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JOHN J. FINNIGAN, JR.
Senior Counsel

VIA OVERNIGHT DELIVERY



May 24, 2004

Public Utilities Commission of Ohio
Docketing Division, 10th Floor
180 East Broad Street
Columbus, OH 43215-3793

Re: Memorandum of CG&E in Opposition
Case no. 03-93-EL-ATA

Dear Sir or Madam:

Enclosed please find an original and 12 copies of The Cincinnati Gas & Electric Company's Memorandum in Opposition to the Memorandum in Support of Allowing the Oral Testimony of Ronald R. McNamara on Cross-Examination for docketing in the above-referenced case. Please date-stamp the two extra copies and return them to me in the overnight-mail envelope provided.

Should you have any questions, please call me at (513) 287-3601.

Sincerely,

John J. Finnigan
Senior Counsel

JJF/sew

Enclosure

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
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BEFORE

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THE PUBLIC UTILITIES COMMISSION OF OHIO

2004 MAY 25 AM 9:50

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) Case No. 03-93-EL-ATA
Standard Service Offer Pricing)
and to Establish a Pilot)
Alternative Competitively-Bid)
Service Rate Option Subsequent)
to Market Development Period)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Certain Costs Associated) Case No. 03-2079-EL-AAM
With The Midwest Independent)
Transmission System Operator)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Capital Investment in its) Case No. 03-2081-EL-AAM
Electric Transmission And Distribution) Case No. 03-2080-EL-ATA
System And to Establish a Capital)
Investment Reliability Rider to be)
Effective After the Market Development)
Period)

**MEMORANDUM OF
THE CINCINNATI GAS & ELECTRIC COMPANY
IN OPPOSITION TO
MEMORANDUM IN SUPPORT OF
ALLOWING THE ORAL TESTIMONY OF RONALD R. MCNAMARA
ON CROSS-EXAMINATION**

The Cincinnati Gas & Electric Company (CG&E) opposes the oral testimony of Ronald R. McNamara on behalf of the Ohio Marketers Group (OMG), on the grounds

that Mr. McNamara's testimony would be expert testimony; the OMG failed to have Mr. McNamara's testimony reduced to writing and filed seven days prior to the hearing as required by the Commission's rules; and it would prejudice CG&E if OMG were permitted to introduce such testimony, in an unwritten format, at this late date.

By way of background, OMG filed a request for subpoena requiring Mr. Ronald McNamara to testify at hearing on May 6, 2004, the deadline for intervenors to file testimony. 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. At an informal pre-hearing conference on May 19, 2004, the issue of whether M. McNamara should be permitted to testify orally at the hearing was raised, and the attorney examiners ordered the parties to submit legal memoranda on this issue.

The Commission's rules provide that: (1) all expert testimony used in Commission proceedings must be reduced to writing. O.A.C. 4901-1-29(A); and (2) unless otherwise specified by rule, expert testimony used as direct testimony must be filed seven days prior to the commencement of the hearing. O.A.C. 4901-1-29(A)(1)(h). The OMG argues that it should be permitted to call Mr. McNamara to testify orally at hearing on May 28, 2004 for the following reasons: (1) Mr. McNamara is not an expert witness; (2) Mr. McNamara will not offer direct testimony, but instead will testify on cross-examination; and (3) the proceedings will not be unduly delayed and no prejudice will occur if Mr. McNamara is permitted to testify. The OMG's arguments are without merit and should be rejected, and Mr. McNamara should not be permitted to testify in this

proceeding, because CG&E would be prejudiced by allowing Mr. McNamara to testify under the present circumstances.

The OMG's first argument is meritless because Mr. McNamara is clearly an expert witness. An expert witness is a witness who meets the following requirements:

Evid R 702 Testimony by experts

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. * *
*¹

Mr. McNamara meets all three prongs of this test. First, Mr. McNamara will testify to "what responsibilities, in the event of default by a load serving entity, to maintain reliability and supply power rests with the MISO, the regional transmission organization, and what responsibilities rests (sic) with the utility."² This clearly is beyond the knowledge of an ordinary lay person. Second, Mr. McNamara is the Vice President of Regulatory Affairs and Chief Economist for the MISO; is the MISO officer

¹ Ohio R. Evid 702.

² See *Memorandum in Support of Allowing the Oral Testimony of Ronald R. McNamara on Cross-Examination* (filed May 21, 2004) at p. 2.

chiefly responsible for tariffs and market design; and holds a Ph.D. in Economics.³ A search under his name at the MISO's website⁴ demonstrates that he regularly files expert testimony on behalf of the MISO at FERC relating to how energy markets operate. He therefore is qualified to testify as an expert based on his education and experience. Third, the OMG states that they want to examine Mr. McNamara regarding his personal *and professional* knowledge⁵ regarding these specialized matters concerning the MISO's and electric distribution utility's responsibilities in the event of default by a load serving entity.⁶ The OMG's argument that Mr. McNamara is not an expert witness and would not testify on matters of specialized knowledge must fail.

The OMG's next argument is that they should be permitted to call Mr. McNamara as a live witness at the hearing because he will testify on cross-examination, and the applicable rule only requires expert testimony to be pre-filed if offered as direct testimony. This argument cannot prevail because the rule establishing the deadline for filing expert testimony applies to testimony offered as direct testimony for a party's case-in-chief, not to whether a witness is questioned under cross-examination. This is clear from a simple review of O.A.C. 4901-1-29, which distinguishes the time periods for offering "direct expert testimony" versus the time period for offering "expert testimony to be offered in rebuttal." O.A.C. 4901-1-29(A)(1)(a) through (h) all provide that direct

³ See *Affidavit of Ronald R. McNamara*, filed as an attachment to *Motion for Leave to Answer and Answer of the Midwest Independent Transmission System Operator, Inc.*, (filed September 26, 2003) in *In re Midwest Independent System Operator, Inc.*, FERC Docket No. ER03-1118-000.

⁴ www.midwestiso.org

⁵ See *Memorandum in Support of Allowing the Oral Testimony of Ronald R. McNamara on Cross-Examination* (filed May 21, 2004) at p. 3.

⁶ *Id.* at p. 2.

expert testimony must be filed at various periods in advance of the hearing, depending on the circumstances. On the other hand, O.A.C. 4901-1-29(A)(2) provides for rebuttal expert testimony to be filed pursuant to a schedule established by the hearing examiner (e.g., after both parties have completed their cases-in-chief), or offered orally at hearing. The OMG seeks to offer Mr. McNamara's testimony as part of their direct case-in-chief, and has failed to meet the seven-day deadline for filing his direct expert testimony. The OMG's second argument therefore cannot prevail.

Finally, the OMG argues that it should be permitted to introduce Mr. McNamara's testimony because it would cause no undue delay or prejudice. CG&E respectfully disagrees. OMG has offered no showing as to why it could not have subpoenaed and deposed Mr. McNamara in advance of the hearing, then filed his testimony in accordance with the scheduling order. This would have permitted CG&E to explore his opinions in advance of the hearing and to prepare for cross-examination.

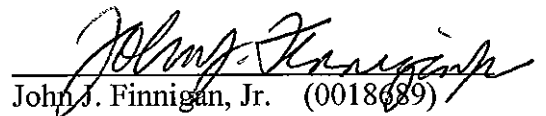
Any expert testimony offered orally, as part of a party's case-in-chief, clearly prejudices the opposing party because the opposing party has no time to analyze the testimony and prepare to cross-examine the witness. This is the reason for the rule that *all* expert testimony must be reduced to writing, unless the hearing examiner expressly allows rebuttal expert testimony to be offered orally.⁷ It is unfair to expect CG&E to be able to cross-examine Mr. McNamara "on the fly" immediately after listening to his testimony. The subject matter of his testimony will relate to the complex features of the MISO Day 1 and Day 2 energy markets, and CG&E cannot be expected to cross-examine him relating to these complex subjects in an off-the-cuff manner, without any time to prepare cross-examination.

⁷ Compare O.A.C. 4901-1-29(A)(1) and 4901-1-29(A)(2).

Finally, OMG cites three Commission cases for the proposition that a governmental employee can be subpoenaed to testify orally at a hearing on “specialized matters” without pre-filing direct expert testimony.⁸ These cases are inapposite, however, because they all involve situations where the Staff subpoenaed the expert witness to testify orally at the hearing, and O.A.C. 4901-1-29(A) expressly exempts testimony offered by the Commission Staff from the requirement that direct expert testimony be submitted in writing.

For all of the foregoing reasons, CG&E respectfully requests that the OMG not be permitted to call Mr. McNamara to testify at the hearing.

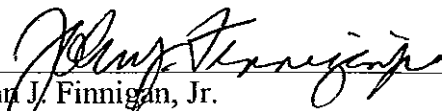
Respectfully submitted,


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⁸ See Memorandum in Support of Allowing the Oral Testimony of Ronald R. McNamara on Cross-Examination (filed May 21, 2004) at p. 3.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum of The Cincinnati Gas & Electric Company 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.


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