

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION FOR ADJUSTMENT OF ELECTRIC) CASE NO.
RATES OF KENTUCKY POWER COMPANY) 91-066

O R D E R

This matter coming on for hearing upon motion of the Attorney General of the Commonwealth of Kentucky ("Attorney General") filed June 7, 1991 to compel Kentucky Power Company ("Kentucky Power") to respond to certain of the Attorney General's data requests propounded to Kentucky Power, both parties being represented by counsel and the hearing officer having made findings of fact and conclusions of law and orders which were adopted and confirmed by the Public Service Commission of Kentucky ("Commission") by Order entered June 26, 1991, and in which Order the Commission deferred ruling upon Items 50, 51, and 228 and a portion of Item 172, pending submission of additional information by Kentucky Power, and it appearing to this Commission as follows:

Items 50 and 51 of the Attorney General's data request asks Kentucky Power to produce the two most recent management letters and recommendations from the company's independent auditors to American Electric Power Corporation, Inc. ("AEP") and certain specified sections of the auditors workpapers for the 1990 financial statements audit. In its response, Kentucky Power stated that the management comment letters contained no specific

comments pertaining to Kentucky Power and that the workpapers were not in its possession. In addition, Kentucky Power maintains that the information is protected from disclosure by the statutory accountant-client privilege.

KRS 325.440 provides that an accountant may not disclose any confidential information pertaining to his client obtained in the course of performing professional service without the client's consent. The Attorney General argues that this privilege only prohibits the accountant from revealing such information but does not protect the client from compulsion to disclose relevant information.

The accountant-client privilege is similar to the privilege that exists between attorneys and their clients. That privilege, found in KRS 421.210(4), provides that "no attorney shall testify concerning a communication made to him, in his professional capacity, by his client, or his advice thereon without his client's consent. . . ." While the statutory language refers only to disclosures by attorneys, it has been established that the privilege was not enacted for their benefit but for the benefit of their clients. Mahaffey v. McMahon, Ky., 630 S.W.2d 68, 69 (1982). Thus, in Matter of Fischel, 557 F.2d 209, 211 (C.A. 9, 1977) the Court stated:

Of necessity the privilege is not limited to the actual communication by the client to the attorney. Ordinarily the compelled disclosure of an attorney's communication or advice to the client will effectively reveal the substance of the client's confidential communication to the attorney. To prevent this result, the privilege extends both to the substance of the client's communication as well as the attorney's advice in response thereto. (emphasis added).

Given the similarity of KRS 325.440 establishing the accountant-client privilege to KRS 421.210(4) establishing the attorney-client privilege, just as attorney's communication to their clients are privileged so, too, are accountants' communications, such as management letters, to their clients privileged. As privileged communications, management letters may not be compelled to be produced.

Whether the accountant's workpapers sought by the Attorney General are privileged communications is not as clear. However, that issue need not be resolved because other statutory provisions put the workpapers beyond the discovery sought by the Attorney General. Under the provisions of KRS 325.420 workpapers are, and remain, the property of the accountant who prepared them. Therefore, Kentucky Power cannot be compelled to produce workpapers not in its possession, nor be compelled to require its accountant to produce such papers since they are the property of the accountant.

For these reasons, Kentucky Power should not be compelled to produce the information requested in Items 50 and 51 of the Attorney General's data request.

Item 228 of the Attorney General's data requests asks Kentucky Power to provide the following:

Provide a machine-readable copy of the computer program used to generate the cost of service study filed in these proceedings. If available or possible, provide such machine-readable copy in a format compatible with a PC (personal computer). Additionally, provide a paper copy of computer instructions which constitute same. Provide a data base for same on machine-readable format.

Kentucky power objected to the request on the grounds that the information was proprietary and that the information was the work product of the company. The Attorney General now seeks to compel production of the information.

The cost-of-service study referred to in the data request was prepared by Mark S. Berndt, a rate analyst employed by AEP, an affiliate of Kentucky Power. The study was filed as part of Mr. Berndt's testimony and it is designed to allocate the various revenues and expenses of the utility to the customer classes which are responsible for them. In this case, the customers of the utility were divided into nine separate classifications. In his testimony, Mr. Berndt identified the source of the information used in the study and described the methodology used to make the allocations. His testimony, however, does not include the actual calculations that were made with the data to produce the allocations shown in the study. The information requested by the Attorney General in Item 228 would provide those calculations.

The actual calculations to produce the study were made by computer in a program purchased by Kentucky Power from another company identified as Ebasco. Item 228 requests both the computer program, preferably on a disk compatible with a PC, and a printout copy of the program. The Attorney General contends that without this information, it cannot verify that the calculations programmed into the computer produced results consistent with the methodology described by Mr. Berndt. In addition, the Attorney General wants the program so that it can run its own cost-of-

service study with data which it believes is more appropriate than the data used by Kentucky Power.

The information sought to be produced is relevant to the proceeding. As an intervenor on behalf of the utility's customers, the Attorney General is entitled to know the basis upon which the allocations produced in the study were made in order to evaluate their accuracy. Commission regulations do not permit a party to refuse discovery of relevant information because it is proprietary. On the contrary, 807 KAR 5:001, Section 7(4)(a) and (c), require utilities to produce information claimed to be proprietary by filing it with the Commission and, at the same time, to petition the Commission to protect the information from public disclosure. Therefore, Kentucky Power cannot refuse to produce the information on the grounds that it is proprietary.

Nor can Kentucky Power rely upon the work product exemption for its refusal to produce the information. Work product information generally exempt from discovery refers to information prepared in anticipation of litigation. The cost-of-service study was made as a necessary part of Kentucky Power's proposed tariff and as such the formulas and equations used to calculate the study are not work product information within the meaning of discovery.

The purpose of discovery is to require each party to reveal the evidence upon which it relies in support of its position and thereby avoid surprise. Discovery is not intended to be used as a means by which one party may be compelled to produce evidence which has previously been made a part of the record, or which merely duplicates in a different form evidence that is in the

record. The question thus presented is whether there is sufficient information in the record to allow the Attorney General to make an analysis and evaluation of the cost-of-service study without the actual equations and formulas used to produce the results shown in the study. The Attorney General is only entitled to the actual equations and formulas if there is not sufficient evidence in the record for an analysis to be made without them.

The testimony of Mr. Berndt, in identifying the data used in the study and in describing the methodology employed, provides sufficient information upon which the Attorney General can analyze the results to determine their accuracy. While it would undoubtedly be easier for the Attorney General to make his own analysis with the equations formulated by Ebasco for Kentucky Power, those equations are not sacrosanct and the Attorney General can verify the accuracy of the results by formulating his own equations consistent with the methodology described by Mr. Berndt. Therefore, the equations and formulas used to make the calculations are not necessary to analyze the study and the motion to compel should be denied. Furthermore, if the Attorney General does not wish to formulate his own program, there is nothing to prevent him from purchasing the program used by Kentucky Power from Ebasco.

Additionally, Kentucky Power should not be required to produce through the discovery process a computer program so that an intervening party may use the process to prepare its case in opposition. The purpose of discovery being to avoid surprise, discovery should not be used as a method by which one party is

compelled to provide the means by which an opposing party can produce evidence to present its case. Therefore, Kentucky Power should not be compelled to provide its computer program in order that the Attorney General can use it to produce his own cost-of-service study.

For these reasons the motion to compel production of the information requested in Item 228 should be denied.

Item 172 requested copies of all expense reports which exceeded \$250 submitted by employees of Kentucky Power and by employees of AEP which were allocated to Kentucky Power. The Commission's Order of June 26, 1991 directed Kentucky Power to produce the information with respect to Kentucky Power employees using the same format used to furnish the information furnished in response to Item 16 but deferred ruling on the request with respect to employees of AEP.

To the extent that expenses of AEP employees are allocated to Kentucky Power there is no meaningful distinction between such expenses and expenses of Kentucky Power employees. Therefore, Kentucky Power should provide the AEP information in the same manner that it provides the same information with respect to its employees. The Attorney General should further have the right to inspect the supporting vouchers of AEP to verify any or all of the expenditures reported by Kentucky Power.

This Commission being otherwise sufficiently advised,

IT IS ORDERED that:

1. The motion to compel with respect to Items 50, 51, and 228 is denied.

2. With respect to the remaining information requested in Item 172, within 10 days from the date of this Order, the information shall be furnished concerning AEP employees in the same manner as Kentucky Power was directed to furnish the information concerning Kentucky Power employees. The Attorney General shall be allowed to inspect the supporting vouchers of AEP to verify any or all expenditures reported.

Done at Frankfort, Kentucky, this 11th day of July, 1991.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman

Commissioner

ATTEST:


Executive Director