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February 15, 2005

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VIA FEDERAL EXPRESS

#7922-0695-3193

Elizabeth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40601

RECEIVED
FEB 16 2005
PUBLIC SERVICE
COMMISSION

**RE: *In the Matter of the Investigation Into the Membership of Louisville Gas and Electric Company and Kentucky Utilities Company in the Midwest Independent Transmission System Operator*
Case No. 2003-00266**

Dear Ms. O'Donnell:

Enclosed please find and accept for filing the original and ten copies of Louisville Gas and Electric Company's and Kentucky Utilities Company's Motion to Compel Supplemental Response to December 7, 2004 Data Request Number One and For an Evidentiary Presumption in the above-referenced matter. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me in the enclosed self-addressed stamped envelope.

Should you have any questions or need any additional information, please contact me at your convenience.

Very truly yours,

Kendrick R. Riggs

KRR/ec

Enclosures

cc: Parties of Record

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED
FEB 18 2005
PUBLIC SERVICE
COMMISSION

In the Matter of:

INVESTIGATION INTO THE)
MEMBERSHIP OF LOUISVILLE)
GAS AND ELECTRIC COMPANY)
AND KENTUCKY UTILITIES)
COMPANY IN THE MIDWEST)
INDEPENDENT TRANSMISSION)
SYSTEM OPERATOR)

CASE NO. 2003-00266

**MOTION OF KENTUCKY UTILITIES COMPANY AND
LOUISVILLE GAS AND ELECTRIC COMPANY
TO COMPEL SUPPLEMENTAL RESPONSE TO
DECEMBER 7, 2004 DATA REQUEST NUMBER ONE
AND FOR AN EVIDENTIARY PRESUMPTION**

Kentucky Utilities Company (“KU”) and Louisville Gas and Electric Company (“LG&E”) (collectively, the “Companies”) hereby move the Public Service Commission (“Commission”) again to compel the Midwest Independent Transmission System Operator, Inc. (“MISO”) to comply with the Commission’s February 4, 2005 Order, which instructed MISO to supplement its response to the Companies’ 12/7/04 Data Request No. 1 by producing a résumé or curriculum vitae for Dr. McNamara and a list of his “writings, reports and speeches.” In the event MISO does not produce the required list by Thursday, February 17, 2005, the Companies also move the Commission to enter an Order creating an evidentiary presumption that the missing list would have contained evidence detrimental to MISO’s witness’s credibility. In support of this Motion, the Companies state as follows:

In response to the Companies’ January 25, 2005, Motion to Compel, on February 4, 2005, the Commission ordered:

Having considered this motion to compel, the Commission finds that each existing resume, curriculum vitae, or other similar document which lists or describes the education, background, or work experience of MISO witness

McNamara should be filed. In addition, any existing list of the writings, reports, or speeches prepared or presented by this witness should also be filed. In the event that no such list exists, MISO should prepare and file a list of the writings, reports, and speeches that were prepared or presented by this witness and are in his possession or under his control. A party cannot shield its expert witness from discovery by simply not maintaining a list of the witness's prior work.¹

In lieu of complying with the Commission's Order, on February 11, 2005, MISO filed with the Commission and distributed to the Companies and other intervenors Dr. McNamara's résumé and five sets of presentation slides from presentations Dr. McNamara has recently given on MISO's Day 2 markets, but MISO did not, and has yet to, provide the list of Dr. McNamara's writings, reports, and speeches the Commission ordered it to file on February 11, 2005.

There is no plausible excuse for MISO not to have obeyed the Commission's clearly worded Order. The Companies first requested this information in a data request dated December 7, 2004 (Data Request No. 1). MISO objected to the Data Request as unduly burdensome, an objection the Companies attempted to overcome with MISO through an e-mail exchange from January 14 - January 18, 2005, in which the Companies agreed only to request that MISO produce a résumé and list of Dr. McNamara's writings, reports and speeches, rather than also asking for copies of the writings, reports and speeches.² The Companies filed their Motion to Compel MISO to produce the requested list on January 25, 2005, which Motion the Commission granted on February 4, 2005, directing MISO to respond by February 11, 2005. In summary, more than two months have elapsed since the Companies first requested the list in their Data Request; a month has gone by since the Companies attempted to work out this dispute with MISO; and ten days ago the Commission ordered MISO to produce the list, yet MISO has yet to comply with the Companies' requests and the Commission's order.

¹ Emphasis added.

² This e-mail exchange is fully described in the Companies' January 25, 2005, Motion to Compel.

Although MISO indicated that it was filing presentations that relate to the Commission's investigation of MISO, Dr. McNamara recently made remarks and filed testimony that should have been included on that abbreviated list. For example, Dr. McNamara gave testimony before the Ohio Public Utility Commission on June 14, 2004, which MISO did not include in the handful of documents accompanying Dr. McNamara's résumé. Dr. McNamara also made remarks at a February 2004 Kentucky Industrial Utility Customers conference that members of the Commission discussed at the first round of hearings in this case.³ Certainly these, and no doubt many others, ought to have been included on the abbreviated "list" that MISO was ordered to produce.

There are serious consequences resulting from MISO's failure to comply with the Commission's Order, such as hampering the Companies' ability to prepare the best case it can for the Commission. During the initial round of hearings in this case, MISO took the opportunity to question the Companies' expert about the content of his past writings, and the Companies seek only to engage in the same line of questioning with MISO's witness, Dr. McNamara, in the upcoming round of hearings before the Commission. Without knowledge of what Dr. McNamara has written or said in his past writings, reports, testimonies and speeches, however, the Companies will be unable to pursue this legitimate line of questioning. If MISO continues to refuse to comply with the Commission's Order, the Companies will be able to review only a tiny fraction of Dr. McNamara's past writings and speeches, effectively doing precisely what the Commission said MISO may not do: "shield its expert witness from discovery by simply not maintaining a list of the witness's prior work."

³ III Tr. 91-94.

Behavior as egregious as MISO's in this matter is deserving of some type of sanction. For example, the Commission is authorized to impose fines upon persons who do not comply with the Commission's orders under KRS 278.990(1). Because of the ease with which MISO could and should have complied with the Commission's Order, and because each day that the Companies are deprived of the requested list makes it even more difficult for the Companies to prepare a case that will be maximally beneficial to the Commission, the Commission could consider imposing a civil fine on MISO beginning on February 12, 2005, and continuing until MISO complies with the Commission's Order by producing the requested list.

In lieu of fines -- part of which the Companies and their customers ultimately would have to pay through MISO's fees -- the Companies move the Commission simply to order MISO to comply with the Commission's February 4, 2005, Order with all haste, and in no event later than Thursday, February 17, 2005. If, by Thursday, February 17, 2005, MISO still has not complied with the Commission's Order by producing the requested list of Dr. McNamara's writings, reports and speeches, the Companies move the Commission to establish a rebuttable evidentiary presumption that the requested list would have contained documents that would contradict Dr. McNamara's testimony for MISO. Creating such a presumption or inference is the common and appropriate remedy for withholding or spoliation of evidence in civil and criminal courts in Kentucky, both state and federal, often through a missing evidence instruction.⁴ In cases where

⁴ The general rule regarding spoliation of evidence is that the intentional destruction of relevant evidence gives rise to a presumption or inference that the destroyed or spoiled evidence was detrimental to the party who so despoiled the evidence. 29 Am.Jur.2d § 244. In Kentucky, spoliation is remedied with "missing evidence" jury instructions and sanctions. Monsanto Co. v. Reed, Ky., 950 S.W.2d 811 (1997). For example, in Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988), in which a prosecutor intentionally erased the taped statements of several witnesses, the court reversed the defendant's conviction and ordered a re-trial, with an order to give the jury a missing evidence instruction that mentioned the prosecutor's misconduct. Id. at 537, 539-40.

In Welsh v. US, 844 F.2d 1239 (6th Cir. 1988), the Sixth Circuit Court of Appeals ultimately decided that the proper sanction for the defendant's pre-litigation, negligent spoliation of crucial medical evidence was to create a rebuttable presumption of causation. Id. at 1249. The court viewed the rebuttable presumption as the best approach because it

the offending party has not spoiled evidence intentionally, Kentucky courts have held it appropriate to issue missing evidence instructions, or to limit, or even prohibit the admission of, the offending party's evidence in order to eliminate the prejudice resulting from the unavailability of the missing evidence.⁵ It is entirely appropriate, given MISO's refusal to comply with the Commission's Order and the prejudice MISO's failure to comply has caused and is causing the Companies, for the Commission to establish such a rebuttable evidentiary presumption if MISO does not comply with the Commission's Order by producing the requested list by Thursday, February 17, 2005.

WHEREFORE, the Companies respectfully move the Commission to compel MISO to comply with the Commission's February 4, 2005, Order by producing with all haste, and in no event later than February 17, 2005, a list all of Dr. McNamara's writings, speeches, presentations, and testimonies over the last ten years. In the event MISO does not produce the requested list by February 17, 2005, the Companies respectfully move the Commission to order the establishing a rebuttable evidentiary presumption that the requested list would have contained documents that would contradict Dr. McNamara's testimony for MISO.

did not impose strict liability on a merely negligent party, but still accorded with federal and Kentucky evidentiary principles. Id.

The Sixth Circuit again construed Kentucky law to authorize negative presumptions against pre litigation spoliators in Beil v. Lakewood Engineering and Mfg. Co., 15 F.3d 546 (6th Cir. 1994). In Beil, the plaintiff subrogee, State Auto Insurance, sued the manufacturer of a heater that allegedly caused a home fire. Id. at 548. Eight months prior to State Auto's filing the suit, a fire inspector hired by State Auto removed and discarded the heater, apparently unaware of the possibility of future litigation. Id. Citing Welsh, the court stated that it was certainly within the court's discretion to grant the defendant summary judgment on remand should it find "that the plaintiff is unable, due to the unavailability of the evidence and the negative inferences, to offer evidence sufficient to support its case." Id. at 553 n.1.

⁵ Tinsley v. Jackson, Ky., 771 S.W.2d 331, 332 (1989).

Dated: February 15, 2005

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Compel Production was served via U.S. mail, first-class, postage prepaid, this 15th day of February 2005, upon the following persons:

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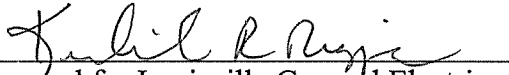
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