

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the matter of:

RECEIVED

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

NOV 04 2004

PUBLIC SERVICE
COMMISSION

AND

AN ADJUSTMENT OF THE ELECTRIC)
RATES, TERMS AND CONDITIONS OF) CASE NO.
KENTUCKY UTILITIES COMPANY) 2003-00434

ATTORNEY GENERAL'S REPLY IN SUPPORT OF
MOTION TO SET ASIDE RATE DETERMINATIONS

* * *

Comes Gregory D. Stumbo, Attorney General of the Commonwealth of Kentucky, on behalf of all affected Kentucky ratepayers, and in reply to the response to Louisville Gas & Electric Company (LG&E), and Kentucky Utilities Company (KU), would show this tribunal as follows:

LG&E SHOULD DISCLOSE THE SUBSTANCE OF
ITS EX PARTE COMMUNICATIONS AND MEETINGS

LG&E commences its thirty page memo by attacking the pace of the Attorney General's investigation of this matter, ignoring the fact that LG&E has persistently failed to produce documents in a timely fashion, has

repeatedly brought suit against the Attorney General to forestall this investigation, and even now objects to the PSC's own review of LG&E's records, which is explicitly permitted by KRS 278.230. By directing LG&E and KU to produce records and documentation as requested by the Attorney General, the PSC will be able to determine the true nature of LG&E's professed willingness to cooperate in this investigation.

Perhaps the most telling indication of LG&E's deceptiveness regarding its claimed compliance with the Attorney General's demands for information appears at page three of its Memo in Response of November 3, 2004. In discussing the ex parte contacts occurring at various meetings involving LG&E employees and PSC personnel, LG&E asserts that "the Companies have consistently expressed their willingness to explain those and other meetings but the AG has shown no interest in the interviewing of witnesses."

In fact, the Attorney General has long demanded that the substance of those very meetings be disclosed and explained. On August 30, 2004, the Attorney General issued a Civil Investigative Demand (CID) to LG&E, stating as follows:

INFORMATION TO BE PRODUCED

Identify each and every communication and the subject matter thereof for each social or personal meeting, party, gathering or

event at which you and employees of the Kentucky Public Service Commission were present between January 1, 2002, and June 30, 2004. Include in the identification the date and location of the meeting and the identity of each person present or witness to said meeting including their name, employer, position, business address and telephone number.

CID, August 30, 2004, emphasis supplied.

LG&E has not only failed and refused to disclose the substance of these meetings, as requested by the Attorney General, but actually filed suit in Jefferson Circuit Court seeking to block the release of this very information. In response to the Attorney General's Motion for Sanctions against LG&E filed in Franklin Circuit Court, LG&E argued lengthily and strenuously that it should not be required to provide this information, and continues to press this matter in the Franklin Circuit Court.

Clearly, LG&E and KU are seeking to materially mislead the PSC on this critical point. They have consistently failed to provide the cooperation necessary to resolve this investigation. Fortunately, the PSC is in a position to direct LG&E and KU to produce this highly relevant information. The Attorney General's Filing of List of Requested Items, which was submitted to the PSC on October 26, 2004, requests the very same disclosure as was demanded in the August 30, 2004 CID. The only alteration in the request is in the citation of the enabling statute. Rather than requiring production of this report under the Consumer Protection Act, it is now requested under the

PSC's express authority to require the submission of reports pursuant to KRS 278.230.

If LG&E and KU are now belatedly willing to cooperate in the production of information that should have been provided months ago, then this investigation may proceed unimpeded. Unfortunately, it appears that LG&E chooses instead to ignore the PSC's own undeniable interest in investigating and resolving this matter, and claims that the Attorney General is attempting to "commandeer" the PSC's investigative authority. This tribunal should recognize this procedural posturing for what it is, yet another in a series of attempts by LG&E to avoid producing information necessary for this investigation to go forward. The PSC's own interests in maintaining public confidence in its procedures clearly outweigh any self interest motivating LG&E's delaying tactics. The PSC should therefore direct production of the requested information from LG&E.

THE APPEARANCE OF IMPROPRIETY MUST BE ELIMINATED TO PRESERVE THE INTEGRITY OF THE ADMINISTRATIVE PROCESS

LG&E and KU ignore the arguments of the Attorney General and the application of relevant caselaw in addressing the propriety of setting aside the instant rate determinations. Tellingly, LG&E cuts short its quotation from the controlling case of LG&E v. Cowan, Ky. App., 862 SW2d 897 (1993), at pp. 11-12 of its Memo in Response, in an attempt to argue that the

only relevant consideration is “the existence of prejudice.” Omitted by LG&E is the critical concluding sentence of the quotation:

In analyzing the issue we must be concerned with protecting the integrity of the administrative process, which includes the question of the appearance of impropriety from ex parte contacts

LG&E v. Cowan, 862 SW2d at 901, emphasis supplied.

The Cowan court then notes that it elects to “depart from the majority opinion in PATCO. Much more instructive are the concurring opinions, and we think the proper attitude toward ex parte contacts are expressed therein.”

Id.

This “proper attitude” includes a ringing condemnation of agency decisionmakers who appear “insensitive to the compromising potentialities of certain official and social contacts. . . .” Id. The Attorney General has steadfastly maintained that the nature and extent of undocumented ex parte contacts between LG&E employees and PSC personnel unavoidably creates the appearance of impropriety which undermines public confidence in ratemaking. This certainly does not foreclose the Attorney General from demonstrating the existence of actual prejudice resulting from improper ex parte contacts at the close of this investigation, but simply underscores the importance of recognizing what the Cowan court plainly identified as a central concern.

LG&E's repeated claim that LG&E v. Cowan does not mean what it says should be dismissed. Indeed, even without Cowan's commonsense directive that the appearance of impropriety resulting from ex parte contacts be considered, surely the PSC, as a public entity governed by the Code of Executive Ethics, would be sensitive to the necessity of assuring public confidence in its actions. LG&E's advice to sweep aside concerns regarding the "mere possibility of impropriety" runs counter not only to controlling caselaw, but to the very ethical requirements applicable to the PSC. The PSC should disregard the ill founded and self serving arguments of LG&E, and should resolve to establish the most rigorous and reassuring procedures possible.

LG&E's misreading of LG&E v. Cowan leads it to dismiss the reasoning in Business and Professional People for the Public Interest v. Barnich, 614 NE2d 341 (Ill. App. 1993). Barnich, like LG&E v. Cowan, recognizes that the appearance of impropriety is a central concern in deciding whether to vacate a rate determination. The Barnich court directly confronted the public utility commissioner's argument that actual prejudice must be shown before reversing an agency decision, and the commissioner's defense that his contacts with the regulated utility were in fact legal. The Barnich court summarized the defendant's position as follows:

Prejudice must be shown before reversing an agency's decision because of improper ex parte contacts. It was possible that all defendant's telephone calls were authorized or even required by the Public Utilities Act

Barnich, 614 NE2d at 344.

The court then rejected the defendant's position, holding that the "[d]efendant failed in his duty to maintain a favorable public impression of impartiality." 614 NE2d at 343. LG&E attempts to make much of the fact that the rate determination in Barnich had already been reversed and remanded by the Illinois Supreme Court before the Barnich court's finding that the unexplained telephone calls foreclosed the participation of the commissioner in the remanded rate case. This is a distinction that does not make a difference; "Plaintiffs were prejudiced by defendant's participation in the proceedings." Id. Clearly, the only reason that the rate determination was not set aside was that it had already been vacated in a prior proceeding. LG&E v. Cowan and Barnich stand for the same point of law: The appearance of impropriety due to ex parte contacts can be fatal to administrative rate making, and should be zealously guarded against.

LG&E sums up its defense of the extensive history of ex parte contacts with the PSC by claiming that the Attorney General "has never asked the Companies to explain these meetings and calls. The Companies remain ready, willing and eager to do so now." Memo in Response, at p. 17.

It is difficult to ascribe this repeated erroneous statement to mere ignorance of the long outstanding demand for an explanation of the subject matter of all meetings and communications. LG&E's aggressive refusal to answer these very questions is abundantly evident in its pleadings and arguments in circuit court. The PSC should seek to avail itself of LG&E's newfound "eagerness" to supply the requested information by directing LG&E and KU to produce the documents and reports requested by the Attorney General.

JUDICIAL AND EXECUTIVE ETHICS RULES
ARE BINDING ON THE PSC

LG&E's argument that the Code of Judicial Conduct has no relevance to administrative ratemaking because this is a "legislative function" is poor advice. Administrative decisions are properly based solely upon a public record. Ex parte contacts cannot be hidden behind a claim to legislative prerogatives where quasi-judicial actions are taken. As an often cited rule puts it, "if one is empowered to act as a judge, he should conduct himself as one." Cascade County Consumer's Assn. v. PSC, 394 P2d 856 (Mt. 1994), holding the Montana Public Service Commission subject to the Judicial Canons of Ethics. As to LG&E's contention that all involved parties have adhered to the requirements of the Code of Executive Ethics,

this is clearly a determination that should await the outcome of the Attorney General's investigation, and any needed referral to the Ethics Commission.

CONCLUSION

LG&E contends that "the Attorney General already has in his possession every piece of information needed" to conclude this investigation. This is simply another in a long line of attempts by LG&E to dictate the terms and conditions of the Attorney General's inquiry.

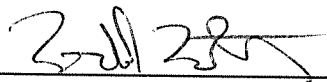
Astonishingly, the drafter of the Memo in Response seems unaware that documents are still being fitfully produced by LG&E, and ignores the Attorney General's right to have a reasonable time to review and request additional data as necessary. See: Recent request to LG&E seeking assurances that all corporate reimbursement documents will be produced, attached hereto as Exhibit A.

In addition, LG&E still refuses to turn over relevant documentation, as is evidenced by the pending litigation in the Franklin Circuit Court, and the Attorney General's outstanding request to the PSC to require production of necessary information that L G & E has thus far failed to produce despite repeated requests. Needed documentation includes lobbying expenditure records, unredacted credit card records, corporate reimbursement documents, and a report identifying the subject matter of communications

and meetings between LG&E employees and PSC personnel. Upon production of the required records, the Attorney General will be able to conduct examinations under oath and produce a report of the results of the investigation. The PSC can greatly expedite this process by requiring the production of the identified records, as requested by the Attorney General.


Respectfully submitted,

GREGORY D. STUMBO
ATTORNEY GENERAL

By: 
Pierce Whites, Assistant Deputy Attorney General
Janet Graham, Assistant Deputy Attorney General
Todd E. Leatherman, Assistant Attorney General
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Frankfort, Kentucky 40601

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing Reply in Support of Attorney General's Motion to Set Aside Rate Determinations was served upon the parties in the attached service list by first class mail on this the 8th day of November, 2004.


Assistant Attorney General



COMMONWEALTH OF KENTUCKY
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November 5, 2004

Via facsimile

Mr. David S. Kaplan
Frost Brown Todd LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363

Re: KG&E/KU Civil Subpoenas and Investigative Demands

Dear David:

I am writing to inquire concerning the production of documents related to Civil Investigative Demand items 2-4 which relate in part to documentation of LG&E payments related to lobbying expenses and meetings attended by PSC employees. In particular documents produced under cover of your October 12, 2004 letter – documents numbered LG&E/AGI-2 1105-1148 appear to be “screen shots” of data contained in an internal accounting data file. I am writing to confirm that the CID requests “all documents” related to these categories of “meetings” and lobbying expenses, including expense reports, internal reimbursement requests, expense vouchers, as well as the documents reflecting the actual payments. LG&E has produced some credit card statements and some receipts from various vendors which appear related to some meetings. However we believe it has not produced all documents reflecting payments or internal tracking documents related to these meetings which would be kept in the ordinary course of business to support the claimed expenses. I would appreciate it if you would confirm LG&E’s intention to produce these documents and a date by which we may expect to receive them.

Sincerely,
GREGORY D. STUMBO
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "Todd E. Leatherman".

Todd E. Leatherman
Director, Consumer Protection Division

