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March 17, 2004

Thomas M. Dorman
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40601

RE: ***Application of Louisville Gas and Electric Company for an Adjustment of the Gas and Electric Rates, Terms and Conditions***
Case No. 2003-00433

Dear Mr. Dorman:

Enclosed please find and accept for filing the original and ten copies of Louisville Gas and Electric Company's Motion to Withdraw Document and Response to Attorney General's Motion to Compel 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,

Allyson K. Sturgeon

AKS/ec
Enclosures
cc: Parties of Record (w/ encl.)
Dorothy E. O'Brien (w/ encl.)

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

MOTION OF LOUISVILLE GAS AND ELECTRIC COMPANY TO WITHDRAW DOCUMENT AND RESPONSE TO ATTORNEY GENERAL'S MOTION TO COMPEL

Louisville Gas and Electric Company ("LG&E"), by counsel, moves the Kentucky Public Service Commission ("Commission") to withdraw from the public record a document that was inadvertently produced by LG&E in its data responses, and responds and objects to the Motion to Compel of the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention ("Attorney General"), on the grounds set forth below:

I. The Commission should grant LG&E's Motion to Withdraw an inadvertently produced document from the public record.

On the evening of March 1, 2004, LG&E discovered it had inadvertently produced a privileged document at page 428 of 441 in the attachment to its response to the request for information of the Kentucky Industrial Utility Customers, Inc. ("KIUC"), Item No. 1-78. LG&E discovered the document in connection with the review of the Attorney General's Supplemental Request for Information to LG&E, Item Nos. 49 and 50. Those two data requests sought supplemental information concerning the document inadvertently produced by LG&E in response to KIUC Data Request Item 1-78 to LG&E.

KIUC Item 1-78 requested all workpapers underlying LG&E's pro forma adjustments reflected in the schedules comprising Rives Exhibit 1. One of those schedules, Reference

Schedule 1.35, referred to the adjustment to revenues for temperature normalization for gas operations. In response to KIUC Item 1-78, LG&E produced a workpaper related to this adjustment. However, LG&E also inadvertently produced a copy of an e-mail to its counsel that was marked "Confidential" and that related to a possible adjustment for temperature normalization for electric operations that was not ultimately proposed in this rate proceeding.

It is clear from the face of this e-mail that it is not responsive to the request for information in Item No. KIUC 1-78, since it does not relate to any adjustment proposed in this proceeding. Likewise, it is clear from the face of the e-mail that it is privileged communication, since it was marked "Confidential" and was addressed to counsel. See Kentucky Rule of Evidence 503.

On March 2, 2004, less than twenty-four hours after the inadvertent disclosure was discovered, counsel for LG&E notified Commission Staff counsel and counsel for the intervenors, in writing, of their professional obligation, pursuant to KBA Ethics Opinion No. E-347, to return the inadvertently disclosed document, and their duty to refrain from even examining the document. KBA Ethics Opinion No. E-374 provides:

> The Committee and Board are in agreement with the view expressed in ABA Formal Opinion 92-368 (1992) that when a lawyer receives materials under circumstances in which it is clear that they were not intended for the receiving lawyer, the lawyer should refrain from examining the materials, notify the sender, and abide by the sender's instructions regarding the disposition of the materials.

See also ABA Formal Opinion 92-368 (1992) (noting the importance of confidentiality between attorney and client and recognizing the duty to return inadvertently disclosed documents which are privileged or otherwise, on their face, not intended for the receiving lawyer).

In response to the March 2, 2004 letter from counsel for LG&E, counsel for KIUC (the party whose data request was being responded to when the inadvertent disclosure was made), the Department of the Army, Metro Human Needs Alliance, People Organized and Working for

Energy Reform, Kentucky Division of Energy, and Kroger have all recognized the inadvertent nature of this disclosure, and each has voluntarily returned the document in question to LG&E. On March 10, 2004, however, counsel for the Attorney General and Commission Staff both advised in writing that LG&E's letter of March 2, 2004 was insufficient and that a motion to remove the document from the public record should be made as a procedural matter.

LG&E moves the Commission to withdraw the document at issue from the public record on the grounds that it was inadvertently produced, is a document which is protected from disclosure by the attorney-client privilege, and the protection has not been knowingly and intentionally waived by LG&E. The document is not, on its face, responsive to the KIUC's request for the workpapers underlying LG&E's pro forma adjustments reflected in the schedules comprising Rives Exhibit 1. It has nothing to do with the proposed adjustments to LG&E's revenue requirement. Because the document at issue was not responsive to the request from the KIUC, and is protected by the attorney-client privilege, the document should be withdrawn from this proceeding. There is nothing contained in the Open Records Act, or the statutes or regulations governing practice before this Commission, which precludes the Commission from withdrawing from the public record a privileged, non-responsive document which was inadvertently produced as part of voluminous discovery. Therefore, the Commission should grant LG&E's motion and order that the document at issue be removed from the public record and not be used in this proceeding.

II. The Attorney General's Motion to Compel should be denied.

On March 1, 2004, the Attorney General filed its Supplemental Requests for Information from LG&E. Specifically, in Item Nos. 49 and 50, the Attorney General asked follow-up questions to the electric weather normalization information contained on page 428 of 441 of the response to KIUC-1-78. LG&E objected to the request on the grounds that the information

requested directly flowed from the document in question, which was inadvertently produced and was privileged. LG&E further objected to the requests because the information requested was protected from disclosure by the work-product privilege.

The Attorney General has now moved the Commission to compel LG&E to respond to its request for additional information related to the inadvertently produced privileged document. LG&E objects on the grounds that the information sought is protected by the attorney-client privilege and the inadvertent production of the document did not waive the privilege. Waiver of the attorney-client privilege requires a "voluntary disclosure of private communications by an individual or corporation to third parties." See In re Grand Jury Proceedings, 78 F.3d 251, 254 (6th Cir. 1996) (emphasis added). See also Howard v. Motorists Mutual Ins. Co., Ky., 955 S.W.2d 525 (1997) (holding that there must be a "voluntary and intentional surrender or relinquishment of a known right" in order for there to be a waiver); Comments to KBA E-374 (noting that a waiver requires a "voluntary and intentional surrender" of a privilege).

In this case, the disclosure of the privileged document was inadvertent and unintentional. While the document at issue was paginated with a label identifying the question to which it was responding and the witness responsible therefore, it was only so marked because it had been mistakenly included in the workpapers to be paginated and reproduced. The pagination process was done electronically, not by hand. Once LG&E was made aware of the inadvertent disclosure, LG&E moved promptly to protect the document.

The Florida Public Service Commission recently considered a similar issue and found that "[a]n inadvertent disclosure of a privileged document does not constitute a waiver of the privilege when several factors are weighed." *In re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor*, Docket No. 03001-EI, 2003 WL

22765546 (Fla. PSC, 2003) (a copy of which is attached). The Florida Commission identified a five-part test to assist in determining whether the disclosure was inadvertent:

> (1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a party of its error.

Id. (citing Abamar Housing and Development, Inc. v. Lisa Daly Lady Décor, Inc., 698 So.2d 276, 279 (Fla. 3d DCA, 1997), *rev. denied* 704 So.2d 520 (Fla. 1997). Here, LG&E inadvertently produced the document in question in the course of responding to over 1,900 data requests (including subparts) over a two-week period of time. The application of this five-point test to the record in this proceeding demonstrates LG&E is entitled to the relief it is requesting:

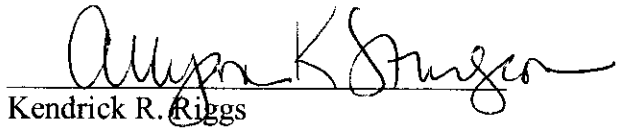
> (1) LG&E did have in place a procedure for review of its disclosures to make sure the production was responsive and intentional. However, due to the press of time and the sheer volume of the documents involved, an inadvertent disclosure still occurred.
>
> (2) Out of the nearly two thousand responses (which, together with the thousands of pages of supporting documents, were over two feet thick) produced by LG&E, only one inadvertent disclosure – consisting of a single page – was made.
>
> (3) The disclosure was limited in size – it was distributed only to the parties of record and their designated representatives – and in scope – it did not include any underlying support or other privileged information.
>
> (4) Within less than one day after discovering the inadvertent disclosure, counsel for LG&E contacted counsel for each of the intervenors and the Commission Staff to advise of the problem.
>
> (5) Justice would be served by removing the document at issue from the public record, because the attorney-client privilege would be preserved, and because parties would not be punished for inadvertent disclosures made as part of an effort to fully and timely respond to voluminous discovery requests within the procedures and deadlines set by the Commission.

For the reasons discussed above, the document at issue is privileged and should be removed from the public record, further discovery should not be permitted and the motion to compel should be denied.

WHEREFORE, Louisville Gas and Electric Company respectfully requests the Commission to grant its motion to withdraw from the public record the privileged document located at page 428 of 441 of the attachment to its response to the request for information of KIUC, Item No. 1-78. Further, LG&E requests that the Commission deny the Attorney General's Motion to Compel Discovery on the grounds set forth above.

Dated: March 17, 2004

Respectfully submitted,



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Counsel for Louisville Gas
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion was served on the following persons on the 17th day of March 2004, by United States mail, postage prepaid:

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H

In Re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor.
Docket No. 030001-EI
Order No. PSC-03-1288-PCO-EI
Florida Public Service Commission
November 12, 2003

ORDER DENYING TAMPA ELECTRIC COMPANY'S MOTION TO COMPEL DISCOVERY FROM THE FLORIDA INDUSTRIAL POWER USERS GROUP

Braulio L. Baez, Commissioner and Prehearing Officer

On November 4, 2003, Tampa Electric Company (Tampa Electric) filed a Motion to Compel Discovery from the Florida Industrial Power Users Group (FIPUG), requesting that the Prehearing Officer issue an order requiring FIPUG to immediately return Ms. Brown's Deposition Exhibit No. 3 to Tampa Electric so that it may be included with the transcript of that deposition and made use of by Tampa Electric in preparing for hearing. On November 7, 2003, FIPUG filed a response opposing Tampa Electric's Motion to Compel Discovery.

Rule 28-106.211, Florida Administrative Code, grants broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case ...." Based upon this authority, and having considered the Motion and Response, the rulings are set forth below.

Tampa Electric states that it took the deposition of FIPUG witness Sheree Brown on October 30, 2003. Tampa Electric further states that Ms. Brown produced and tendered to Tampa Electric certain documents in response to the Deposition Notice and certain of the documents were later entered into evidence as deposition exhibits. Tampa Electric asserts that prior to and during the deposition, its counsel and representives were provided the document at issue to review. According to Tampa Electric, while attorneys for Tampa Electric were out of the room during a recess, counsel for FIPUG took the document from the court reporter and refused to return it. Tampa Electric states that Deposition Exhibit No. 3 was a 10-page document prepared by Ms. Brown which sets forth, among other things, her assessment of certain issues relating to the shutdown of Gannon Units, background information pertaining to matters specifically included in her prepared direct testimony and her evaluation and opinion of the merits of positions asserted by Tampa Electric. Tampa Electric states that Exhibit No. 3 also includes Ms. Brown's analysis of Ms. Jordan's rebuttal testimony and/or statements about errors in her own prefiled testimony. Tampa Electric asserts that Exhibit No. 3 is clearly designed to provide the basis for Ms. Brown's testimony during her deposition and during her cross-examination at hearing.

Tampa Electric cites Rule 1.280(b)(4), Florida Rules of Civil Procedure, which provides that the substance of the facts and opinions (and the grounds for the opinions) to which an expert is expected to testify are necessarily discoverable, whereas the facts and opinions of non-testifying experts are discoverable only upon a showing of exceptional circumstances. Tampa Electric states that it is undisputed that FIPUG plans to call Ms. Brown as an expert witness and that the materials

sought to be produced were created by Ms. Brown herself in the preparation of her testimony. According to Tampa Electric, courts interpreting Rule 1.280, Florida Rules of Civil Procedure, in such circumstances have held that such materials cannot be considered work product and must be produced.

Tampa Electric also cites to Section 90.507, Florida Statutes, to further assert that any privilege that might have existed with respect to Deposition Exhibit No. 3 has been waived by Ms. Brown's voluntary disclosure of the exhibit to Tampa Electric. Tampa Electric states that counsel for FIPUG made an objection to Exhibit No. 3 on the grounds that it is attorney work product and privileged. Tampa Electric asserts that the objection was evidentiary in nature, as counsel for Tampa Electric thereafter questioned Ms. Brown about the contents of Exhibit No. 3 without further objection. According to Tampa Electric, it was only much later in the deposition and, after the court reporter had marked and attached Exhibit No. 3 to the deposition, that counsel for FIPUG physically removed Exhibit No. 3 from the court reporter's possession. Tampa Electric asserts that any privilege that may have existed with respect to Exhibit No. 3 was waived long before counsel for FIPUG physically removed the exhibit from the record. Tampa Electric argues that it is clear that Ms. Brown's Deposition Exhibit No. 3 was prepared by her and directly relates to the subject matter of her testimony in this proceeding. According to Tampa Electric, it is entitled to the immediate return of Ms. Brown's Deposition Exhibit No. 3 in order to prepare for hearing.

FIPUG responds that it opposes Tampa Electric's Motion to Compel. FIPUG states that Tampa Electric's motion seeks the disclosure of a document clearly protected by the work product privilege and exempt from discovery pursuant to Rule 1.280(b)(3), Florida Rules of Civil Procedure. FIPUG asserts that it stated that the document in dispute, "TECO Fuel Hearing, Preparation for Deposition and Cross, Motions to Strike," appeared, from its title, to constitute privileged attorney work product. FIPUG states that Tampa Electric responded that the privilege did not run to such documents in the possession of an expert and proceeded to examine the document. According to FIPUG, at the time that Tampa Electric's attorney asked the court reporter to mark the disputed document as Exhibit No. 3 to the deposition, FIPUG's counsel objected to the admission of the document on the grounds that it contained attorney work product and is privileged. FIPUG states that prior to the deposition's conclusion, it took custody of the document marked Exhibit No. 3 to prevent its disclosure. FIPUG further states that it explained that the document was prepared from notes taken in Ms. Brown's discussions with FIPUG's counsel and that the document contained privileged work product information. FIPUG argues that since the document contains the mental impressions, conclusions, opinions, theories and trial strategy of FIPUG's attorney prepared for litigation in this case, it is exempt from disclosure pursuant to Rule 1.280(b)(3), Florida Rules of Civil Procedure.

FIPUG asserts that the document was in a box containing a large volume of documents, most of which were responsive to Tampa Electric's Deposition Notice request; however, the document was outside the scope of Tampa Electric's Deposition Notice request. According to FIPUG, the document was not used in the preparation of Ms. Brown's testimony, it was not referred to in her testimony, and it did not contain any mathematical calculations that form the basis of her testimony or the numbers used in her testimony. FIPUG argues that the document should not have been included among the responsive documents brought to the deposition and its brief, inadvertent disclosure when Tampa Electric's counsel reviewed the large boxes of

responsive documents does not result in waiver of the privilege. FIPUG asserts that the circumstances in this case do not rise to the level of a waiver because any disclosure was only brief and inadvertent.

Upon review of the pleadings and consideration of the arguments, Tampa Electric's Motion to Compel Discovery from FIPUG is denied. The disputed document is protected by the work product privilege and exempt from discovery pursuant to Rule 1.280(b)(3), Florida Rules of Civil Procedure. An inadvertent disclosure of a privileged document does not constitute a waiver of the privilege when several factors are weighed. See General Motors Corporation v. McGee, 837 So.2d 1010, 1040 (Fla. 4th DCA 2002) rev. denied 851 So.2d 728 (Fla. 2003), quoting Abamar Housing and Development, Inc. v. Lisa Daly Lady Decor, Inc., 698 So. 2d 276, 279 (Fla. 3d DCA 1997) rev. denied 704 So.2d 520 (Fla. 1997). In Abamar, the court identified a five- part test to determine whether production of a document is inadvertent:

(1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a party of its error

Based on the foregoing, there has been no waiver of the work product privilege.

It is therefore,

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that Tampa Electric's Motion to Compel Discovery from FIPUG is denied.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 12th day of November, 2003.

(SEAL)

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk

and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

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