an expert witness, then his testimony must have been prefiled in accordance with Rule 4901-1-29, which states in pertinent part:

(A) Except as otherwise provided in this rule, all expert testimony to be offered in commission proceedings, except testimony to be offered by the commission staff, shall be reduced to writing, filed with the commission, and served upon all parties prior to the time such testimony is to be offered.

(1) Unless otherwise ordered by the commission, the legal director, the deputy legal director, or the attorney examiner assigned to the case:

... (h) All direct expert testimony to be offered in any other commission proceeding shall be filed and served no later than seven days prior to the commencement of the hearing.

(2) All expert testimony to be offered in rebuttal shall be filed and served within the time limits established by the commission or the presiding hearing officer, unless the commission or the presiding hearing officer determines that such testimony need not be reduced to writing.

(B) For purposes of this rule, "commencement of the hearing" means the scheduled date for beginning the hearing at which expert testimony is to be offered.

(C) Notwithstanding paragraph (A) of this rule, the presiding hearing officer may, in his or her discretion, permit an expert witness to present **additional** oral testimony at the hearing, provided that:

(1) Such testimony could not, with reasonable diligence, have been filed and served within the time limits established by the commission or the presiding hearing officer; or

(2) The presentation of such testimony will not unduly delay the proceeding or unjustly prejudice any other party.

Thus, if Mr. McNamara's testimony is expert testimony, regardless of whether it is direct or rebuttal testimony, OMG should have prefiled the testimony at least seven days prior to the hearing or on the day testimony was due (May 6, 2004). In addition to prefiled testimony, an expert may present additional oral testimony at the hearing if it could not have been filed, or it would not unduly delay the proceeding or unjustly prejudice any other party. Given that OMG neither prefiled Mr. McNamara's testimony nor had him testify as a member of the public at the public hearing, there is no "additional" oral testimony. Nonetheless, even if OMG had met the requirements of Rule 4901-1-29, O.A.C., given the voluminous, complex and ongoing material on which OMG proposes to question Mr. McNamara, all parties would be prejudiced by the introduction of such testimony (through cross examination) at this late date as it does not allow for sufficient time to analyze the testimony and cross-examine the witness. Thus, OMG's arguments are without merit and should be rejected. OMG failed to meet the requirements for testimony and, oral testimony at this late date by Mr. McNamara would prejudice all other parties in this proceeding.

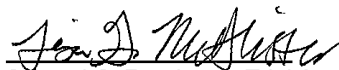
On a practical level, OMG's proposal to bring Mr. McNamara into this proceeding on the basis that MISO's Day 2 operational configuration can be presented as a matter of fact is unsustainable on its face. If MISO's Day 2 operation status was something that could be ascertained as a matter of fact, then it is likely that OMG would simply point to MISO's tariff or this or that FERC order to support its views on MISO's role. OMG's proposal to bring Mr. McNamara into this proceeding as a witness called by OMG is itself an implicit admission that MISO's Day 2

functionality can only be described as a matter of opinion based on assumptions regarding how and when various issues might be resolved. To this point, it seems clear that we have seen many of opinions on this subject since 1996 and none of them have turned out to be correct. The fact that Mr. McNamara signed a FERC tariff filing does make Mr. McNamara a fact witness.

To the extent that Mr. McNamara is permitted to testify on behalf of OMG without satisfying the rules that have been followed by other parties, OMG should not be permitted to elicit information from Mr. McNamara through cross examination. If Mr. McNamara is testifying about facts known to him as a result of signing an application submitted to FERC, then OMG should have no right or reason to resort to cross examination with a witness OMG is sponsoring in this proceeding. If Mr. McNamara is hostile to the positions of OMG, then OMG can manage the risk by removing Mr. McNamara from the witness list.

For all of the foregoing reasons, IEU-Ohio respectfully requests that the OMG not be permitted to call Mr. McNamara to testify at the hearing.

Respectfully submitted,



Samuel C. Randazzo, Trial Attorney

Lisa G. McAlister

Daniel J. Neilsen

MCNEES WALLACE & NURICK LLC

21 East State Street, 17th Floor

Columbus, OH 43215-4228

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

lmcalister@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Memorandum of Industrial Energy Users-Ohio in Opposition to Memorandum in Support of Allowing the Oral Testimony of Ronald R. McNamara on Cross-examination* was electronically served on the following parties this 24th day of May, 2004.



Lisa G. McAlister

Benita A. Kahn
Vorys, Sater, Seymour & Pease
Counsel for General Electric Company
P.O. Box 1008
Columbus, Ohio 43216-1008
bakahn@vssp.com

Sally W. Bloomfield
Thomas J. O'Brien
Counsel for Ohio Manufacturers' Association
Brickler & Eckler, LLP
100 South Third Street
Columbus, Ohio 43215
sbloomfield@bricker.com

Colbert, Paul
The Cincinnati Gas & Electric Company
155 E. Broad Street
Columbus, Oh 43215
Paul.Colbert@Cinergy.com

M. Howard Petricoff
Vorys, Sater, Seymour & Pease
Counsel for MidAmerica Energy Co.,
Strategic Energy, LLC, Duke Realty and
Constellation Power Sources, Inc.
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vssp.com

Richard L. Sites
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, Ohio 43215-3620
ricks@ohanet.org

Michael L. Kurtz
Boehm, Kurtz & Lowry
Attorneys for The Kroger Co.
and The Ohio Energy Group
2110 CBLD Center
36 East Seventh Street
Cincinnati, Ohio 45202
mkurtzlaw@aol.com

Barth E. Royer
Judith B. Sanders
Counsel for Suppliers Retail, Inc.
Bell, Royer & Sanders Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215-3900
BarthRoyer@aol.com

Larry S. Sauer
Jeffrey L. Small
Ann M. Holtz
Office of Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
sauer@occ.state.oh.us

W. Jonathan Airey
Counsel for Constellation NewEnergy, Inc.
Vorys, Sater, Seymour & Pease
52 East Gay Street E, P.O. Box 1008
Columbus, Ohio 43216-1008
wjairrey@vssp.com

Craig G. Goodman
National Energy Marketers Association,
3333 K Street, N.W., Suite 110
Washington, DC 20007
cgoodman@energymarketers.com

Arthur E. Korkosz
First Energy Solutions Counsel
76 South Main Street
Legal Dept., 18th Floor
Akron, Ohio 44308-1890
KorkoszA@FirstEnergyCorp.com

David F. Boehm
Counsel for AK Steel Corp.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 2110
Cincinnati, Ohio 45202
dboehmlaw@aol.com

David C. Rinebolt
Ohio Partners for Affordable Energy
337 S. Main Street, 4th Floor, Suite 5
P.O. Box 1793
Findlay, Ohio 45839-1793
drinebolt@aol.com

William A. Adams
Dane Stinson, Esq.
BAILEY CAVALIERI LLC
Counsel for Green Mountain Energy Co.
10 West Broad Street, Suite 2100
Columbus, Ohio 43215
William.Adams@BaileyCavalieri.com
Dane.Stinson@BaileyCavalieri.com

Shawn P. Leyden
Vice President and General Counsel
PSEG Energy Resources & Trade LLC
80 Park Plaza, 19th Floor
Newark, NJ 07102
Shawn.Leyden@pseg.com

Mary W. Christensen
Christensen, Christensen & Devillers
401 North Front Street
Suite 350
Columbus, Ohio 43215-2249
MCristensen@Columbuslaw.org

Cognis Corporation
c/o Theodore J. Schneider
Murdock, Goldenberg, Schneider & Groh
700 Walnut Street, Suite 400
Cincinnati, OH 45202
tschneider@mgsqglaw.com

Noel F. Morgan
Legal Aid Society of Cincinnati
215 E. Ninth Street
Suite 200
Cincinnati, OH 45202
nmorgan@lascinti.org