

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION OF ELECTRIC RATES OF)
LOUISVILLE GAS AND ELECTRIC COMPANY TO) CASE NO. 10320
IMPLEMENT A 25 PERCENT DISALLOWANCE OF)
TRIMBLE COUNTY UNIT NO. 1)

O R D E R

On August 29, 1989, Kentucky Industrial Utility Customers ("KIUC"), an intervenor in the above-styled matter, filed a motion for this Commission to Interdict Affidavits filed on August 28, 1989 by Louisville Gas and Electric Company ("LG&E") and by Commission Staff and requested an order that the Commission not be given the specific dollar details of negotiations of the parties preceding the proposed Settlement Agreement entered into between LG&E and the Staff. On August 29, 1989, LG&E filed objection and response to KIUC's motion. On August 31, 1989, intervenors, Jefferson County, Kentucky ("Jefferson"), Attorney General of the Commonwealth ("AG"), and Residential Intervenors filed pleadings joining in support of KIUC's motion. On September 1, 1989, Save the Valley ("STV") filed a Motion to Join KIUC's motion. KIUC, Residential Intervenors, AG, and Jefferson County filed a joint memorandum in support of their motions on September 1, 1989. LG&E filed a reply memorandum on September 1, 1989.

Upon being advised of KIUC's motion, the Executive Director placed LG&E's affidavits and Staff's affidavits in a sealed

envelope separate from the public record. This Order addresses the issue of whether the above-mentioned affidavits are permitted to be filed of record for consideration by the Commission, which affidavits allegedly contain, in part, specific dollar details of various parties' negotiation positions prior to the Settlement Agreement being entered into by LG&E and Staff.

The Settlement Agreement has been filed with the Commission for its consideration of adoption. Many of the intervenors in opposition to the proposed Settlement Agreement have filed motions and comments with this Commission contending that the tendered settlement should be rejected by the Commission because of claims of irregularities occurring during settlement negotiations, including certain alleged ex parte actions of the Staff, which have allegedly violated the rights of the intervenors and have created an unconstitutionally sound proposal. (For example, see the motion by Jefferson County, Kentucky filed August 8, 1989 requesting dismissal of the proposed settlement.)

The Commission is also aware of numerous other pleadings and correspondence filed in this matter that put in issue the content of the settlement negotiations. These claims of irregularities led the Commission to order, at the August 23, 1989 hearing, that it would first hear evidence from the parties involved in the negotiations regarding the content of the negotiations. The parties, however, agreed that affidavits addressing the subject matter could be filed with the Commission in lieu of an evidentiary hearing.

KIUC asserts in its motion that the Commission did not intend for the parties to file affidavits addressing the substance of the parties' settlement positions, but rather welcomed only affidavits addressing the procedure of the Settlement Agreement. The intervenors also argue that to look at the substance of the parties' settlement positions would be legally incorrect.

The Commission ruled that any individual "representing any of the parties to this matter may, if they wish to, file an affidavit of their, his or her own, in whatever detail the individual cares to, pertaining to that individual's understanding and appreciation and knowledge of the conduct of the negotiations." (emphasis added) See, draft of Transcript of Evidence, page 180. The Commission intended to allow all individuals, if they so desired, involved in the settlement negotiations to file any affidavit covering any aspect of the settlement negotiations. A review of the draft of the transcript of the hearing clearly indicates that the Commission in no way limited the breadth or the scope of what the affidavits could contain.

Furthermore, the Commission is of the opinion that since issues of irregularities and claims of denial of due process have been made regarding the Settlement Agreement, it is incumbent on the Commission to conduct an examination of the negotiations. "[T]he conduct of the negotiations was relevant to the fairness of the settlement and that the trial court's refusal to permit discovery or examination of the negotiations constituted an abuse of discretion." In Re: General Motors Corporation Engine

Interchange Litigation, 594 F.2d 1106, 1124 (7th Cir., 1979). The court in General Motors at page 1124, footnote 20, stated:

Inquiry into the conduct of negotiations is also consistent with the letter and the spirit of Rule 408 of the Federal Rules of Evidence. That rule only governs admissibility. It simply bars admission of evidence of compromise negotiations to prove liability or damages and expressly provides that it 'does not require exclusion when evidence is offered for another purpose'

Following the General Motors case, the United States Bankruptcy Court in, In Re Grant Broadcasting of Philadelphia, Inc., 71 B.R. 390, 394 (Bankr. E.D. PA. 1987) when considering a proposed Settlement Agreement being objected to by many debtors allowed, notwithstanding Federal Rule of Evidence 408, an inquiry concerning all parties "negotiating positions at various phases in the negotiation process, in order to allow all parties to develop any possible evidence of collusion, naivete, or just bad bargaining tactics on the part of the debtors." (emphasis added). Furthermore, in Home Box Office v. Federal Communications Commission, 567 F.2d 9 (D.C. Cir., 1977) the United States Court of Appeals for the District of Columbia remanded a case back to the Federal Communications Commission ("FCC") noting allegations of ex parte contacts and ordering the Commission to hold evidentiary hearings respecting the nature and source of all ex parte contacts so that the FCC had a complete record when it makes its decision. In Sangamon Valley Television Corp. v. U.S., 269 F.2d 221, 225 (D.C. Cir. 1959) the court found that it is appropriate to hold ". . . an evidentiary hearing to determine the nature of the source of all ex parte pleas and other approaches

that were made. . . ." while a formal procedure was pending. The intervenors tried to distinguish these cases on the basis that in this instance the nature of the ex parte contacts are already known and reflected in the filed settlement agreement. However, the intervenors complaining are the only parties that have had their say as to the nature of these alleged ex parte contacts. Until the Commission allows all parties to submit evidence as to all unrevealed ex parte contacts and the nature of these contacts, the Commission cannot fairly judge the impact of these contacts of which the intervenors complain. Therefore, the Commission is of the opinion that the law is clear that the Commission not only has the right to consider all aspects of the settlement negotiations once irregularities have been alleged, but that it is incumbent upon the Commission to do so.

The intervenors complain about the Commission's "goulash" approach regarding the admission of evidence and points the Commission to Re: Pacific Gas & Electric Co., 99 PUR4th 141 at 182 (Calif. 1988) where California Commission operates under a strict settlement rule. However, there are at least two significant distinctions between that case and the one before this Commission. First, the California Commission operates under Evidence Code §§1152, 1152.5, 1154, and proposed settlement rule 51.9 which provides in part:

No statement, admissions, or offers to stipulate or settle, whether oral or written, made in preparation for, or during, negotiations of stipulations or settlements shall be subject to discovery, or admissible in any evidentiary hearing unless agreed to by all parties participating in the negotiation.

Id. at page 182. This Commission follows no such code but operates under the legislative mandate of KRS 278.310 stating that ". . . neither the commission nor the commissioner shall be bound by the technical rules of legal evidence." Secondly, in this instance, unlike Pacific Gas & Electric, supra, the intervenors have opened the door by their complaints about the negotiations and cannot now close it without giving all parties an opportunity to submit evidence to allow the Commission to fairly judge the complaints.

In addition to the claims of irregularity and ex parte contacts, the Commission is also aware that the affidavit filed by Jefferson County on August 28, 1989 in and of itself puts the content of the settlement negotiations at issue making it relevant and subject to rebuttal. For example, Jefferson County has stated: "During this entire week there was no discussion in any detail whatsoever regarding the language of a possible settlement document." (Miller Affidavit, page 3) Similarly, "LG&E did not appear to be willing. . . to make a meaningful financial proposal." (Miller affidavit, page 7) The Commission is well aware of the case law cited by KIUC which stands for the proposition that the content of settlement negotiations is inadmissible at trial determining damages or liability because it is not relevant. This case law is not applicable in this instance because this is not a civil trial on the merits to determine liability or damages. This is a tendered settlement agreement which is being vehemently opposed by intervenors protests of irregularities and the Commission must decide if the settlement is


reasonable and in the public interest. The admissibility of the nature and conduct of the negotiations necessarily becomes relevant in this review.

Being sufficiently advised, IT IS THEREFORE ORDERED that KIUC's motion is DENIED. IT IS FURTHER ORDERED that reply affidavits are due on or before September 5, 1989.

Done at Frankfort, Kentucky, this 1st day of September, 1989.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:

Executive Director