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November 3, 2004

HAND DELIVERY

Elizabeth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40601

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

Application of Kentucky Utilities Company for an Adjustment of its Electric Rates, Terms and Conditions
Case No. 2003-00434

Dear Ms. O'Donnell:

Enclosed please accept for filing two originals and five (5) copies each of Louisville Gas and Electric Company's and Kentucky Utilities Company's Response to Attorney General's Motion to Set Aside Rate Determinations and Summary of Disputed Items in the above-referenced matters. Please confirm your receipt of these filings 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,

Kendrick R. Riggs

KRR/ec
Enclosures
cc: Parties of Record

316089.1

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**

In the Matter of:

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

LOUISVILLE GAS AND ELECTRIC COMPANY'S AND KENTUCKY UTILITIES COMPANY'S RESPONSE TO ATTORNEY GENERAL'S MOTION TO SET ASIDE RATE DETERMINATIONS AND SUMMARY OF DISPUTED ITEMS

Louisville Gas and Electric Company ("LG&E") and Kentucky Utilities Company ("KU") (collectively, the "Companies"), pursuant to the Commission's Order of October 22, 2004, file this Response to the Motion to Set Aside Rate Determinations and Summary of Disputed Items filed by Attorney General Gregory D. Stumbo ("AG").

FACTUAL BACKGROUND

On May 6, 2004, nearly two months *before* the Commission entered its final orders in Case Nos. 2003-00433 and 2003-00434 (the "Rate Cases"), the AG first publicly alleged that he knew of "collusion" in the Rate Cases. The AG took no immediate action on these allegations, however, despite the fact that he was actively participating in the Rate Cases as a consumer intervenor. On June, 30, 2004, the Commission issued largely stipulated final orders in the Rate Cases.

In early July, the AG issued subpoenas to the Commission and the Companies investigating whether the increase in the Companies' base electric rates – the only aspect of the final orders from which the AG dissented – was the product of *ex parte* communications and "collusion." After the Franklin Circuit Court permitted the AG's investigation under the Consumer Protection Act to proceed, the Commission appropriately ordered its own investigation into:

> (1) whether the Companies "had improper ex parte contacts with the Commission employees regarding these cases; and
>
> (2) whether "[t]he settlement negotiations that resulted in the Partial Settlement Agreement, Stipulation, and Recommendation may have been the product of collusion."

(Order, 7/15/04). Subsequently, on motion of the AG, the Commission agreed to hold its own investigation in abeyance for 60 days. (Order, 8/12/04). The Commission further ordered the AG to file a report of the findings of his investigation, and recommendations, by October 12, 2004.

The subpoenas served on the Companies requested information regarding communications between the Companies and the Commission during the 18 month period leading to the final orders in the Rate Cases. Under a letter agreement narrowing the scope of the subpoenas, the Companies produced over 12,000 pages of documents evidencing communications between employees of the Companies and the Commission. This production of documents – which included voluminous email, calendar entries, and phone records – was substantially complete by August 6, 2004, more than two months prior to the due date of the AG's report. (See Letter from Kaplan to Leatherman, August 6, 2004, attached as Exhibit A).

The documents produced by the Companies in response to the AG's broad request reflect the multitude of issues that require the Companies to have appropriate contact with the Commission on a regular basis. The documents evidence the many required contacts the

Companies must have with the Commission involving accident and outage reporting, crisis communications during and after extreme weather, and mandatory facility inspections. The documents also evidence participation in formal proceedings in pending cases and audits, as well as informal conferences on specific company and industry issues such as assessing the vulnerability of the transmission grid to terrorism. Some documents evidence contacts with the Commission during legislative sessions regarding proposed legislation affecting the utility industry, such as the net metering and transmission siting bills. And some documents evidence occasional interaction between the Companies and the Commission in a variety of informal settings, such as regional utility industry conferences and welcome receptions. None of the documents evidence any off-the-record communications regarding the merits of the Rate Cases, or any other improper *ex parte* contacts.

In his Motion to Set Aside Rate Determinations, the AG complains that he has been unable to make progress in his investigation due to the alleged failure of the Companies to provide him the documents he needs. The AG suggests that "documentation establishing various *ex parte* contacts" which occurred in February, June, and July 2003 was not produced until September 29, 2004. This claim is demonstrably untrue. On August 6, 2004, the Companies voluntarily produced documents evidencing those very meetings, none of which involved improper *ex parte* contacts. (Documents produced to AG 8/6/04, numbered LG&E/AGI 0054, 0096, 0110, 7364, 8538). The documents show that these meetings occurred in appropriate settings at regional utility industry conferences and a public reception. 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.

The Companies produced additional documents to the AG commencing on September 27, 2004. This production occurred under a second subpoena issued on August 30, 2004 (the "Second Subpoena"). The Second Subpoena changed the focus from the Companies' communications with the Commission to the alleged purchase of meals and gifts for Commission employees on company credit cards, as well as lobbying expenses.[1] To justify the expansion of his investigation, the AG has represented to the Franklin Circuit Court that the information is related to possible legislative reform, stating:

> All of the inquiries are clearly related both to the Attorney General's investigation of potentially improper business practices and the investigation of **whether proper policies are in place regulating contact between public utilities and the PSC**.
>
> *****
>
> The information sought will reveal the extent of the ex parte contact between LG&E and the PSC, as well as establish the necessary factual basis to support potential reform of state rules and policies relating to utility ratemaking.

(AG's Memorandum of Law in Support of Sanctions, pp. 5, 8, emphasis supplied).

In response to the Second Subpoena, the Companies have now produced documentation from 2003-2004 (and are producing documentation from 2002) showing expenses incurred by the Companies in connection with all meetings and events that were attended by Commission employees, or reflecting amounts spent for legislative lobbying. The Companies continue to diligently produce documents under the Second Subpoena. The most recent installment of documents under the Second Subpoena, produced on October 25, 2004, brings the total amount of email and phone records to over 2,000 additional pages. None of these documents reflect improper contacts or purchases.

[1] The subpoena also asked for all internal email "relating to" communications with the Commission and all cell phone records for six employees.

The Companies have produced to the AG all credit card records evidencing expenditures related to events attended by the PSC in 2003-2004.[2] The Companies have also agreed to produce relevant documents from 2002 relating to regional conferences attended by employees of the Companies and the Commission, as well as cell phone records evidencing calls placed in 2002 to 25 specific phone numbers provided by the AG. In sum, the AG now has in his possession all calendar entries, all non-privileged emails and written correspondence, all company phone records and all cell phone records that could be located regarding any communications with the Commission for the period from January 1, 2003, through June 30, 2004. The AG now has in his possession all documentation, including credit card records, regarding any expenditure for any meeting, reception or dinner attended by any member of the Commission during that same period. In an effort to assist the AG in bringing this investigation to a timely resolution, and despite its continued objection to the relevance of the requested information, the Companies have voluntarily agreed to produce documentation showing expenses incurred by the Companies in connection with all meetings and events that were attended by Commission employees during 2002. Thus, the AG already has in his possession every piece of information reasonably needed to demonstrate whether there were any improper

[2] The Companies objected to the wholesale production of its American Express credit card records for all employees regardless of whether they had any contact with the Commission or made any expenditures related to the Commission. The Franklin Circuit Court permitted the AG to serve a third-party subpoena on American Express, but ordered the AG to provide notice to the Companies, and an opportunity to object, before publicizing or filing with the Commission any credit card records. (Order, 10/12/04, attached as Exhibit B) American Express' decision to withhold documents until the Companies' motion for a protective order had been ruled upon by Judge Crittenden was due to their respect for the judicial process, not any threats from the Companies. The AG's allegation that the Companies threatened American Express with litigation to obstruct the investigation is demonstrably untrue. After the AG revealed in the Franklin Circuit Court that he had subpoenaed American Express to moot the Companies' objections to producing the credit card records, the Companies contacted American Express to request that they withhold producing the records until the Court had ruled on the Companies' motion for a protective order. American Express has now produced the subpoenaed records in conformity with the Court's 10/12/04 order. Ironically, the AG's subpoena to American Express sought only the credit card records of Louisville Gas and Electric Company and American Express took the position the subpoena did not encompass credit card records of the parent, LG&E Energy LLC. Cooperating with the AG, LG&E authorized American Express to treat the subpoena as if it also encompassed the records of the parent company.

ex parte communications regarding the Rate Cases or whether there was any collusion. None of the disputed documents have any probative value to the Commission's investigation of improper contacts in the Rate Cases.

The failure of the AG to receive everything he has requested prior to the Commission's October 12, 2004 deadline is the inevitable by-product of his unreasonably broad document requests under the Second Subpoena, not a lack of cooperation from the Companies.[3] Rather than wasting enormous time and resources provoking disputes over documents that go far outside the scope of the Commission's investigation of improper communications in the Rate Cases, the AG could have been reviewing the documents produced on August 6, 2004, and interviewing witnesses.[4] Had he done so, the AG could have met the Commission's October 12, 2004 deadline, and then continued his wide-ranging investigation under the Consumer Protection Act in another forum.

Having failed in his Motion to present any evidence of improper communications during the Rate Cases, the AG now asks the Commission to use its investigatory powers to compel the Companies to produce the exact same documents which are at issue in the Franklin Circuit

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[3] The Companies also have objected to the wholesale production of documents from 2002 due to their remoteness in time from the Rate Cases, which were filed in December 2003 and decided on June 30, 2004. Producing these additional documents from targeted categories was not so burdensome as to warrant prolonging the discovery dispute. However, the Companies continue to believe that it would be unreasonably burdensome to require them to search for a second time the emails and calendars of 200 employees to locate documents of the same type already produced for 2003-2004. The first search covering eighteen months consumed the efforts of more than 200 employees and hundreds of person hours, which was extremely disruptive of other important duties.

[4] After negotiations over the Second Subpoena broke down, the Companies filed their petition to modify the Second Subpoena in Jefferson Circuit Court, the principal place of business of LG&E. The petition was filed on the statutory deadline in order to avoid waiver of the right to seek modification of the Second Subpoena. On October 12, 2004, that case was transferred to the Franklin Circuit Court by agreement to the parties. The grounds for modifying the Second Subpoena are fully set forth in the Companies' briefs, which have been served on the Commission as a party to the court proceedings. See Response to Motion for Sanctions (filed September 22, 2004); Supplemental Response to Motion for Sanctions (filed September 27, 2004); Response of Louisville Gas and Electric Company to the Attorney General's Summary of Disputed Items Related to August 30, 2004 Civil Investigative Demand (filed October 7, 2004); Response to Attorney General's Supplemental Summary of Disputed Items Related to August 30, 2004 Civil Investigative Demand (filed October 18, 2004); Response of Kentucky Utilities Company and Louisville Gas and Electric Company to Attorney General's Notice of Public Service Commission Action Relating to Matters Pending Before this Court (filed October 28, 2004). All discovery issues have been fully briefed, and are ripe for decision by the Franklin Circuit Court.

Court. Indeed, in the court action, the AG tacitly conceded that the Second Subpoena is overbroad by backing off his demand for all documents "related to" communications with the Commission. See Second Subpoena, Request No. 7.[5] However, the AG's List of Requested Items, filed with the Commission on October 26, 2004, is a verbatim reproduction of the original Second Subpoena, without any qualification. The AG therefore seeks from the Commission pursuant to KRS 278.230 what he has conceded he should not obtain from a court of law under the standards governing the enforceability of administrative subpoenas.

In the same motion asking the Commission to require the production of documents he deems necessary to complete his investigation, the AG has asked the Commission to set aside the Rate Orders without tendering a shred of supporting evidence.[6] Either these motions were filed without the evidence necessary to support the extraordinary relief sought by the AG, or the documents the AG seeks are not necessary for the AG to prove the allegations of improper *ex parte* contacts and "collusion" in the Rate Cases.

The issues now before this tribunal are:

(1) whether the Commission should order the Companies to respond to document requests under a subpoena the scope of which is presently submitted for decision by the Franklin

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[5] "The AG [has] narrowed its request from all documents 'related to' social and personal meetings to documents 'evidencing communications'; excluding publicly filed documents - and including documents produced, reviewed or created which are related to the rate cases." (AG's Supplemental Summary of Disputed Items filed in the Franklin Circuit Court, October 13, 2004, at p. 4).

[6] On October 22, 2004, the Companies submitted a written request to the Commission to amend its October 22, 2004 Order to direct the AG to file any evidence the AG has which supports his motion – or file a statement with the Commission that the AG's Office does not have any such evidence. To date, the AG has declined to submit any such evidence or admit to a lack of such evidence. The Companies respectfully renew their request.

The AG has acknowledged that he is required by KRS 367.250 to keep confidential the information he has obtained in his investigation, and that he may therefore share the information with the Commission only on a confidential basis pursuant to the law enforcement exception contained in that provision. LG&E and KU respectfully suggest that it is appropriate for the AG initially to provide any evidence to the Commission on a confidential basis pursuant to KRS 367.250, but reserve the right of access to any such evidence if the Commission determines the evidence is probative of the allegations made by the AG in his motion.

Circuit Court pursuant to KRS 367.240(2), and which seeks documents outside the scope of the Commission's investigation;[7]

(2) whether the Commission should grant the AG's motion to continue to hold the Commission's investigation in abeyance indefinitely;[8]

(3) whether the AG has provided sufficient evidence of improper *ex parte* contacts and collusion to warrant setting aside the Rate Orders; and

(4) whether the AG has provided sufficient evidence of improper *ex parte* contacts and collusion to require the recusal of the Commissioners and their staff from further participation in the Rate Cases.

For the reasons set forth below, these requests should be denied.

However, the Commission should provide the AG with a final opportunity to report his findings and make recommendations to the Commission. The AG has received all of the documents under the first and second subpoenas he needs to complete this task. The Companies recommend granting the AG an extension of no more than 30 days from the entry of its order denying the AG's motion to set aside the rates.

ARGUMENT

I. The AG may not nullify the Companies' statutory right to seek modification of the Second Subpoena by commandeering the Commission's investigatory powers under KRS 278.

The AG's subpoenas were issued to investigate possible violations of the Consumer Protection Act, KRS 367.110 *et seq.* Persons served with subpoenas under the Act have a statutory right to seek modification of subpoenas which are unreasonably broad or otherwise

[7] The Companies assume that the AG's request for the production of documents from the Commission of the circumstances and purpose of each *ex parte* contact with LG&E and KU during the pendency of the Rate Cases is moot in light of the AG's representation at the October 21, 2004 informal conference of the AG's satisfaction with the Commission's cooperation.

[8] The Commission is treating the AG's October 12, 2004 Status Report as a motion.

beyond the authority of the AG. KRS 367.240(2). These statutory protections ensure due process without regard to whether the target of an investigation is a regulated utility.

The Companies have invoked the jurisdiction of the Franklin Circuit under this provision by filing a petition to modify the Second Subpoena. Once the jurisdiction of a court has been invoked by a petition filed pursuant to KRS 367.240, "it is the duty of the court to examine the documentation and facts upon which the AG based his decision to issue the demand . . . [and] . . . the responsibility of the court is to protect against the issuance of arbitrary orders." Ward v. Com. ex rel. Stephens, Ky.App., 566 S.W.2d 426, 429 (1978), citing United States v. Morton Salt Co., 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950).

The Public Service Commission is charged by statute with regulating utilities and enforcing the provisions of KRS Chapter 278. See KRS 278.040(1). The AG claims that the Commission's duty to "cooperate" with his Consumer Protection Act investigation empowers the AG to commandeer the Commission's investigatory powers under KRS Chapter 278 to obtain documents he cannot obtain from the Franklin Circuit Court. However, KRS 367.160 cannot reasonably be construed to empower the AG to require an agency of the Executive Branch to use its statutory powers to conduct discovery for the AG. The statutory authority in KRS 367.160 was delegated to the Commission from the General Assembly to conduct the Commission's investigations under KRS Chapter 278 and not as authority to conduct investigations for the AG under the Consumer Protection Act under KRS Chapter 367.

In the Franklin Circuit Court action, the AG cited Strong v. Chandler, Ky., 70 S.W.3d 405 (2002), for the proposition that the Commission has a duty to cooperate with the AG's investigation under the Consumer Protection Act. In Strong, the Court held that the confidentiality exception in the Open Records Act for proprietary business records did not forbid

the Cabinet for Economic Development from disclosing to the AG documents in its possession relevant to determining whether a company had breached its incentive contract with the state. Id. at 410. Strong does not support the AG's contention that he can force an agency to use its investigative powers to obtain information for the AG that the AG is unable to obtain under his own investigative powers.

Critical to the result in Strong was that the AG's "request to inspect the records was never made under the Open Records Act, but rather under the independent statutory authority of the Attorney General . . ." Id. By contrast, in this case the AG has subpoenaed the Companies' records under the Consumer Protection Act which specifically affords statutory protections to the Companies. Thus, the duty of the Commission to "cooperate" with the AG under KRS 367.160 does not support the AG's overreaching interpretation that he may use KRS 278.230 to circumvent the statutory protections in the Consumer Protection Act afforded to any person on whom the AG serves an administrative subpoena.

Even if KRS 278.230 could be manipulated to avoid KRS 367.240(2) and abrogate the jurisdiction of the Franklin Circuit Court, this use of the Commission's regulatory authority would do nothing to advance the Commission's interest in expediting its investigation and achieving finality in the Rate Cases. The AG has coupled his document requests with motions to vacate the Commission's rate determinations and to recuse the Commissioners and their staff from further involvement in these cases. The filing of these motions is completely inconsistent with the need for additional discovery to prove that improper communications and "collusion" occurred in the Rate Cases. If indeed the AG filed his motions in good faith, he cannot justify using the powers of the Commission to obtain additional documents that could only be relevant to proposed legislative reform and other matters beyond the scope of the matters being

investigated here. Those documents must be obtained, if at all, pursuant to the Consumer Protection Act and under the supervision of the Franklin Circuit Court.

II. The AG has failed to provide grounds for setting aside the base electric rate determinations in the June 30, 2004 Order.

A. There is no evidence of any ex parte communications about the merits of the Rate Case.

The standard for evaluating the propriety of communications between the Commission and its regulated utilities is set forth in Louisville Gas and Electric Company v. Cowan, Ky., 862 S.W.2d 897 (1993). Relying on the seminal PATCO case,[9] the Cowan court defined an improper *ex parte* communication as a communication "relevant to the merits of the proceeding between an interested person and an agency decision maker." Id. at 900. "Since the contact must relate to the merits of the proceeding, legitimate procedural and status inquiries are not subject to sanction." Id. Determining whether a particular contact is improper therefore requires the application of "common-sense guidelines to govern *ex parte* contacts in administrative hearings, rather than rigidly defined and woodenly applied rules." PATCO, 685 F.2d at 563.

"We note the rule in Kentucky is that such *ex parte* contacts make administrative agencies' decisions voidable, not void per se." Cowan, 862 S.W.2d at 899. If an *ex parte* contact is determined to be improper, it "will void an agency decision where the decision was tainted so as to make it unfair either to the innocent party or to the public interest the agency is supposed to protect." Id. at 901 citing PATCO, 685 F.2d. at 564.[10] The existence of prejudice is a factual determination requiring consideration of a variety of factors:

> whether the improper contacts may have influenced the agency's ultimate decision; whether the contacting party benefited [sic] from

[9] Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority, 685 F.2d 547, 564 (D.C.Cir. 1982)

[10] The AG's request that the Commission set aside the rate determinations and direct LG&E and KU to refile their rate applications is inconsistent with Cowan's holding that *ex parte* communications make the rate determinations voidable, but not void per se. The AG has not met his burden of proof under the Cowan requirements.

> the decision; whether the contents of the contact were disclosed; and whether vacation and remand would serve a useful purpose.

Cowan, 862 S.W.2d at 901 citing PATCO, 685 F.2d, at 564-65.

Without being specific, the AG alleges that "a vast number of *ex parte* contacts occurred between LG&E employees and PSC personnel, both via telephone and in person, during the pendency of the rate cases."[11] (AG Motion, p. 5). The AG also references alleged "dinners, receptions, conventions, and . . . golf outings." (Id.) The Companies cannot reasonably address these veiled allegations. There is no question that LG&E employees had numerous legitimate contacts with the Commission before and during the pendency of the Rate Cases. Such communications should happen between regulated utilities and the regulatory body that oversees them. It is simply wrong to assume that the mere existence of these communications is an indicia of wrongdoing. Under Cowan, these contacts were improper only if they were "relevant to the merits of" the Rate Cases. Id. at 900. The AG's reliance on Cowan is therefore misplaced because the AG still has not alleged – much less proven – that there were any **improper communications regarding the merits** of the Rate Cases. And, to be abundantly clear, there were no such communications.

In Cowan, the parties to a PSC matter entered into a non-unanimous settlement of a dispute over LG&E's recovery of costs associated with a power plant in Trimble County. Id. at 900. The Court held that it was error for the Commission to approve a non-unanimous settlement and that a hearing was required. However, *in dicta*, the Court addressed allegedly improper contacts between LG&E and the Commission:

[11] The AG apparently is referring back to the exhibits to his Proposed Submission of Status Report and Motion to Hold Proceeding in Abeyance, filed with the Commission on August 4, 2004. These documents show 22 entries culled from the Commission's sign-in log and a chart showing phone calls from LG&E employees to Commissioners and staff.

> Although not strictly necessary to our decision, we are compelled to comment upon the ex parte contacts between LG & E and the PSC.
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> * * * * *
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> [W]e initially note that the record discloses little beyond the bald facts. LG&E's president met with two (2) sitting members of the PSC and gave them a settlement proposal on a matter then pending before the PSC and affidavits denying any intent to do wrong from all persons involved. **There is no question that the settlement proposal was a communication on the merits between an interested party and agency decisionmakers.** As such, it is improper and must be condemned no matter how innocently given or received.

Id. at 901 (emphasis supplied). The conduct condemned by the Cowan court was a clear-cut case of *ex parte* communications on the merits of a pending case. Cowan did not hold that all telephone calls and meetings that occur contemporaneously with a pending case are *per se* improper. While Cowan cautions that "seemingly innocuous inquiries can be subtle or indirect attempts to influence the substantive outcome" of a pending case, id. at 900, the AG must prove that this occurred, not simply assert that it did.

B. To set aside the rate determination, the AG must show actual impropriety which prejudiced the rate determination.

It is also abundantly clear that Cowan requires a factual showing of prejudice in order to void a rate order. Id. at 901 ("If an improper *ex parte* contact has been made, it will void an agency decision where the decision was tainted so as to make it unfair either to the innocent party or to the public interest the agency is supposed to protect.") However, despite the possession of documents, emails, phone records and plethora of other information, the AG does not identify any actual impropriety that occurred in connection with the Rate Cases. His assertion, which the Companies emphatically dispute, that there was an appearance of impropriety is insufficient under Cowan to set aside the Commission's ruling in the Rate Cases.

Cowan follows the clear majority rule, which requires actual impropriety and proof of prejudice before **overturning agency action**. See, e.g., Cincinnati v. Public Utilities Comm'n of Ohio, 595 N.E.2d 858, 861 (Ohio 1992) (even in the situation of overt *ex parte* contacts between Utility and decision maker, refusing to vacate administrative order because lack of proof of actual prejudice resulting from the contacts); Ottawa v. Pollution Control Bd., 472 N.E.2d 150, 154 (Ill. App. Ct., 3d Dist. 1984) (refusing to reverse agency order despite existence of *ex parte* contacts directed to the substance of the underlying case due to a lack of prejudice); E&E Hauling, Inc. v. Pollution Control Bd., 451 N.E.2d 555, 571-72 (Ill. Ct. App, 2d Dist. 1983) (reinstating county board decision granting land fill application despite the existence of *ex parte* contacts because of a lack of prejudice); Seebach v. PSC of Wisc., 295 N.W.2d 753, 759 (Wisc. Ct. App. 1980) (refusing to reverse agency order despite *ex parte* contacts, noting that moving party bears the burden of proving actual prejudice); Neuberger v. Portland, 607 P.2d 722, 725 (Ore. 1980) (refusing to reverse a zoning decision despite *ex parte* communications in light of movant's failure to prove prejudice).

These precedents illustrate the general rule that claims of bias in administrative proceedings generally must overcome a presumption of honesty and integrity in favor of the administrative agency. See Nicholson v. Judicial Retirement and Removal Commission, Ky., 562 S.W.2d 306, 309 (1978); Cobb v. Yeutter, 889 F.2d 724, 730-31 (6th Cir. 1989); Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1437 (9th Cir. 1986); see also Unger v. Industrial Commission of Ohio, 640 N.W.2d 833, 836 (Ohio 1994) (collecting cases applying the presumption of honesty and integrity). The Commission is entitled to the presumption of honesty and integrity. The AG cannot undo agency action simply by raising the mere possibility

of impropriety. The AG must demonstrate that actual impropriety has prejudicially impacted the proceedings before obtaining a rehearing of the Rate Cases.

Attempting to shirk his burden of proof on this critical issue, the AG suggests that a mere "appearance of impropriety" – without proof of any impact on the proceeding – is sufficient to set aside agency action. Ignoring the actual holding in Cowan, the AG relies entirely on the anomalous decision of the 1st District Appellate Court in Illinois in Business & Professional People for the Public Interest v. Barnich, 614 N.E.2d 341 (Ill. App. Ct., 1st Dist. 1993), to create an untenable argument that is contrary to any reasonable interpretation of Kentucky law. But Barnich is completely distinguishable because it did not involve setting aside a rate order. It involved recusing a single Commissioner prospectively.

Furthermore, Barnich is also distinguishable on the recusal issue, because the court relied for its holding on the Illinois Administrative Procedure Act ("APA"), as well as ethics rules specifically codified for the Illinois Commerce Commission ("ICC"). The Kentucky legislature has expressly excluded the Commission from the requirements of Kentucky's Administrative Procedure Act pursuant to KRS 13B.020, while Illinois has reiterated within its Public Utilities Chapter that its APA applies to the ICC.[12] This exemption reflects the Kentucky General Assembly's recognition that Kentucky's Commission has broader regulatory responsibilities under KRS Chapters 74, 278 and 279 than simply functioning as a hearing officer for an agency.

In Barnich, a public interest organization sued a commissioner of the Illinois Commerce Commission seeking his immediate recusal due to 116 calls **he made** to utility representatives during a six-month period in which the rate case was pending. Although there was no finding that any of the phone calls concerned the merits of the rate case, the court concluded that recusal

[12] Ill.St. Ch. 111 2/3 § 10-103.

was required under the rules of conduct applicable to judges.[13] **However, it is critically important to note that the issue in Barnich was whether the plaintiff had stated grounds for recusal, not whether a rate order should be vacated after-the-fact.** In fact, the result in Barnich was simply that the recused Commissioner played no role thereafter in the rate hearing. No rate order was vacated based on the Commissioner's phone calls.

The AG incorrectly states that the court in Barnich "ordered that the Commissioner should be disqualified **and the case reheard.**" (AG Motion, p. 6, emphasis supplied). In fact, the rehearing of the rate case was not the result of the "appearance of impropriety" from the phone calls, but had been **previously** ordered by the Illinois Supreme Court on other grounds. Id. at 343. Barnich was recused from a pending rate case that had previously been remanded to the Illinois commission by the Illinois Supreme Court. Id. at 294. The previous rate order was reversed and remanded to the commission because the record contained insufficient evidence to justify Commonwealth Edison's recovery in its rate base of costs associated with building nuclear power plants. See Business and Professional People for the Public Interest v. Illinois Commerce Commission, 146 Ill. 2d 175 (Ill. 1991). The issue of improper *ex parte* contacts was not raised in the prior proceedings and played no role in the decision to remand the rate case.

Barnich thus stands for the limited proposition that, under Illinois law, a mere appearance of impropriety may be sufficient to warrant **recusal** of an agency decision maker. Even that limited proposition finds no support in Kentucky law. See Summit v. Mudd, Ky., 679 S.W.2d 225 (1984) (prosecuting attorneys' office could not be disqualified based merely on an appearance of impropriety; actual prejudice must be shown). But even uncritical acceptance of

[13] The separate and distinct issue of recusal is analyzed at Argument Section III, *infra*.

the holding in Barnich does not support AG's conclusion that the Rate Cases may be set aside based on a mere appearance of impropriety.

A decision to recuse a single Commissioner from a pending case prior to a decision is a much less drastic measure than setting aside an agency decision after-the-fact. Setting aside final agency action is much more prejudicial to the parties who have relied on it. That is precisely why Cowan requires a showing of prejudice resulting from actual impropriety in order to set aside a rate order.

The AG nevertheless continues to rely on conclusory allegations of impropriety rather than evidence. Indeed the AG has yet to interview a single LG&E employee regarding these allegations and has never asked the Companies to explain these meetings and calls. The Companies remain ready, willing, and eager to do so. The evidence will show that all contacts between the Companies and the Commission were legal and proper.

III. The AG's vague motion to recuse the Commissioners and their staff from further consideration of these Rate Cases is untimely, unsupported by evidence and should be denied.

The AG's Motion makes the extraordinarily serious request that the Commission should "[r]ecuse from participation in these rate cases any Commissioners or staff who have engaged in undocumented *ex parte* contacts with LG&E employees." The AG's motion to recuse lacks even a scintilla of evidentiary support and should be denied.

A. The motion to recuse should be denied as untimely.

The AG's investigation of *ex parte* communications between regulated utilities and the Commission has existed since before the Companies filed their Rate Cases on December 29, 2003.[14] Almost ten months ago, on January 9, 2004, the Commission issued an order granting

[14] See Attorney General's Response to Motions to Set Aside and Quash and for Temporary Injunction filed with the Franklin Circuit Court July 15, 2004; Videotape of 7/15/04 hearing in Franklin Circuit Court, Oral Argument of

the AG full status as an intervenor in the Rate Cases. Thereafter, the AG submitted approximately 1,100 data requests to LG&E and KU and presented testimony by four expert witnesses. Despite his avowed concern over the possibility of *ex parte* contacts, the AG did not ask the Companies a single question about improper *ex parte* communications or collusion.

On May 4, 2004, the Commission opened the hearing for the Rate Cases and, with the affirmative support of the AG, adjourned the hearing to allow the parties to discuss the possible settlement of the case. During the negotiations that day, the AG's Rate Case lawyers agreed to settle the revenue requirement and other issues. The next day, May 5, 2004, AG Stumbo appeared at the Commission to rescind his lawyers' agreement to the settlement. The Commission proceeded with the hearing and the parties, including the AG, continued to negotiate, reaching agreement on many other issues including an annual increase of LG&E's natural gas base rates of $11.9 million.

On May 6, 2004, during a radio interview with 840 WHAS, AG Stumbo publicly alleged the Rate Cases were tainted by collusion. At the Rate Case hearing that same day, the Commission inquired on the record as to whether any of the counsel present were aware of any collusion. All counsel including the AG's lawyers advised they had no knowledge of any such collusion.[15] The hearing continued on contested issues while the settlement negotiations on other issues advanced. When the Commission again inquired on the record as to whether any party had any objection to the process, no one expressed any objection.[16] All parties, including the AG, then stated on the record that they would sign the settlement agreement on a recommended

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Pierce Whites on behalf of the AG, at 10:54:08 to 10:56:30. Whites stated that since the time AG Stumbo took office, he has been investigating "highly improper" contacts between the PSC and Kentucky-American, and believed this was part of a pattern involving LG&E. Id.

[15] Transcript of Evidence, May 6, 2004, pp. 14-19.

[16] Transcript of Evidence, May 6, 2004, p. 19.

basis.[17] Every single party to the six month Rate Case process - those who participated daily in the discovery, the meetings before the Commission, the negotiations and the ultimate settlement stated, on the record, that they had no knowledge of any impropriety. Faced with the complete absence of evidence or even an expression of concern by the parties in the best position to know what actually happened during the Rate Case proceedings, the Commission appropriately moved forward on the merits. On May 12, 2004, there was a hearing on the merits of the settlement and all counsel signed the agreement as to all uncontested issues. On June 30, 2004, the Commission issued the Rate Case Orders, approving the partial stipulation on the electric base rates worth $101.4 million and determining that this amount was reasonable based on a factual record that supported almost $6 million more (a $107.3 million award). The revenue increase granted by the Commission was almost $40 million less than that originally sought by the Companies.

Only after this lengthy and complex process was complete, on July 8, 2004, did the AG first take action on his allegations of collusion by issuing his first set of civil subpoenas and document requests upon the Commission and the Companies. Thus, the investigation was not launched until almost 60 days after the AG asserted he had knowledge of collusion in the Rate Cases.

It is well settled in Kentucky that "[a] motion for recusal should be made immediately upon discovery of the facts upon which disqualification rests. ... Otherwise, it will be waived." Bussell v. Commonwealth, Ky., 882 S.W.2d 111, 113 (1994); see also Noe v. Commonwealth, Ky. 103 S.W.2d 104, 106 (1937); Neace v. Commonwealth, Ky., 26 S.W.2d 489, 490 (1930). A disqualification motion is timely only if it is made "at the earliest possible moment" after obtaining the information of possible bias. In re Big Rivers Electric Corp., 213 B.R. 962, 972

[17] The AG did not agree to stipulated amounts for increasing LG&E's and KU's electric base rates or the treatment of the depreciation expenses stipulated to by the other ten parties to the proceeding as fair, just and reasonable.

(Bankr.W.D.Ky. 1997) (citing In re Cooke, 160 B.R. 701, 704 (Bankr.D.Conn. 1993)). "[E]ven a relatively brief delay in filing the motion may result in a finding of untimeliness." Id.; see also Apple v. Jewish Hospital & Medical Center, 829 F.2d 326, 334 (2d Cir. 1987); Datagate, Inc. v. Hewlett-Packard Co., 941 F.2d 864, 871-72 (9th Cir. 1991); Martin-Trigona v. Lavien, 573 F.Supp. 1237, 1244-45 (D.Conn. 1983); and Black v. American Mutual Insurance Company, 503 F.Supp. 172, 173 (E.D.Ky. 1980).

The timeliness requirement is equally applicable to administrative proceedings. A party who seeks to disqualify an administrative adjudicator must take action in a timely manner. Marcus v. Dir., Office of Workers' Compensation Programs, U.S. Dept. of Labor, 548 F.2d 1044, 1051 (D.C.Cir. 1976) (*per curiam*) (stating that "it will not do for a claimant to suppress his misgivings while waiting anxiously to see whether the decision goes in his favor."); see, e.g. Waste Management of Ill., Inc. v. Pollution Control Bd., 530 N.E.2d 682, 695 (Ill.App.Ct. 1988) (*appeal denied* 537 N.E.2d 819 (1989)). Where, as here, the party has failed to raise its claim of disqualification in a timely manner, the failure is deemed to constitute a waiver of its right to make a timely objection. See, e.g. A.R.F. Landfill, Inc. v. Pollution Control Bd., 528 N.E.2d 390, 394 (Ill.App.Ct. 1988) (*appeal denied* 535 N.E.2d 398 (Ill. 1988)); Mountain States Tel. and Tel. Co. v. Public Utilities Comm'n., 763 P.2d 1020, 1028 (Colo. 1988).

The AG's delay in making the motion to recuse, at least five months after he made his first public allegation and more than three months after the Commission issued the Rate Case orders, denied the Commission the opportunity to consider the allegations and take any necessary corrective action prior to issuing a final order. The AG offered no evidence of error during the proceedings and still offers no evidence in its pending motion, relying on a mere unsupported assertion of impropriety. The AG's motion for recusal should be denied by the Commission in

order "to nullify the rewards of 'sandbagging' through employment of dilatory tactics and to prevent parties from disqualifying judges after obtaining an inkling of their views as to the merits." Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges, § 20.5.3 (1998) (hereinafter "Flamm").

B. The motion to recuse is not supported by any evidence.

In an administrative agency setting, the movant must demonstrate, under an objective standard, whether "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C.Cir. 1970). The burden of proof is on the moving party to make a substantial showing of personal bias. See e.g. Pueblo v. Fire and Police Pension Assn., 827 P.2d 597, 602 (Colo.App. 1992); State Transp. Comm'n of Wyo. v. Ford, 844 P.2d 496, 498 (Wyo. 1992); Jutkowitz v. Dep't of Health Serv., 596 A.2d 374, 382 (Conn. 1991). The showing must also include a showing that prejudice to the complaining party resulted from the alleged bias. Waste Management, 530 N.E.2d at 1043.

The AG has submitted *no* evidence before this Commission in support of his allegation of improper *ex parte* communications with the Commissioners or their staff. The AG makes general statements about numerous meetings and phone calls but fails to set forth any factual basis to conclude that the communications improperly related to the merits of the Rate Cases. In fact, based on the record, it is impossible to even identify the specific Commissioners or staff members to which the vague accusations are directed. In short, there is not even a scintilla of evidence to overcome the well-established presumption that the Commissioners and staff performed their duties with honesty and integrity. Kroger Co. v. Louisville & Jefferson County Air Bd., Ky., 308 S.W.2d 435, 439 (1957) ("[T]here is a presumption that every public officer acts in good faith in the performance of the duties intrusted to him by law[.]"); see also Bernard

v. Russell County Air Board, Ky., 747 S.W.2d 610, 612 (1987); Rawlings v. Newport, Ky., 121 S.W.2d 10, 15 (1938).

The Attorney General's reliance upon the canons of ethics applicable to the judiciary is misplaced. Under Kentucky law, "[i]t is well settled that rate making is a legislative function and the power vested in the legislature to make rates may be exercised by it either directly or through some appropriate agency." Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company, Ky., 983 S.W.2d 493, 497 (1998); see also Commonwealth ex rel. Stephens v. South Central Bell Telephone Company, Ky., 545 S.W.2d 927, 931 (1976); Louisville & Nashville Railroad Company v. Garrett, 231 U.S. 298, 34 S.Ct. 48 (1913) (holding that the Railroad Commission order to fix rates was a legislative act). The Commission has also recognized that ratemaking is a legislative function. See East Logan Water District v. City of Russellville, Kentucky, Case No. 01-00212 (Order dated July 3, 2002); In re City of London, Case No. 02-00036 (Order dated February 12, 2002); and In re Big Rivers Electric Corporation, Case No. 94-453 (Order dated February 21, 1997). The Kentucky Court of Appeals recognized this important difference when evaluating the propriety of alleged *ex parte* communications by the Commissioners and PSC Staff in a rate proceeding when it observed:

> Although open hearings and some adjudicating are involved, rate making is basically a legislative function. Commonwealth ex rel. Stephens v. South Central Bell Tel. Co., supra, held that courts need not inquire into the wisdom of legislative procedures, unless they are tainted by malice, fraud or corruption. We are primarily concerned with the product and not with the motive or method which produced it.

National-Southwire Aluminum Co. v. Big Rivers Electric Corp., Ky. App., 785 S.W.2d 503, 515 (1990) (citations omitted; emphasis supplied).

KRS 11A.030(2) is equally inapplicable. That statute is one of five "guidelines" to be used by members of the Executive Branch in determining whether to abstain from action on official decisions "because of a possible conflict of interest."[18] But the AG's motion does not even allege that any employees of the Commission held a personal or financial interest in the Rate Cases which could create a possible conflict of interest.

Moreover, KRS 11A.045 has been construed to permit agency employees to attend cookouts,[19] accept food and refreshments from private corporations sponsoring receptions,[20] and attend holiday functions for a spouse's employer.[21] These ethics opinions recognize that such conduct is appropriate and does not give rise to an appearance of impropriety. There is no evidence in the record that the dinners, receptions, conventions and golf outings vaguely referenced (but unidentified) by the AG are improper under Kentucky's ethics rules for public servants. Indeed, as discussed below, the Motion fails to identify which Commission employee, if any, should have abstained from the decision making process in the Rate Case Orders. The Motion's vague allegations about "dinners, receptions, conventions and golf outings" all appear to relate to events in 2003 and employees who are no longer employed at the Commission.

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[18] KRS 11A.030 provides as follows:

> In determining whether to abstain from action on an official decision because of a possible conflict of interest, a public servant should consider the following guidelines:
>
> (1) Whether a substantial threat to his independence of judgment has been created by his personal or private interest;
>
> (2) The effect of his participation on public confidence in the integrity of the executive branch;
>
> (3) Whether his participation is likely to have any significant effect on the disposition of the matter;
>
> (4) The need for his particular contribution, such as special knowledge of the subject matter, to the effective functioning of the executive branch; or
>
> (5) Whether the official decision will affect him in a manner differently from the public or will affect him as a member of a business, profession, occupation, or group to no greater extent generally than other members of such business, profession, occupation, or group. A public servant may request an advisory opinion from the Executive Branch Ethics Commission in accordance with the commission's rules of procedure.

[19] Commonwealth of Ky. Executive Branch Ethics Commission, Advisory Opinion 00-53 (Sept. 22, 2000).

[20] Commonwealth of Ky. Executive Branch Ethics Commission, Advisory Opinion 93-35 (July 8, 1993).

[21] Commonwealth of Ky. Executive Branch Ethics Commission, Advisory Opinion 98-47 (Dec. 17, 1998).

While the absence of specificity by the AG is an impediment to this Company making a detailed response to his allegations, the fact remains that this Company has engaged in no improper *ex parte* communications with members of the Commission, has not engaged in collusion, has not purchased gifts or other things of value for members of the Commission, has violated no laws and has conducted itself in an honorable and ethical way.

In summary, the AG's recusal motion rests solely upon unfounded speculations. He has not offered a scintilla of evidence of actual impropriety by any Commissioner or staff. "The possible appearance of impropriety ... is simply too weak and too slender a reed on which to rest a disqualification order in this cause, particularly where the mere appearance of impropriety is far from clear." In re Public Service Company of Indiana, Inc., 63 P.U.R.4th 694, IPSC Cause No. 37414 (1984). The AG's motion to recuse should therefore be denied.

CONCLUSION

The AG's Motion has made the extraordinarily serious allegation that the Rate Cases are so tainted that the Commission should set aside "the rate case determination" in the Rate Cases to restore public confidence,[22] direct the Companies to "resubmit applications for any rate increase" and "recuse from participation in these rate cases any Commissioners or staff who have engaged in undocumented *ex parte* contacts with LG&E employees. (AG Motion, p. 8). Yet, the

[22] In the AG's pleadings filed October 29, 2004, in Case Nos. 2004-00303 and 2004-00304, the AG clarified his position when he said:

> The Attorney General participated fully in the negotiations among the parties which lead to the unanimous portion of the Partial Settlement Agreement, Stipulation and Recommendation that agreed to the implementation of an REA for each of the KU and LG&E service areas. While he continues to ask the PSC to set aside the amount of the rate increase, he has not sought to have those issues upon which the parties were unanimously agreed set aside. Further, given that the Attorney General's filed testimony indicated that he finds at least some level of a rate increase to be appropriate for each of the Companies, albeit one substantially less than that ultimately awarded by the Commission, he believes that it is appropriate to implement the noncontested aspects of the settlement now. It is impossible for collusion to taint that upon which all of the parties are unanimously agreed.

Attorney General's motion does not offer even a scintilla of evidence in support of the motion. Quite the contrary, the AG concurrently asks the Commission to hold its own investigation in abeyance indefinitely pending the completion of the AG's investigation into subjects the AG concedes are beyond the parameters of the Rate Cases, and asks the Commission to circumvent the jurisdiction of the Franklin Circuit Court and order the Companies to provide him with additional discovery.

The Companies and their customers have a well-established right to a final determination of these rate proceedings "within a reasonable time and in accordance with due process." Kentucky Power Co. v. Energy Reg. Comm'n of Kentucky, Ky., 623 S.W.2d 904, 908 (1981). The Kentucky Supreme Court has said: "[p]ublic policy dictates [that public utility rate proceedings] not be unnecessarily prolonged." Stephens v. Kentucky Utilities Company, Ky., 569 S.W.2d 155, 158 (1978). The Commission should bring critical finality to these rate proceedings and deny the AG's Motion. The AG has the documents he has requested for a very broad 18 month period of time (e.g., January 1, 2003 through June 30, 2004) and has had most of this information for many weeks if not months. The Commission can further ensure that these rate proceedings are not unnecessarily prolonged anymore by ordering the AG to file his final report within 30 days from the date the Commission enters its order denying the Motion.

For these reasons, the Commission should:

(1) deny the AG's request to order the Companies to respond to document requests under a subpoena which is presently before the Franklin Circuit Court pursuant to KRS 367.240(2), and which seeks documents outside the scope of the Commission's investigation;

(2) order the AG to file his final report within 30 days from the date the Commission enters its order denying the Motion;[23]

(3) deny the AG's request to set aside the Rate Case Orders and direct the Companies to file new Rate Cases; and

(4) deny the AG's request to recuse the Commissioners and their staff from further participation in the Rate Cases.

Dated: November 3, 2004

Respectfully submitted,

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Counsel for Louisville Gas and Electric Company and Kentucky Utilities Company

[23] The AG has acknowledged that he is required by KRS 367.250 to keep confidential the information he has obtained in his investigation, and that he may therefore share the information with the Commission only on a confidential basis pursuant to the law enforcement exception. LG&E and KU respectfully suggest that it is appropriate for the AG initially to provide any evidence to the Commission on a confidential basis pursuant to KRS 367.250, but reserve the right of access to any such evidence if the Commission determines the evidence is probative of the allegations made by the AG in his motion

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Response was served on the following persons on the 3rd day of November 2004, U.S. mail, postage prepaid:

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August 6, 2004

VIA FACSIMILE

Mr. Todd E. Leatherman, Director
Consumer Protection Division
Office of the Attorney General
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601-8204

Re: Attorney General Civil Subpoenas and Investigative Demands issued pursuant to KRS Chapter 367

Dear Todd:

Today, we delivered documents responsive to the Subpoenas under the terms set forth in my letter of July 23 and our telephone discussion on August 2. This first phase of the production includes LG&E/AGI 0001-9059. Documents for each employee are in rubber-banded groups with the name of the employee as the first page. We have also included phone records (land line and cell phone) at the end of the production. Please note that there is one floppy disk and one compact disk in the production.

As I indicated on August 2, we anticipate producing additional documents next Friday. These will consist of additional employee documents and documents produced to us by outside counsel. We also expect to be producing additional customer complaints. We also anticipate producing next Friday a list of undocumented communications under item 4 of our agreement.

After you have a chance to look at the documents we have produced, I would like to follow-up with you about whether we need to produce any additional audit-related documents at this time. I am also trying to confirm which of these documents may actually be filed of record in a public docket.

In sum, by next Friday, we hope that our production will be substantially complete. I will of course contact you immediately if we encounter any unexpected delays in assembling and producing responsive documents.

Finally, as we agreed, I have attached to this email a list of telephone numbers of representatives of the Public Service Commission (other than the main number at the Commission) known or in the possession of any representative of the Companies.

Yours truly,

David S. Kaplan

Enclosures

DSK:skn

cc: Dorothy E. O'Brien
Robert C. Webb

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I

CIVIL ACTION NOS. 04-CI-962 and 04-CI-970

KENTUCKY PUBLIC SERVICE COMMISSION, ON BEHALF OF ITSELF AND SIXTEEN CURRENT AND FORMER EMPLOYEES — PLAINTIFFS

v.

GREGORY D. STUMBO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY — DEFENDANT

and

KENTUCKY UTILITIES COMPANY and LOUISVILLE GAS AND ELECTRIC COMPANY — PLAINTIFFS

v.

GREGORY D. STUMBO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY — DEFENDANT

ORDER

Upon motion by Louisville Gas and Electric Company for a protective order and the Court having heard the argument of counsel on October 8, 2004, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that LG&E's Motion for a Protective Order is denied insofar as LG&E sought an order requiring the Attorney General to withdraw the Civil Investigation Demand served upon American Express Co. The Attorney General may proceed to enforce

compliance with the Civil Investigative Demand served upon American Express by the Attorney General, but only on the following conditions:

1. As used in this Order, the following terms shall have the following meaning:

a. "The American Express Documents" shall mean the documents provided by American Express to the Attorney General in response to the Civil Investigative Demand served upon American Express by the Attorney General.

b. "The Attorney General" shall mean every person employed by or retained by the Attorney General.

2. The Attorney General shall maintain the confidentiality of every American Express Document pursuant to the terms of this Order, including:

a. The Attorney General shall maintain the American Express Documents in such a manner that they are accessible only by lawyers and paralegals (and their personal assistants) who are engaged in the investigation in which the Civil Investigative Demand was served upon American Express.

b. Before any American Express Document is disclosed, described or otherwise identified by the Attorney General to the Public Service Commission or any court or any other person or entity, the Attorney General shall give counsel for LG&E the opportunity to explain or comment on the document(s). The Attorney General may utilize the procedures authorized in KRS 367.240 to obtain additional information or explanation from LG&E employees regarding the American Express Documents, provided that any formal or informal witness statement relating to any American Express Document(s) shall also be kept confidential pursuant to the terms of this Order.

c. If, after counsel for LG&E has been given the opportunity to explain the document(s), the Attorney General intends to disclose, describe or otherwise identify any American Express Document to the Public Service Commission or any court or any other person or entity, the Attorney General shall provide written notice to counsel of record in this action for LG&E, not less than five business days prior to the proposed disclosure, description or identification, a description of the proposed disclosure, description or identification, in order to give LG&E an opportunity to apply to the Court for an appropriate order. Any notice of intended disclosure, description or identification shall also be kept confidential by the Attorney General.

c. If, upon receipt of such written notice, counsel for LG&E applies to this Court for an order, the Attorney General shall not make the disclosure, description or identification proposed in the written, confidential notice until after the Court has ruled upon LG&E's application. All documents filed with this Court in connection with any such application shall be filed under seal.

Roger Crittenden
Judge, Franklin Circuit Court

TENDERED BY:

Sheryl G. Snyder by JMG w/express permission
Sheryl G. Snyder

HAVE SEEN:

Pierce B. Whites by JMG w/express permission
Pierce B. Whites