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PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN ADJUSTMENT OF THE GAS AND ELECTRIC RATES, TERMS, AND CONDITIONS OF LOUISVILLE GAS AND ELECTRIC COMPANY	)))	**CASE NO: 2003-00433**

REVISED REBUTTAL OF THE ATTORNEY GENERAL TO LOUISVILLE GAS AND ELECTRIC COMPANY'S RESPONSE TO MOTION TO COMPEL

The original rebuttal filed by the Attorney General mistakenly utilized the case heading for the Kentucky Utilities Rate case, Case No. 2003-00434, meaning that document was filed of record in the wrong action. Therefore, the AG files this revised rebuttal utilizing the proper case style of the Louisville Gas and Electric case, Case No. 2003-00433.

ARGUMENT:

Louisville Gas and Electric Company is refusing to answer two data requests asked by the Attorney General based on its assertion that the document which identified the issue about which the requests are made is protected by attorney-client privilege and was inadvertently disclosed. Therefore, in what appears to be an argument similar to the "fruit of the poison tree" suppression theory in criminal law, LG&E argues that the document must be returned and any questions to which it gave rise must be left unanswered.

In In re Grand Jury Proceedings, 78 F3d 251, 254 (6th Cir. 1996), cited by LG&E in its memorandum in support of the suppression and return of the document and the cessation of any

further mention of the issue it raises, the Court discussed the attorney-client privilege. That Court points out that the purpose of the attorney-client privilege is to promote free and open communication between clients and their lawyers and goes on to say that because the privilege serves to abrogate discovery, it is narrowly construed. Disclosure of documents or the subject matter protected by the attorney-client privilege has long been held to constitute a waiver of the privilege in some jurisdictions because the essence of the privilege is confidentiality, and once that has been breached, even if inadvertently or unintentionally, the confidential nature of the matter is no more and neither can nor should be afforded further protection. United States v. Kelsey-Hayes Wheel Co., et al, 15 F.RD. 461, 464-65 (USDC Michigan, 1954)

In United States v. Kelsey-Hayes Wheel Co. the Court discussed whether the attorney-client privilege could be claimed with reference to privileged documents produced among a large volume of documents copied and supplied during discovery. That Court pointed out that attorney-client privilege does not extend to every communication between attorneys and clients, but only to those for which there is an intention of confidentiality. It goes on to say that the privilege is neither absolute nor eternal because once the "cloak of confidence" has been lifted by subsequent events, with or without the concurrence of the party claiming the privilege, the communication is no longer confidential so the privilege no longer operates. The Court notes,

> Since the privilege exists in derogation of the overriding interest in full disclosure of all competent evidence, when the policy underlying the rule can no longer be served, it would amount to no more than mechanical obedience to a formula to continue to recognize it. See, page 465.

United States v. Kelsey-Hayes Wheel Co. follows the so-called strict rule under which inadvertent disclosures serve to waive the attorney-client privilege regardless of whether the disclosure was made knowingly and voluntarily or inadvertently, i.e.; storage and copying

policies that allowed the disclosure, interview discussions referencing the subject matter of a communication, allowing oneself to be overheard, etc.

The ABA and KBA ethics opinions, cited by LG&E, follow the so-called liberal rule under which the obligation to maintain the attorney-client privilege is moved from the party with the privilege to the recipient of the document if the document was inadvertently supplied and recognizes that with the increase in volume of discovery requested and supplied, the likelihood of inadvertent disclosure increases.

It is important that the ethics opinions cited do not reference the sort of general public disclosure that took place here where the contested document was placed into the public record of the PSC at the same time some 30 or so copies of it were distributed and disseminated among various people at various locations. Instead, those opinions reference a disclosure limited to one or two others, and does not include placing the document at issue in a public record where anyone can view it or ask for its production under an open records request. That distinction is critical. Those opinions are not relevant in the current situation where the documents were placed in the public record and have remained there to this date, subject to exactly the same potential for dissemination and review as any other item or other document in that record.

Furthermore, for disclosures made in the course of discovery there is yet a third approach, the so-called ad hoc or balancing approach, which considers:

> (1) the extent to which reasonable precautions were take to prevent disclosure of privileged information; (2) the number of inadvertent disclosures made in relation to the total number of documents produced; (3) the extent to which the disclosure, albeit inadvertent, has, nevertheless, caused such a lack of confidentiality that no meaningful confidentiality can be restored; (4) the extent to which the disclosing party has sought remedial measure in a timely fashion; and (5) considerations of fairness to both parties under the circumstances. Floyd v Coors Brewing Company, 952 P 2d 797, 809 (Colorado 1997).

Again, the disclosure in the case at bar was not just the provision of a document to an opposing party, as is usually the case in discovery and as was the case in those instances where the ad hoc approach is discussed and applied. The document at issue was made a part of a public record and was and is still subject to general public review and copying so long as it remains a part of that record. Thus, there is some question as to whether it is appropriate to apply any test developed in the more limited context of standard discovery where no ability for further dissemination of the material in question could occur while the return or continued use of that information is contested. In fact, the issue in all of the cases and opinions cited by LG&E is whether the contested item can become a part of the public record once it has been disclosed to an opposing party. Here it is already a part of the public record.

Regardless, even under the balancing test, the public interest dictates that LG&E be required to answer the Attorney General's Supplemental Data Requests. Under the first prong of the analysis, though the Company asserts that it made a serious effort to prevent the disclosure of privileged information, the document shows on its face that it was widely disseminated within the company among employees and consultants in addition to being sent to counsel. The Company is well practiced in protecting confidential and proprietary information in the context of proceedings before the Commission, so it is not clear why this document fell outside of that practice. Its wide dissemination to those in the company militates against the assertion that all due precautions were taken to prevent the breach of confidentiality that attended production of the document.

Under the second prong of the analysis, at least so far as any one has noticed, only the one inadvertent disclosure was made in very voluminous document production. The AG

concedes that this militates toward granting LG&E's request to remove the document and prevent any further reference to it or the fruit of its poisonous tree.

Under the third prong of the analysis, the nature and extent of the disclosure among those who are parties to the case and most importantly, its inclusion in the public record, clearly means that no meaningful confidentiality can be restored. It has been a part of the public domain for weeks. The confidentiality originally intended for this document has been so fully and completely compromised that the privilege for this document cannot be restored and should not be restored. Any potential privilege that might have protected the original intent of confidentiality is gone and should not be restored.

Under the final prong of the analysis, while the Company sought to recover the document from the parties in a relatively timely fashion,[1] no correlative effort to remove the document from the public record with its general open access to any and all was made until the issue was forced by the Attorney General and the Commission. This strongly militates against restoring privilege.

Finally, fairness to the parties dictates that privilege not be restored and that the Company be compelled to respond to the data requests. Rate setting is a quasi-legislative function that is designed to promote the public interest. The Company should be required to respond to the data requests that arose because of the issue raised in the document revealed in this quasi-legislative context. The public interest in fair and accurate rates demands that the Company not be allowed

[1] LG&E points out that many of the parties have returned the document pursuant to their request and assumes that by doing so the parties have agreed that its privilege continues. The Company uses this as a reason to restore the privilege. Note that the parties who have returned the document are not those who can or do sponsor witnesses about the issue raised. The issue is primarily pertinent to the residential class and those with varying load factor. Those representatives who have surrendered the document represent high load factor clients, customers who negotiate special rates, low income representatives who are usually without the capability to sponsor witnesses to the issue raised, a governmental customer and the energy department which is interested in demand management and rate design rather than in rate setting. Given the document's lack of relevance for them, compliance with the request to return the document does not mean that they agree that the privilege should be continued.

to play a "now you see it now you don't" shell game with information relevant to that legislative effort.

The "fruit of the poisonous tree" doctrine is designed to punish overly zealous police who have trampled the constitutional rights of the accused. It is a serious doctrine whose acknowledged consequence is that justice is compromised in order to protect constitutionally guaranteed individual freedoms. To accord the same sort of treatment here is both absurd and unwarranted.

The Company should be allowed to take what measures it deems appropriate to garner removal of the document from the public domain by seeking confidential protection for it under the governing regulation, but it should also be required to respond to the Attorney General's data requests and the Attorney General should be free to make such use of the document and the responses to the data requests as the case requires.

Respectfully submitted,

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Certificate of Service

I hereby certify that service was made on the parties of record this the 26th day of March, 2004 by mailing a true copy of the foregoing to:

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