



S T O L L · K E E N O N · O G D E N
P L L C

2000 PNC PLAZA
500 WEST JEFFERSON STREET
LOUISVILLE, KY 40202-2828
MAIN: (502) 333-6000
FAX: (502) 333-6099
www.skofirm.com

KENDRICK R. RIGGS
DIRECT DIAL: (502) 560-4222
DIRECT FAX: (502) 627-8722
kendrick.riggs@skofirm.com

October 8, 2008

RECEIVED

OCT 10 2008

PUBLIC SERVICE
COMMISSION

Stephanie L. Stumbo
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40601

RE: Application of Kentucky Utilities Company for an Adjustment of Base Rates
Case No. 2008-00251

Application of Kentucky Utilities Company to File Depreciation Study
Case No. 2007-00565

Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Base Rates
Case No. 2008-00252

Application of Louisville Gas and Electric Company to File Depreciation Study
Case No. 2007-00564

Dear Ms. Stumbo:

Enclosed please find and accept for filing two originals and ten copies of the Motion of Kentucky Utilities Company and Louisville Gas and Electric Company for Reconsideration and Reinstatement of Procedural Order in the above-referenced matters. 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 please contact me at your convenience.

Yours very truly,


Kendrick R. Riggs

KRR:ec

Enclosures

cc: Parties of Record

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

OCT 10 2008

PUBLIC SERVICE
COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY)
UTILITIES COMPANY FOR AN) CASE NO. 2008-00251
ADJUSTMENT OF BASE RATES)

In the Matter of:

APPLICATION OF KENTUCKY)
UTILITIES COMPANY TO FILE) CASE NO. 2007-00565
DEPRECIATION STUDY)

In the Matter of:

AN ADJUSTMENT OF THE ELECTRIC)
AND GAS RATES, TERMS AND) CASE NO. 2008-00252
CONDITIONS OF LOUISVILLE GAS)
AND ELECTRIC COMPANY)

In the Matter of:

APPLICATION OF LOUISVILLE GAS)
AND ELECTRIC COMPANY TO FILE) CASE NO. 2007-00564
DEPRECIATION STUDY)

**MOTION OF KENTUCKY UTILITIES COMPANY AND
LOUISVILLE GAS AND ELECTRIC COMPANY
FOR RECONSIDERATION AND REINSTATEMENT OF PROCEDURAL ORDERS**

Kentucky Utilities Company (“KU”), and Louisville Gas and Electric Company (“LG&E”) (collectively, the “Companies”), for their Motion for Reconsideration and Reinstatement of Procedural Orders, state as follows:

Introduction

On October 6, 2008, the Commission entered orders vacating the procedural schedules pertaining to these cases (the “Orders”) along with a Notice signed by Vice Chairman James W. Gardner (the “Notice”) indicating the Vice Chairman’s belief that he is prohibited by law from hearing the above-referenced cases involving KU until December 15, 2008 because Lexington-

Fayette Urban County Government (“LFUCG”), an intervenor herein, is a client of the law firm of which he remains a partner. The contemplated delay is unnecessary and fundamentally unfair to the Companies which, through no fault of their own, will be forced either to forego needed rate increases for additional months or to put rates into effect prior to issuance of an Order. Such rates would be subject to refund, with all the administrative expense, burden, customer confusion and dissatisfaction, and upheaval such a procedure entails.

While the Commission and the utilities may disagree over the amount of rate relief warranted by the current rate case, the Commission and the utilities (as well as the intervenors) do not disagree about the strong preference for a Commission order to resolve these rate matters. The Companies want to recover fair, just and reasonable rates in a timely manner. Neither the Commission nor the Companies want a situation in which rates are being recovered that have not been set by the Commission, but the Companies will have no alternative to placing rates into effect, subject to refund, if the Commission does not act within the suspension period prescribed by statute. Part of the calculation of needed rate relief is the calculation of the timing by which those new rates will go into effect.

Delay is unwarranted. The Orders altering the procedural schedules in these cases should be vacated, and the procedural orders previously entered reinstated, for the following reasons:

- Even without Vice Chairman Gardner’s participation in the KU cases, there is a quorum present, pursuant to KRS 278.080, to hear both cases in a timely manner. All three Commissioners are unquestionably available to decide the LG&E cases, and two Commissioners are unquestionably available to hear the KU cases beginning December 1, 2008.
- Even if a quorum were not available, the planned delay and disruption in processing these cases would not be justified. KRS 278.080 specifically permits even a single Commissioner or a hearing officer to hold hearings, receive

evidence, and prepare the final order, which will become a Commission Order on affirmation by a quorum of Commissioners. By providing for such a procedure, the General Assembly has made it plain that even if *all* of the Commissioners are unavailable to hear a case, the case must nevertheless be processed in a timely manner.

- To the extent there is a conflict on the part of Vice Chairman Gardner due to his firm's representation of the LFUCG (and KU does not believe there is any actual bias), that conflict, and perceived bias, adversely affects *KU*, not the public at large. KU is willing to, and hereby does, waive its right to object to the conflict. It is the height of irony that the party that could suffer *potential* injury from the conflict is being subjected to *actual* injury as a result of alleged concern on its behalf. The law does not mandate such a result.
- Further, if KU's willingness to waive the conflict is considered insufficient, the Commission already has authority under the "Rule of Necessity," to set aside the conflict for the purpose of acting in a manner consistent with the best interest of the citizens of Kentucky.
- The delay serves no purpose, because delay alone will not cure the conflict found by the Executive Branch Ethics Commission. In fact, absent waiver by KU, the ongoing conflict identified by the Executive Branch Ethics Commission will continue beyond the ten-month period the law prescribes for deciding this case.

Argument

I. AS THE COMMISSION MAY UNQUESTIONABLY PROCESS THE CASES AS CONTEMPLATED BY THE ORIGINAL PROCEDURAL ORDERS, THE DELAY, BURDEN AND EXPENSE CAUSED BY VACATING THOSE ORDERS IS UNWARRANTED

There is no reason to delay the processing of these cases. While due process requires that a decision be rendered by an unbiased decision maker, it also requires that a case be heard at a meaningful time. *See Franklin v. Natural Resources and Env'tl. Protection Cabinet*, 799 S.W. 2d 1, 5 (Ky. 1990) (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)). Unnecessarily delaying a hearing could, ironically, substitute a real public interest problem for one that is merely perceived.

Moreover, in the statutes that govern the Commission, the General Assembly has made it plain that delay merely for the purpose of attempting to ensure all three Commissioners'

participation is unwarranted, providing that, even if there is only one Commissioner, or even *no* Commissioners, available to conduct a hearing, the hearing will go forward not only with pre-hearing matters like discovery, but with the rate hearing itself. KRS 278.080 provides, in pertinent part:

No vacancy in the commission shall impair the right of the remaining commissioners to exercise all of the powers of the commission. Any investigation, inquiry, or hearing that the commission has power to undertake or hold may be undertaken or held, and the evidence therein taken, by any one (1) or more commissioners or a hearing examiner designated for that purpose by the commission, and every finding, opinion or order made by the commissioner or commissioners or hearing examiner so designated shall, when approved or confirmed by the commission, become the finding, opinion or order thereof.

It has long been the law in Kentucky that an agency may base its decisions in adjudicative cases on the work of a hearing officer. *See Our Lady of the Woods, Inc. v. Com., Kentucky Health Facilities and Health Services Certificate of Need and Licensure Board*, 655 S.W. 2d 491 (Ky. Ct. App. 1982). KRS 278.080 codifies that long-standing law with specific reference to the Commission. Moreover, the Commission is not unique in terms of its ability – indeed, its responsibility -- to keep its cases moving even when there is a lack of quorum. In enacting the Kentucky Administrative Hearings statutes in KRS Chapter 13B, the General Assembly took pains to ensure that agency heads would have the ability to delegate responsibility to keep cases moving. KRS 13B.030(1) functions in the same manner as KRS 278.080:

An agency head may exercise all powers conferred on an agency relating to the conduct of administrative hearings, and he may delegate conferred powers to a hearing officer or a member of a collegial body that serves as an agency head, or he may delegate conferred powers to a hearing officer to conduct an administrative hearing before a hearing panel, reserving the authority to render a recommended order to that panel.

The Commission should exercise its powers under KRS 278.080 to keep these proceedings on track. Three Commissioners are available to hear and decide LG&E's cases, and at least two are available to hear and decide KU's cases. Even if they were not, a single Commissioner or a Hearing Officer could step into the void. To the extent the Commission desires to schedule public hearings, it may continue to do so during January 2009 after the evidentiary hearings beginning on December 9, 2008. The previously set procedural schedule should be reinstated. KRS 278.190(3) requires the Commission decide these cases "as speedily as possible." Causing the Companies to place their proposed rate into effect subject to refund can and should be avoided.

II. TO THE EXTENT THAT VICE CHAIRMAN GARDNER CAN BE CONSIDERED OR PERCEIVED TO BE "BIASED" TOWARD HIS FIRM'S CLIENT, LFUCG, THE INTEREST TO BE PROTECTED IS KU'S TO WAIVE

As stated above, Vice Chairman Gardner may unquestionably hear and decide the cases involving LG&E. Moreover, his only stated reason for delaying his participation in KU's cases is his firm's relationship with LFUCG, who is an intervenor here and whose interests may or may not be adverse to those of KU. Thus, KU is the party whose interests are theoretically threatened by Vice Chairman Gardner's participation in the cases, and waiver by KU will cure any perceived conflict.¹ And KU hereby does waive its right to object to the conflict. While KU believes that it is the only party to this proceeding whose interests are theoretically threatened by Vice Chairman Gardner's participation in the cases, KU invites the other parties to join in the waiver.

Ample precedent permits such waivers in the context of both civil and criminal trials, where choice of presiding judge may affect the interests at stake.² The public interest is surely as much at stake in a criminal proceeding, wherein the Commonwealth itself is a party, as in a utilities' proceeding. Instead, waiver by the defendant, as shown in the authorities cited, was fully effective in resolving such a conflict. KU's waiver of any objection to the participation of Vice Chairman Gardner is fully effective here.

Vice Chairman Gardner may hear these cases as originally determined.

III. IN THE ALTERNATIVE, IF KU'S WILLINGNESS TO WAIVE THE CONFLICT IS SOMEHOW CONSIDERED INSUFFICIENT, THE COMMISSION ALREADY HAS AUTHORITY UNDER THE "RULE OF NECESSITY", TO SET ASIDE THE CONFLICT FOR THE PURPOSE OF ACTING IN A MANNER CONSISTENT WITH THE BEST INTEREST OF THE CITIZENS OF KENTUCKY.

Self-disqualification without careful consideration of the results to interested parties can result not in fairness, but in its polar opposite. KRS Chapter 278 imposes serious and ongoing responsibilities upon Commissioners. The importance of discharging those obligations must be the paramount consideration when any Commissioner decides whether he or she should participate in a KRS Chapter 278 proceeding. Not surprisingly, the law has, for hundreds of years, justified decision making by persons with actual conflicts of interest, if there is no alternative decision maker available.

The "Rule of Necessity" is the venerable common law principle recognizing that even a judge with a personal interest in the case not only "may," but indeed "must" "take part in the decision of a case ... if the case cannot be heard otherwise." *U.S. v. Will*, 449 U.S. 200 (1980); *See Flamm, Judicial Disqualification Section 30.11 "Rule of Necessity in Administrative*

² *Carlozzi v. Perkins Law Group*, 2007 WL 2893661 (Ky. App. 2007) (even where a party with knowledge of the grounds for a judge's disqualification fails to object, the failure to object constitutes a waiver of the disqualification); *McCrobie v. Commonwealth*, 2006 WL 2987082 (Not Reported in S.W. 3d)(Ky. 2007);. *Johnson v. Commonwealth*, 180 S.W.3d 494, 503 (Ky. App. 2005)

Proceedings” (1996). Not surprisingly, in light of KRS 278.080 (requiring a quorum for Commission decision), and the lack of a specific procedure for referring Commission cases elsewhere or appointing temporary Commissioners to hear specific cases, the Commission itself has cited the Rule of Necessity.³

The circumstances do not justify disruption. And even if they did, the Rule of Necessity would govern. The procedural schedules should be reinstated, and this case should be heard in a timely manner.

IV. DELAYING THE CASE IS MEANINGLESS, AS DELAY WILL NOT CURE VICE-CHAIRMAN GARDNER’S CONFLICT POINTED OUT BY THE EXECUTIVE BRANCH ETHICS COMMISSION

The Commission has delayed hearing these cases to allow Vice-Chairman Gardner a six month “reasonable period” to abstain from deciding this case. However, the July 11, 2008 Advisory Opinion of the Executive Branch Ethics Commission, at 5, makes it clear that the six-month abstention period applies only to matters in which a party was “formerly” represented by the Vice Chairman. For matters involving *current* clients of the Vice-Chairman’s firm, the conflict remains current, and the six month period prescribed for abstention from deciding cases involving former clients does not cure it: “Due to your ongoing and future relationship with the law firm, *you are required to abstain* from participating in any matters in which another member of your law firm *or a client of the law firm* is involved.” [Advisory Opinion, at 5] (emphasis added). Thus, with respect to the case at bar, the conflict will remain after December 16, 2008, as LFUCG will remain a current client of the firm in which Vice Chairman Gardner is an equity

³ On July 8, 1994, the Commission denied an Attorney General motion demanding that two Commissioners disqualify themselves. The Order was based in part on the Rule of Necessity. *In the Matter of An Investigation of Electric Rates of LG&E to Implement a 25 Percent Disallowance of Trimble County Unit No. 1*, KPSC Case No. 10320 (1994).

partner. The six month cure period pertaining to a “former client” will not even begin until the LFUCG is actually a “former” client.

In summary: if KU’s waiver of the conflict is deemed to be a cure by the Commission, then Vice Chairman Gardner may hear this case as originally scheduled. If the Commission determines that the waiver is insufficient to cure the conflict, then Vice Chairman Gardner will clearly be unable to decide the case at any time during the ten month period allowed for decision pursuant to KRS 278.190(3). In either event, delay of the procedural schedule serves no purpose. The original procedural schedule should be reinstated.

Conclusion

There is no justification for delaying the processing of these cases and imposing upon the Companies no effective choice: [1] foregoing needed rate increases for additional months and sustaining further regulatory lag or [2] incurring the unnecessary administrative burden and expense of placing the rate schedules into effect at the end of the suspension period subject to refund, and causing significant customer confusion and dissatisfaction, only to deal with potential refund obligations later. The Companies, if necessary, will exercise their statutory rights under KRS 278.190(2) and place the proposed rates into effect, subject to refund and the Commission’s order. This, however, is completely unnecessary. There is a quorum available to hear the cases. The original procedural schedules should be reinstated, and these cases should proceed.

Dated: October 8, 2008

Respectfully submitted,

By: 

Kendrick R. Riggs
W. Duncan Crosby III
Stoll Keenon Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202-2828
Telephone: (502) 333-6000

Robert M. Watt III
Stoll Keenon Ogden PLLC
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507-1801
Telephone: (859) 231-3000

Allyson K. Sturgeon
Senior Corporate Attorney
E.ON U.S. LLC
220 West Main Street
Louisville, Kentucky 40202
Telephone: (502) 627-2088

Counsel for Kentucky Utilities Company and
Louisville Gas and Electric Company

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Reconsideration and Reinstatement of Procedural Orders was served via U.S. mail, first-class, postage prepaid, this 8th day of October 2008 upon the following persons:

Dennis G. Howard II
Lawrence W. Cook
Assistant Attorneys General
Office of the Attorney General
Office of Rate Intervention
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601-8204

David C. Brown
Stites & Harbison, PLLC
400 West Market Street, Suite 1800
Louisville, KY 40202

Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

Joe F. Childers
Getty & Childers, PLLC
1900 Lexington Financial Center
250 West Main Street
Lexington, KY 40507

Willis L. Wilson
Leslye M. Bowman, Director of Litigation
Lexington-Fayette Urban County Government
Department of Law
200 East Main Street, P. O. Box 34028
Lexington, KY 40588-4028

Lisa Kilkelly
Legal Aid Society
416 West Muhammad Ali Blvd.
Suite 300
Louisville, KY 40202


Counsel for Kentucky Utilities Company and
Louisville Gas and Electric Company