

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 Company in the
Midwest Independent Transmission
System Operator, Inc.

Case No. 2003-00266

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**Midwest ISO's Response to
the LG&E/KU Motion to Compel
and for an Evidentiary Presumption**

FEB 18 2005

PUBLIC SERVICE
COMMISSION

The Midwest Independent System Operator, Inc. ("the Midwest ISO") hereby responds to the Motion to Compel and for an Evidentiary Presumption, filed on behalf of Louisville Gas and Electric Company and Kentucky Utilities ("LG&E/KU" or "the Companies") on February 16, 2005:

1. The Companies make the unsupportable assertion that the Midwest ISO withheld from its supplemental response to LG&E/KU 12/7/04 Data Request No. 1, filed on February 11, 2005, information relating to testimony that Dr. McNamara gave before the Ohio Public Utilities Commission in June 2004 and a presentation he gave at the KIUC Energy conference held in February 2004. Motion at p. 3. This assertion could not be further from the truth.

a. Dr. McNamara was subpoenaed to testify, in person, at an Ohio PUC hearing held on June 14, 2004. He did not prefile testimony, and this was not a proceeding to which the Midwest ISO was a party. Moreover, Dr. McNamara did not testify at the hearing about LG&E/KU's membership in the Midwest ISO or the EMT's possible effect on LG&E/KU — the subject matter of this investigation and of the Companies' data request. Neither he nor the Midwest ISO has a copy of the transcript of this hearing, and there are no other documents relating to Dr. McNamara's testimony

to provide to LG&E/KU; however, this was a public proceeding, and the transcript should be obtainable through the Ohio PUC.

b. The Midwest ISO is particularly mystified by LG&E/KU counsel's assertion that it failed to disclose Dr. McNamara's presentation at a conference for the Kentucky Industrial Utility Customers in February 2004. Listed in the text response, and attached thereto, are slides from the presentation given by Dr. McNamara on February 19, 2004 during the KIUC Energy Conference. *See* Midwest ISO Supplemental Response to LG&E/KU 12/07/04 Supplemental Data Request No. 1, Attachment No. 2. The first slide clearly gives the title, date, and location of this presentation. Even the most casual review of the Midwest ISO's supplemental response would have revealed this.

2. LG&E/KU's vitriolic assertions to the contrary, the Midwest ISO has complied with the 2/4/05 Order. Actually, the Midwest ISO's response went beyond the letter of that Order:

a. The Order required the Midwest ISO to provide any "existing resume, curriculum vitae, or other similar document" for Dr. McNamara. There was no such existing document; however, the four-page resume attached to the Supplemental Response was prepared and provided.

b. The Order also required that any existing list be provided, and if no such list existed for one to be prepared and provided, to respond to LG&E/KU's request for identification of "each and every" writing, report, or presentation "which relates to the subject matter of this investigation." LG&E/KU 12/07/04 Data Request No. 1(b). No such list existed, but the Midwest ISO identified the relevant documents, listed them, and also provided printouts of the documents and sent the slide presentations in their native electronic format to LG&E/KU counsel.

c. Neither the Midwest ISO nor Dr. McNamara maintains a list of his writings, reports, or presentations while he worked for AEP or his other former employers. It is unlikely that these would have related either to LG&E/KU membership in the Midwest ISO or the operation or effect on LG&E/KU of the EMT recently approved by FERC. However, any such pronouncements presented those companies' positions, and the writings thereof represent the intellectual property of those companies. Dr. McNamara does not have in his possession or have access to any of these materials, and he has neither a list of them nor the ability to list them from memory. Such lists and materials might be compelled through non-party subpoenas to the relevant employers, but not through data requests to the Midwest ISO.

3. It seems an obvious point, but one the Companies appear to have lost sight of: the Midwest ISO did not retain or specially employ Dr. McNamara for this investigation or to provide expert opinion testimony in the investigation.

a. Dr. McNamara's testimony before this Commission is as an officer of the Midwest ISO and presents the position of the Midwest ISO on the issues under investigation. The Midwest ISO designated Dr. McNamara to present that position because of his economics expertise and his first-hand knowledge of the development and implementation of the Day 2 Markets as set out in the Midwest ISO's Energy Markets Tariff.

b. The Companies complain that the Midwest ISO has cross-examined Dr. Morey "about the content of his past writings" and that without "knowledge of what Dr. McNamara has written or said in his past ..., the Companies will be unable to pursue this legitimate line of questioning." Motion at p. 3. Dr. Morey was retained by LG&E/KU for the specified purpose of conducting a study about Midwest ISO membership (and alternatives thereto) and to provide testimony about that study and

its results. He is a hired, outside expert. His testimony has been presented not as the official LG&E/KU position, but rather as his own professional opinion that served as an input to the formation of the LG&E/KU position.

4. The Companies then suggest that disproportionate, intemperate sanctions be imposed for what it claims is an inadequate response to its supplemental data request. It is outrageous to suggest that the Midwest ISO be sanctioned for complying with the Commission's 2/4/05 order by preparing and producing information that responds to the Companies' data request. Even if there had been any non-compliance, sanctions are inappropriate.

a. The Companies' first suggestion is that the Commission employ KRS 278.990(1), which authorizes civil and criminal penalties for willful statutory or regulatory violations or willful failure "to obey any order of the commission from which all rights of appeal have been exhausted." The Midwest ISO's right of appeal from the interlocutory 2/4/05 Order has not yet begun,¹ let alone have been exhausted.

b. What LG&E/KU is really after, however, is an ill-considered "rebuttable evidentiary presumption that the requested list would have contained documents that would contradict Dr. McNamara's testimony for MISO." Motion at p. 4. LG&E/KU appears to have borrowed this idea from Kentucky case law allowing "missing evidence" instructions, mostly in criminal cases, where there has been spoliation² of evidence. *See, e.g., Sanborn v. Commonwealth*, 754 S.W.2d 534, 540 (Ky.

¹ Although the Midwest ISO's compliance with the 2/4/05 Order may moot the straightforward objection it made in December 2004 to LG&E/KU's 12/7/04 Data Request No. 1, a finding that it had not complied would eviscerate any such impediment to an eventual appeal.

² Spoliation is defined as "The intentional destruction of evidence and when it is established, fact finder may draw inference that evidence destroyed was unfavorable to party responsible for its spoliation." *Black's Law Dictionary* (6th Ed.), p. 1401.

1988) (Kentucky Supreme Court established missing evidence instruction).³ The Companies' sole basis for its request is the allegation that the Midwest ISO has not provided a complete list of Dr. McNamara's writings, reports, and speeches. The Companies have not (and cannot) allege that the Midwest ISO has intentionally destroyed any evidence in this case.

c. Furthermore, the Companies seek an adverse presumption against Dr. McNamara's testimony as a whole on the basis of a claimed failure relating to "expert witness" discovery. This makes no sense, since much of Dr. McNamara's testimony is not opinion at all, but reports facts and Midwest ISO positions.⁴ LG&E/KU's failure to suggest what, specifically, in Dr. McNamara's testimony could be presumed to be "contradicted," or that the presumption is an appropriate remedy for any impediment to this investigation. *See, e.g., Coca-Cola Bottling Co. v. The Coca-Cola Co.*, 110 F.R.D. 363, 369 (D. Del. 1986) (limiting sanction against Coca-Cola for willfully refusing to disclose its syrup formula to irrebuttable inferences on sub-issues thereby foreclosed to its adversaries).

³ In *Sanborn*, 950 S.W.2d at 539, the "missing evidence" instruction was held to be justified because, during the pendency of the criminal defendant's pre-trial motion to obtain witness statements, the prosecutor intentionally destroyed videotapes of witnesses — three of whom testified against the defendant at trial.

⁴ *E.g.*, "On August 6, 2004, [FERC] conditionally accepted, subject to the fulfillment of certain conditions, the Midwest ISO's filing of an [EMT] that contains all of the element of the Midwest ISO's new energy markets" (9/29/04 Supplemental Direct p. 3 *ll.* 18-21); "Uniform pricing was used in the original PJM tariff (from April 1997 to April 1998, when it was replaced by LMP)" (*id.*, p. 20 *ll.* 22-23); "LG&E/KU is subject to transmission thermal, voltage and stability limits, [and] regional loop flows over which it has little or no control" (11/19/04 Rebuttal, p. 16 *ll.* 18-19); an explanation of the operation of settlement accounting under the EMT (*id.*, p. 23 *ll.* 2-8); "LG&E/KU's transmission system is not contiguous with SPP's systems; it is 'two wheels away'" (*id.*, p. 53 *ll.* 14-15); a description of FERC's 9/16/04 GFA carve-out order (*id.*, p. 63 *ll.* 7-12); defining "hurdle rate" as used in the Midwest ISO model (*id.*, p. 82 *ll.* 22-24).

d. An evidentiary presumption that something LG&E/KU contends should have been on the list would contradict something in Dr. McNamara's testimony is not made more sensible by calling it a "rebuttable" presumption. The Companies are adamant that they have the last word in these proceedings, and object to the introduction of any "live" rebuttal testimony. Rebutting the presumed contradiction could not be accomplished by extrinsic evidence corroborating Dr. McNamara's testimony, and there is a logical problem with attempting to prove that nothing that could be taken to be contradictory has ever been said or written.

5. The Commission is not bound by the technical rules of evidence, KRS 278.310, and has full authority and competence to weigh the evidence provided to it in the course of this investigation and otherwise consider the positions taken by the various parties. LG&E/KU's notion of a "rebuttable evidentiary presumption" adds nothing to the balance.

WHEREFORE, the Midwest ISO respectfully requests that the Commission deny LG&E/KU's motion.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this the 18th day of February, 2005, the original and ten (10) copies of the foregoing, were hand-delivered to the Commission for filing. A copy of the foregoing has also been sent by first-class U.S. mail to:

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