COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

O R D E R

On August 11, 1989, the Louisville Gas and Electric Company ("LG&E") filed a document entitled Stipulation And Settlement Agreement ("Settlement Agreement"), attached hereto and incorporated herein as Appendix A, and a motion requesting the Commission to approve the Settlement Agreement and terminate this investigative docket. The Settlement Agreement, signed by LG&E and the Commission's Staff, is intended to resolve the rate-making issues arising from: 1) the Commission's decision in Case No. 9934[1] to disallow 25 percent of the Trimble County Unit No. 1 Generating Plant ("Trimble County") from LG&E's rate base; 2) the decision in Case No. 10064[2] that a portion of LG&E's current rates be collected subject to refund pending determination of a rate-making methodology to implement the Trimble County disallowance; and 3) the initiation of this pending investigation

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1 Case No. 9934, A Formal Review of the Current Status of Trimble County No. 1.

2 Case No. 10064, Adjustment of Gas and Electric Rates of Louisville Gas and Electric Company.

to determine the appropriate rate-making methodology to implement the Trimble County disallowance. In addition, the Settlement Agreement requires LG&E to dismiss its appeals,[3] now pending in the Franklin Circuit Court, challenging the Commission's decisions in Case Nos. 9934 and 10064.

LG&E's motion states that the Settlement Agreement "resulted from extensive negotiations which involved all parties to this proceeding," and that it "substantially fulfills all legitimate interests advanced by all parties."[4] On August 14, 1989, the Commission issued a procedural Order which granted the parties an opportunity to submit written comments on the Settlement Agreement and further established a hearing on August 23, 1989 to receive evidence on the merits of the Settlement Agreement and receive oral arguments.

The Intervenors in this case include the Attorney General's Office, Utility and Rate Intervention Division ("AG"), Jefferson County, Kentucky ("Jefferson"), City of Louisville ("Louisville"), Residential Intervenors, Kentucky Industrial Utility Customers ("KIUC"), Department of Defense ("DOD"), and Save the Valley ("STV").

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3 Louisville Gas and Electric Company v. Public Service Commission, Franklin Circuit Court, Civil Action No. 89-CI-0678 (filed May 10, 1989).

Louisville Gas and Electric Company v. Public Service Commission, Franklin Circuit Court, Civil Action No. 89-CI-0679 (filed May 10, 1989).

4 Motion of LG&E to Approve Settlement Agreement, pages 1-2.

THE SETTLEMENT PROCESS

On August 21, 1989, the Commission issued an Order denying motions by Jefferson and Residential Intervenors seeking summary rejection of the Settlement Agreement on the ground that it was the product of improper ex parte negotiations. That Order also overruled Jefferson's claim that its due process rights were violated by the negotiating process which produced the Settlement Agreement now under review. Subsequently, extensive arguments were presented by counsel at the hearing regarding the procedural process leading up to the Settlement Agreement and whether that process was irregular in any material respect.

In response to those arguments, the Commission stated at the hearing that it "is convinced, given the objections made by the Intervenors, that the conduct of the negotiations leading up to the product called Stipulation and Settlement Agreement . . . is part and partial [sic] of determining the fairness of that document."[5] Evidence relevant to the conduct of those negotiations was to be received into the record by affidavits and reply affidavits.[6] Those affidavits were to be used by the Commission for the limited purpose of determining if "the settlement negotiations themselves resulted in either a tainted proposal for this Commission's consideration, on whether conduct

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5 Transcript of Evidence ("T.E."), August 23, 1989, pages 50-51.

6 Id., pages 179-181.

of the negotiations in part or in whole created an unconstitutionally sound proposal."[7]

Pursuant to the procedures agreed to by the parties at the hearing, affidavits were filed on August 28, 1989 by John Hart, Jr., LG&E's Vice-President for Rates and Research; M. Lee Fowler, LG&E's Vice-President and Controller; Frank L. Wilkerson, LG&E's Vice-President for Corporate Planning and Development; C. Kent Hatfield, LG&E's attorney; J. Bruce Miller, Jefferson's attorney; F. Bruce Abel, KIUC's attorney; Phyllis Fannin, the Commission's Director of Rates and Tariffs Division; and Richard G. Raff, Commission Staff Counsel. On September 5, 1989, reply affidavits were filed by Mr. Miller; Mr. Abel; Mr. Raff; Pamela Johnson, the AG's Director of the Utility and Rate Intervention Division; and Anthony G. Martin, Residential Intervenor's attorney.

The affidavits and reply affidavits reveal minute details regarding the conduct of the settlement negotiations from their inception on July 25, 1989 through the filing of the Settlement Agreement on August 11, 1989. Jefferson's reply affidavit also presents further argument in support of its claim that its due process rights have been violated. Since this claim was previously addressed and rejected by the Commission's August 21, 1989 Order, these further arguments will be treated as a request for reconsideration of that decision.

First, Jefferson challenges the propriety of those affidavits which reveal the substance of the settlement offers made and the

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[7] Id., page 180.

issues discussed during the negotiating process. Similar objections were overruled by the Commission's September 1, 1989 Order. Specifically, that Order found that Jefferson's August 28, 1989 affidavit "in and of itself puts the content of the settlement negotiations at issue making it relevant and subject to rebuttal."[8]

Jefferson now argues that at no time did it reveal the specifics of any settlement proposal and, therefore, those specifics are not relevant. The Commission finds that the specifics of the proposals made during the settlement discussions are most relevant to the issue of whether any parties' due process rights have been violated. The Settlement Agreement has been challenged as being the product of improper ex parte negotiations between LG&E and the Staff. Absent record evidence of the specific negotiations, the Commission is unable to determine the validity of the due process claim. In addition, Jefferson's counsel stated at the hearing that, "we have no objection to putting the entire process that occurred that created this settlement before the Commission."[9]

Jefferson also claims that the disclosure of specific settlement discussions is a violation of the Commission's admonishment at the hearing to avoid such disclosures. While it is true that the Commission did issue an admonishment at the hearing, at that time the record contained no evidence of specific

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8 September 1, 1989 Order, Case No. 10320, page 6.

9 T.E., August 23, 1989, page 29.

settlement discussions. The Commission merely admonished counsel to refrain from presenting comments that were "based on an 'evidentiary matter' not yet before the Commission."[10] Since the Commission had already established a procedural schedule for receiving evidence on the settlement negotiations,[11] the admonishment was clearly not a prohibition against the introduction of this evidence at the appropriate time.

Second, Jefferson claims that the Commission lacks any established procedures for conducting settlement negotiations and that every intervenor except DOD has objected to the procedure and Settlement Agreement. The Commission notes that its regulation, 807 KAR 5:001, Section 4(4), specifies that, "In Order to provide opportunity for settlement of a proceeding or any of the issues therein, an informal conference with the commission staff may be arranged." And an informal settlement conference was established by Commission Order dated July 20, 1989. No objections were filed challenging the establishment of this settlement conference. To the contrary, every party appeared and participated in the conference with the Staff.

Settlement conferences were held at the Commission's offices on July 25, 28, and 31, 1989. At no time during the course of these settlement negotiations did any party file an objection to the absence of procedures to conduct such negotiations. Rather, the objections were filed only after the negotiations produced an

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10 T.E., August 23, 1989, page 19

11 T.E., August 23, 1989, pages 4-5.

agreement in principle on a settlement. Jefferson cites no authority, other than "due process," to support its argument that the Commission must have other established procedures for conducting settlement negotiations, and the Commission knows of no such authority. Certainly the parties must be afforded their rights to due process, but those rights were clearly satisfied by the August 23, 1989 hearing. Furthermore, even if a cognizable claim could arise from the absence of Commission procedures for conducting settlement conferences, it could certainly be argued that any such claim was waived when each party actively participated in the conferences without objection. See Rudolph v. Commonwealth, Ky., 564 S.W.2d 1, 4 (1977) ("It is settled that except in the most flagrant of circumstances even constitutional rights may be waived by nonassertion.")

Third, Jefferson argues that the Commission's reliance on Pennsylvania Gas and Water Co. v. Federal Power Comm'n, 463 F.2d 1242 (D.C. Cir. 1972) in the August 21, 1989 Order is misplaced because in Pennsylvania Gas: 1) only one of numerous parties objected to the settlement; 2) there were no controverted issues of fact; and 3) the administrative proceedings were before a federal agency and governed by the federal Administrative Procedures Act. The Commission had relied upon the decision in Pennsylvania Gas for its holding that a regulatory commission "cannot refuse to consider a [settlement] proposal which appears, on its face at least consistent with [its] duty [of protecting the ultimate consumer]." Pennsylvania Gas at 1249-1250.

Clearly, it is for the Commission to determine, based on the facts and circumstances of each case, whether a settlement proposal is facially consistent with the Commission's statutory responsibility to balance the just needs of the utility and the public needs for service at reasonable cost. That determination can neither be made, as Jefferson urges, by counting the number of parties who object to the settlement proposal, nor by the Commission abdicating its statutory responsibility to the Intervenors when they collectively represent the general interests of many groups of consumers. And while some minimum level of intervenor support may be needed for a commission to consider a settlement proposal without affording the objectors a hearing, nothing in the Pennsylvania Gas decision supports Jefferson's argument that intervenor support is needed for a commission to hold a hearing to consider a settlement proposal on its merits.

The absence of controverted issues of fact in the Pennsylvania Gas case makes it analogous to, rather than distinguishable from, the pending proceeding. In Pennsylvania Gas the Commission refused to grant a hearing but "accepted all of Penn Gas' factual allegations as correct." Pennsylvania Gas at 1251. In this investigation, an evidentiary hearing was held but no intervenor presented any testimony or challenged through cross-examination the testimony in support of the Settlement Agreement. Consequently, there is no record evidence to support the existence of any controverted issue of fact on the reasonableness of the Settlement Agreement.

Further, the Court in Pennsylvania Gas held that an administrative hearing was not a prerequisite to the Commission's acceptance of a contested settlement when there is no dispute of fact and a party objecting to a settlement has been afforded ample opportunity to present its objections and the commission has ruled thereon. In discussing the federal Administrative Procedures Act, the Court noted that, "There is nothing in the Administrative Procedures Act which expressly requires unanimous consent of all the participating parties to an agreement of settlement . . . ." Pennsylvania Gas at 1250. Consequently, there is no merit to Jefferson's argument that the proceedings at issue in Pennsylvania Gas were under the Administrative Procedures Act.

Fourth, Jefferson challenges the Commission's reliance on Mobil Oil Corp. v. Federal Power Comm'n, 417 U.S. 283 (1974) and Utah Dept. of Admin. Serv. v. Public Service Comm'n, 658 P.2d 601 (Utah 1983). In each of these cases, the Court said that a utility commission has an affirmative duty to review the merits of a non-unanimous settlement agreement. Jefferson argues that those two decisions are distinguishable because an "exhaustive hearing on the merits of the settlement" was conducted by each commission in those cases, whereas "In the instant case, there was a hearing in which no independent evidence was offered by anyone other than employees of LG&E and one employee of the Commission. . . ."[12]

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12 Jefferson's Reply Affidavit, page 9.

Jefferson's argument is specious. The parties were afforded an evidentiary hearing upon notice. Intervenors waived their rights to present evidence in opposition to the settlement and further elected to waive their rights to cross-examine the witnesses who testified in support of the Settlement Agreement. Having waived their rights to more fully participate in the hearing and develop the evidentiary record, the Intervenors have no standing to now argue that the hearing was not "exhaustive" or that the evidence was not "independent."

Fifth, Jefferson challenges, as being factually distinguishable, the legal precedents cited by the Commission's September 1, 1989 Order to support the decision that an inquiry may be made into the specific details of the negotiating process. While it is true that each case cited by the Commission did involve unique factual circumstances, the cited cases, singularly and collectively, stand for the legal principle that inquiry into settlement negotiations is proper when the settlement is challenged as being the product of irregular or ex parte negotiations.

Sixth, Jefferson claims that the Commission has ignored Jefferson's legal precedents regarding the confidentiality of settlement negotiations. While the Commission has been fully cognizant of Jefferson's legal precedents, they were not cited in any Commission decision because they were not relevant to the due process issues raised by Jefferson and other parties. Jefferson cites the following cases: Wolf Creek Collieries Co. v. Davis,

Ky., 441 S.W.2d 401, 402 (1969), (In a trial of the issue of liability, evidence of a settlement offer was not admissible); Whitney v. Penick, Ky., 136 S.W.2d 570, 575 (1940) ("[A]n offer of compromise is never admissible in evidence upon trial of a case."); and Elam v. Woolery, Ky., 258 S.W.2d 452 (1953) ("An offer of compromise is not admissible as evidence upon the trial of a case.").

The prohibition against admitting evidence of settlement offers in a trial of a case is based on the reasoning that "the law favors settlement of controversies out of court, and will not permit an offer of compromise to be used as a weapon against the party making the offer." Elam v. Woolery at 453. That reasoning, however, has no application to the determination of the issue of whether the proceeding leading to the Settlement Agreement is tainted. This issue addresses not a trial of the merits of the Settlement Agreement, but rather the conduct leading up to that agreement. An offer of settlement was filed in the record of this proceeding by LG&E on June 14, 1989. Jefferson, and every other party to this case, subsequently filed comments in the record that addressed the merits of LG&E's offer of settlement and supported the convening of settlement negotiations. The procedures followed in this investigation are consistent with the Commission's regulation governing settlements, 807 KAR 5:001, Section 4(4).

If the legal precedents cited by Jefferson were binding on the Commission, no one could invoke the right under 807 KAR 5:001, Section 4(4), to convene a settlement conference because the mere exercise of that right would constitute inadmissible evidence of

settlement negotiations. Furthermore, none of the precedents cited by Jefferson involve a trial of the fairness of a settlement where the conduct of the negotiations itself is claimed to have fatally flawed the end product - the Settlement Agreement. Intervenors' convoluted argument is that the Commission should adjudge Intervenors' due process rights were violated by the conduct of the settlement negotiations, yet the Commission, on the basis of confidentiality, may not review those same negotiations!

Seventh, Jefferson concludes its Reply Affidavit by alleging that its due process rights have been violated by the Staff's active participation in this case. Specifically, Jefferson argues that a Commission employee cannot, consistent with due process, negotiate a settlement with one party to this investigation and then, in a hearing before the Commission, argue for its adoption absent procedural rules governing the responsibility of Commission employees and the rights of parties in settlement negotiations. Jefferson admits, however, that if one of the parties submits a settlement proposal, "Staff of the Commission can comment favorably or unfavorably on that proposal. That is their responsibility."[13] The crux of Jefferson's complaint is that no authority exists for Staff "to assume the role of a 'party'. . . and negotiate a settlement."[14] Jefferson further argues that if

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13 Jefferson Reply Affidavit, page 13.

14 Id.

Staff could assume such a role, the participation by Intervenors would be rendered useless.

The Commission finds Jefferson's due process argument to be devoid of merit. The Commission's regulation, 807 KAR 5:001, Section 4(4), authorizes settlement conferences with the Staff. Such a conference was convened in this case. If Jefferson's position is correct, and the Staff lacks the authority to negotiate a settlement, the Commission's regulation would be rendered useless. The regulation expressly states that its purpose is to "provide opportunity for settlement,"[15] a purpose that would be illusory if Staff lacked the ability to negotiate a settlement. It is also significant to note that the regulation does not provide for a settlement conference "among the parties"; it provides for such a conference "with the commission Staff."[16] The regulation clearly contemplates that the Staff will be an active participant in any settlement conference. Furthermore, the Staff did actively participate in negotiations during the informal conferences. Neither Jefferson nor any other party objected to Staff's role in negotiating prior to the consummation of a settlement proposal. It was only after the Staff signed a settlement proposal that the objections arose.

The Commission also notes that its Order dated August 21, 1989 overruled similar claims of due process violations arising

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15 807 KAR 5:001, Section 4(4).

16 Id.

from the absence of procedural rules governing settlement conferences. That Order pointed out that the proper role of the Staff in a settlement conference was previously questioned by the same Intervenors in Case No. 10064 and addressed by the Commission's March 17, 1988 Order. Consequently, the parties to this proceeding were put on notice long ago that Staff would be an active participant in any settlement process. Furthermore, the Commission itself is a party defendant to the two court cases which the Settlement Agreement will resolve and both of these court cases seek relief from the Commission, not from the Intervenors. If the Staff may not actively participate in settlement negotiations, who should or could the Commission look to in representing the interests of the Commission?

NEGOTIATING THE SETTLEMENT AGREEMENT

The Commission has reviewed the affidavits and reply affidavits to determine whether the settlement negotiations leading to the submission of the Settlement Agreement were, in any material respect, irregular or produced a tainted proposal. The settlement process was initiated on June 14, 1989 when LG&E filed a settlement offer providing for a $4.2 million rate reduction; an exclusion of 25 percent of the Trimble County investment from LG&E's rate base upon the plant's commercialization; the termination of this instant investigation; and voluntary dismissal by LG&E of its Franklin Circuit Court appeals from Case Nos. 9934 and 10064. Settlement conferences were held at the Commission's offices on July 25, 28, and 31, 1989.

The AG, Jefferson, Louisville, Residential Intervenors, and KIUC (collectively referred to as the "Intervenor Group") presented a written counteroffer on July 25, 1989, which provided for a $4.2 million rate reduction, $10 million in customer refunds, and the payment by LG&E of $2 million for the Intervenor Group's attorney fees.[17] As the negotiations continued through July 31, 1989, LG&E offered substantially greater rate reductions while the Intervenor Group sought substantially less refunds.[18] LG&E first countered with an offer of a token payment of $200,000 toward payment of Intervenor Group's attorney fees, but then refused to include any payment in all subsequent offers.

Despite LG&E's firm opposition to paying the Intervenors' attorney fees, the Intervenor Group persisted in its efforts. The affidavits demonstrate that the Intervenor Group was so intent on recovering $1.6 million of attorney fees that the group proposed increasing future electric rates so that LG&E could recoup its payment from the ratepayers. The Intervenor Group's proposal would effectively transform LG&E into a mere conduit by which the Intervenor Group would recover its attorney fees by taxing the ratepayers.

It is apparent that much progress was made during the negotiating conferences. When negotiations commenced on July 25, 1989, LG&E was offering $4.2 million in ratepayer benefits and the

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17 Staff Affidavit of Richard Raff, Exhibit A.

18 LG&E Affidavit of John Hart, Exhibit B.

Intervenor Group was demanding $16.2 million. By July 31, 1989, LG&E had increased its offer to $2.5 million in refunds and $7 million in rate reductions, for a total ratepayer benefit of $9.5 million; whereas the Intervenor Group had reduced its demand to $2.5 million in refunds and $10 million in rate reductions, for a total ratepayer benefit of $12.5 million.

In addition to the 3 days of negotiating conferences held at the Commission's offices, a private negotiating session was held on the evening of July 28, 1989. This private session was requested by the Intervenor Group and included only the Intervenor Group and LG&E. The Staff was not invited to this private session and was not aware that it occurred until the following week. The Intervenor Group presented a settlement offer at the private session consisting of $11 million in refunds and rate reductions to the ratepayers, plus payment of the Intervenor Group's attorney fees. The Intervenor Group requested LG&E to pay $1.4 million of attorney fees if LG&E could recoup the payment from ratepayers. However, if the Commission denied recoupment, LG&E would pay $1 million of attorney fees.[19]

No formal settlement conferences were scheduled subsequent to July 31, 1989. However, on August 1, 1989, Staff decided to gauge LG&E's willingness to increase its offer to $11 million, an amount that was halfway between the last offer by LG&E and the last

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[19] LG&E Affidavit of John Hart, pages 2-3.

demand by the Staff and the Intervenors. Staff Counsel first contacted Jefferson's counsel, who had been designated by the Intervenor Group as its spokesperson during the settlement conferences. Jefferson's counsel advised Staff Counsel that any offer less than $12.5 million was not acceptable and that the efforts of the Intervenor Group had turned from settlement negotiations to seeking judicial remedies in the Franklin Circuit Court. Staff Counsel then contacted LG&E's counsel to discuss LG&E's willingness to offer an $11 million settlement.

On August 2, 1989, LG&E's counsel contacted Staff Counsel to offer a settlement at $11 million. Before responding to LG&E's offer, Staff Counsel contacted counsel for the AG, Jefferson, KIUC, Residential Intervenors, DOD and STV. Each of these Intervenors was informed of Staff's willingness to accept LG&E's $11 million offer and encouraged to join in a settlement.

The affidavits and reply affidavits present no credible evidence to convince the Commission that any party was excluded from any of the settlement negotiations. Each of the Intervenors was fully informed of LG&E's $11 million offer before its terms were accepted by the Staff. None of the Intervenors requested further settlement negotiations. Counsel for Jefferson, acting on behalf of the Intervenor Group, did ask Staff Counsel to take no further action for approximately 3 weeks to accommodate the vacation schedules of Intervenors' counsels and the out-of-town locations of expert witnesses.

Despite vacation schedules, counsel for each member of the Intervenor Group was readily accessible to discuss LG&E's $11

million offer with Staff Counsel. There is no record evidence to explain why the Intervenor Group's counsels could contact Staff Counsel but could not contact each other. LG&E's $11 million offer did not include any major changes in terms of the settlement provisions that had previously been negotiated with the Intervenors. Based on these facts, the Commission finds that the Intervenors' request for a 3-week delay was neither justified nor reasonable.

Furthermore, there is no evidence that any intervenor was excluded from participating in the drafting of the Settlement Agreement. As the AG acknowledged in its reply affidavit, "[I]f Intervenors could accept the dollar amount of the agreement before the definitive agreement was drawn, then Intervenors could potentially have some input as to the language of the definitive agreement."[20]

The AG's reply affidavit also challenges the Settlement Agreement because it does not include the Intervenors' suggested language that, "[I]n no event shall LG&E request the additional 25% [of Trimble County] prior to 1995 without agreement of all Intervenors who are signatories to this agreement."[21] The AG claims that this language would be a valuable benefit to the ratepayers if included in the Settlement Agreement.

The Commission's April 20, 1989 Order in Case No. 9934 said that the 25 percent of Trimble County disallowed from rate base

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20 AG Reply Affidavit, page 4.

21 AG Reply Affidavit, page 3.

could be included "if, at a later date, LG&E can demonstrate that the capacity is the best available alternative to meet its projected demands."[22] LG&E has a statutory obligation under KRS 278.030 to serve its customers at the lowest reasonable cost. Should LG&E believe that it can demonstrate the need for additional capacity, and further demonstrate that the remaining 25 percent of Trimble County is the best available alternative, it would be unreasonable to allow the Intervenors to veto LG&E's right to make those demonstrations to the Commission. Similarly, the AG's reply affidavit suggests other modifications to the language of the Settlement Agreement which, if adopted, would also impose restrictive conditions on LG&E's ability to demonstrate the need for additional quantities of Trimble County capacity. The Commission finds that these conditions are not now appropriate for inclusion in the Settlement Agreement. Rather, Intervenors will have every opportunity to review LG&E's need for additional Trimble County capacity if and when LG&E seeks to include it in rate base.

The Commission finds that the conduct of the settlement negotiations were, in all respects, proper and regular and in no way fatally flawed. The proposed Settlement Agreement now pending review by the Commission is neither the product of ex parte negotiations nor tainted by any irregularity. The Settlement Agreement provides the ratepayers with essentially the same $11

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22 Case No. 9934, Order dated April 20, 1989, page 6.

million of financial benefits that the Intervenors demanded as a settlement during their private negotiating session with LG&E. The record clearly demonstrates that the Settlement Agreement was the result of the negotiating process that took place during the settlement conferences. As the DOD aptly stated, "No one should criticize the Staff or LG&E for 'talking settlement,' with anyone who would listen, including LG&E. . . . [T]he Staff's action appears to have been taken in good faith, and in the best interest of all of the public. The action appears to have achieved pretty good results."[23]

Based on the affidavits and reply affidavits, as well as the evidence of record, the Commission finds that there have been no violations of any party's constitutional due process rights. Each party had a full and fair opportunity to participate in the negotiating process. Furthermore, the Commission finds that the negotiations were at all times conducted on an arms-length basis and no one participated in bad faith. The negotiating process afforded each party its rights as conferred by the Constitution, the statutes, and the case law.

THE SETTLEMENT AGREEMENT - REASONABLE ON ITS FACE

On August 21, 1989, a motion to reject the Settlement Agreement as unreasonable on its face and contrary to the public interest was filed jointly by the Intervenor Group. The motion to reject alleges that: 1) the Settlement Agreement is merely a

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[23] DOD Comments, filed August 21, 1989, page 9.

proposal since it has not been signed by any party other than LG&E; 2) the amount of customer refunds and future rate reductions is facially insufficient when compared to the amount of revenues collected subject to refund and LG&E's exposure to liability created by the Commission's decisions in Case No. 10064; 3) LG&E's agreement to cap its Trimble County investment at $750 million for rate-making purposes is an invitation to the Commission to engage in speculation regarding the total construction cost and, therefore, should not be considered as a benefit to be offset against LG&E's exposure to liability; 4) LG&E's agreement to not request a rate increase to be effective prior to January 1, 1991 requires the Commission to speculate as to LG&E's future financial condition and its entitlement to any rate relief and should not be deemed a benefit to offset LG&E's exposure to liability; 5) the provision to foreclose any further challenges to or reviews of the prudency of LG&E's construction of Trimble County and its cost is unreasonable and unlawful; and 6) if the Trimble County cost disallowance can be implemented without additional evidence, the Commission should immediately reduce LG&E's rates to reflect a 25 percent disallowance of Trimble County construction work in progress ("CWIP") and require a return of all revenues collected subject to refund.

The Intervenor Group and STV argued at the hearing that the Settlement Agreement was unreasonable and unfair on its face and not in the public interest. Their argument is based on the claim that the only proper method by which the Commission can review the Settlement Agreement is to compare its ratepayer benefits of $11

million to LG&E's potential liability of $28.5 million[24] arising from the Commission's decision in Case No. 10064 that revenues associated with Trimble County CWIP be collected subject to refund. These Intervenors argue that the Commission can give no affirmative consideration to any provision of the Settlement Agreement that they characterize as being speculative, such as the rate moratorium through December 31, 1990, the $750 million cap on Trimble County investment, or the dismissal by LG&E of its pending appeals from Case Nos. 9934 and 10064.

The Commission finds the arguments of these Intervenors to be unpersuasive. The Settlement Agreement is, as the Intervenors note, merely a proposal. It is for that reason that the parties were afforded the opportunity to submit written comments thereon and a hearing was held to consider its reasonableness. Although no party except LG&E has signed the Settlement Agreement, the DOD has endorsed it. The DOD stated that, "The substance of the Stipulation between LG&E and the Commission Staff appears to be in the realm of reasonableness. DOD would have no objection to those terms and conditions as a resolution of major issues in this case."[25] DOD's reluctance to be a signatory to the Settlement

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[24] Motion of Intervenors to Reject Proposed Stipulation, filed August 21, 1989, page 3.

[25] DOD Comments, filed August 21, 1989, pages 11-12.

Agreement was due to its tactical strategy, rather than any objection to the substance of the agreement.[26]

While it is true that some of the provisions of the Settlement Agreement are incapable of being quantified in terms of an immediate dollar value, there is certainly no good reason why such provision should be ignored. In fact, these allegedly speculative provisions will actually bring about certainty and resolve the speculation that now exists absent such provisions.

It is incongruous to compare the ratepayer benefits flowing from the Settlement Agreement to LG&E's exposure to liability arising from Case No. 10064. The Commission has entered no Order directing LG&E to make any refunds and, at this stage of the proceedings, ratepayers have no entitlement to any refunds. LG&E's exposure to liability represents no tangible benefit to the ratepayers. The ratepayers will benefit, if at all, only after a rate-making methodology is developed in this investigation. And even then, the amount of ratepayer refunds would be dependent upon the rate-making methodology developed and could vary from zero up to the $11.4 million provided for in Case No. 10064. Therefore, the Settlement Agreement, providing for definitive ratepayer benefits of $11 million, is neither unreasonable on its face nor contrary to the public interest.

The provision in the Settlement Agreement to cap the Trimble County investment for rate-making purposes at 75 percent of $750

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26 Id., page 9.

million will provide significant ratepayer protection against escalating construction costs. Whether this provision will save the ratepayers money cannot be determined until the construction is completed. However, this provision will immediately benefit the ratepayers by eliminating the risk of escalating construction costs. Similarly, the provision for a rate moratorium will eliminate the burden on ratepayers of rate increases prior to December 31, 1990. LG&E has stated that absent this moratorium,, one or two rate cases would likely be filed.[27] Clearly, this provision for a moratorium provides the immediate benefits of rate stability and predictability.

The foreclosure of future challenges or reviews of LG&E's prudency in constructing Trimble County is neither unreasonable nor unlawful. The Commission conducted a full and exhaustive investigation of LG&E's need for Trimble County in Case No. 9934. Based on that investigation, the Commission directed LG&E to complete Trimble County by December 31, 1990, rather than delay its completion or terminate construction. Case No. 9934 also disallowed LG&E's recovery from its ratepayers of 25 percent of the investment in Trimble County. The issues surrounding LG&E's construction of Trimble County have been adjudicated and laid to rest. The Settlement Agreement requires LG&E to dismiss its appeal from the Commission's decisions in Case No. 9934. The future presentation of challenges to the construction of Trimble

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[27] T.E., August 23, 1989, page 59.

County would constitute a collateral attack on the Commission's decisions in Case No. 9934, as well as the provisions of the Settlement Agreement that recognize the 25 percent disallowance of Trimble County investment.

LG&E has proposed that the disallowance of Trimble County costs be implemented pursuant to the terms of the Settlement Agreement. Since LG&E is agreeable to this procedure for cost disallowance, the only evidentiary issue to be resolved is the reasonableness of the Settlement Agreement. Evidence was introduced on that issue at the August 23, 1989 hearing. However, should the Commission not approve the Settlement Agreement, the pending investigation would have to proceed to an evidentiary hearing and a Commission determination of the appropriate rate-making methodology to implement the Trimble County disallowance. There currently exists no record evidence to support an immediate rate reduction, absent the Settlement Agreement, to implement the Trimble County disallowance.

Based on an exhaustive review of the Intervenors' arguments, the Commission finds that the Settlement Agreement is both reasonable on its face and in the public interest. Accordingly, all pending motions to dismiss should be denied.

SETTLEMENT AGREEMENT - REASONABLE ON ITS MERITS

Having concluded that the Settlement Agreement is not facially unreasonable, the Commission must now review the merits of the agreement to determine if it represents a reasonable resolution of the issues and perforce is in the public interest. By its Order of August 22, 1989, the Commission imposed upon those

supporting the Settlement Agreement the burden of proof to demonstrate its reasonableness. Testimony was presented at the August 23, 1989 hearing by LG&E witnesses Fred Wright, Senior Vice President of Operations; John Hart, Jr., Vice President of Rates and Economic Research; M. Lee Fowler, Vice President and Controller; and Commission Staff witness Gary L. Forman, Manager of Rates and Tariffs Division.

All of the evidence presented at the hearing supported the reasonableness of the Settlement Agreement. None of the Intervenors who oppose the Settlement Agreement presented any evidence to support their opposition. Further, none of the Intervenors cross-examined the witnesses who testified on behalf of the Settlement Agreement. Consequently, there are no contested issues of fact to be determined by the Commission.

LG&E witness Wright succinctly summarized the benefits flowing from the Settlement Agreement. They consist of: 1) a $2.5 million refund to customers within 60 days of the Commission's approval of the Settlement Agreement, rather than a mere possibility of refunds to be paid in two to three years at the conclusion of all judicial appeals; 2) an $8.5 million annual rate reduction, effective January 1, 1990; 3) a moratorium on general rate increases from now through December 31, 1990, which will provide ratepayers with rate stability; 4) a significant reduction in LG&E's future revenue requirements due to the rate base exclusion of 25 percent of the Trimble County investment; 5) a cap on the recoverable cost of Trimble County, not to exceed 75 percent of $750 million, which protects ratepayers against cost

overruns while affording full passthrough of any cost savings; 6) dismissal by LG&E of its appeals from Commission Orders in Case Nos. 9934 and 10064; 7) a resolution of the instant case, resulting in the certainty of benefits now, rather than the possibility of benefits in later years; 8) the elimination of one or two rate cases that would likely be filed in the absence of the rate moratorium; and 9) significant savings of money and human resources for the Commission, LG&E, and the Intervenors by eliminating current litigation and this pending investigation.[28]

In evaluating the provisions of the Settlement Agreement, the Commission is of the opinion that affirmative consideration must be given to those provisions that will have a material impact on LG&E's rates. The provision that will produce the greatest dollar benefit to the ratepayers is LG&E's acceptance of the disallowance of 25 percent of Trimble County from rate base. LG&E projects the reduction in revenue requirements that will flow to the ratepayers from this disallowance, starting in 1991, will be in excess of $30 million annually. This projection is conservative; the calculation being based on only the savings in the components of rate of return, income taxes, and depreciation.[29]

The DOD has submitted a similar projection, but it also includes anticipated savings in operation and maintenance expenses. The DOD's projection exceeds $40 million annually.[30]

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28 T.E., August 23, 1989, page 58-60.

29 Id., page 62.

30 Id.

This benefit will, of course, flow to the ratepayers irrespective of the Settlement Agreement if the Commission's decision in Case No. 9934 is affirmed by the courts. However, should that decision not be affirmed, no benefits will be forthcoming in the absence of the Settlement Agreement. As the DOD candidly observed, "One who forecasts the outcome of litigation, in 1991, of 'excess capacity' issues must be very confident. Likewise, some refund money, and an agreed upon rate reduction in January are less illusory than forecasted victories before the Commission or the courts."[31] LG&E's dismissal of its appeals from Case Nos. 9934 and 10064 eliminates the degree of uncertainty surrounding those court appeals, guarantees that the ratepayers will receive the benefit of the 25 percent disallowance of Trimble County, and allows LG&E to direct its full efforts to selling Trimble County capacity off-system.

LG&E testified that, but for the rate moratorium provision in the Settlement Agreement, an application for increased rates would be filed as soon as possible.[32] Based on the actual Trimble County CWIP balance on July 31, 1989 of $616 million, [33] the additional revenue requirement would be $11.1 million annually.[34]

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31 DOD Comments, Filed August 21, 1989, page 5.

32 T.E., August 23, 1989, page 63.

33 LG&E Hearing Exhibit No. 2.

34 T. E., August 23, 1989, page 64.

Utilizing LG&E's assumption of an April 1, 1990 effective date for the rate increase, the ratepayer benefit attributable to the rate moratorium through December 31, 1990, is $8.3 million. Consequently, the Settlement Agreement provides total ratepayer benefits through December 31, 1990 of $19.3 million, consisting of $11 million in refunds and rate reductions plus $8.3 million savings due to the moratorium.

The Commission has also analyzed the merits of the Settlement Agreement in comparison to the scenario argued by all Intervenors, except DOD. That scenario assumes that there is no Settlement Agreement, the decisions in Case Nos. 9934 and 10064 are affirmed, and the ratepayers receive the maximum possible benefits of $11.4 million annually under Case No. 10064. Since there would be no Settlement Agreement, this investigation would continue, through testimony, discovery, hearings, and briefs, to establish the appropriate rate-making methodology for the disallowed costs of Trimble County. Concluding this investigation by April 1, 1990 would result in refunds of $21.2 million to the ratepayers.[35]

However, absent the Settlement Agreement and its rate moratorium through December 31, 1990, LG&E will have filed for a rate increase of $11.1 million annually to be effective April 1, 1990.[36] The impact of this rate increase through December 31,

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35 $11.4 million annually from May 20, 1988 through April 1, 1990.

36 T.E., August 23, 1989, page 64.

1990, is $8.3 million.[37] Consequently, if there is no Settlement Agreement, the $21.2 million in ratepayer benefits from disallowing 25 percent of Trimble County CWIP would be reduced by the $8.3 million rate increase to recover the additional cost of Trimble County CWIP. This would result in a net benefit of $12.9 million ($21.2 less $8.3).

Therefore, this analysis demonstrates that the ratepayer benefits absent the Settlement Agreement could be a maximum of $12.9. This must be compared to the ratepayer benefits under the Settlement Agreement of $11 million. While absent the Settlement Agreement the ratepayer benefits could be $1.9 million greater, the receipt of <u>any</u> benefits under the Intervenors' scenario is contingent upon the courts affirming the Commission's decisions in Case Nos. 9934 and 10064, and the Commission selecting a rate-making methodology that affords the maximum possible benefits to the ratepayers.

If the courts reverse the Commission's decision in Case No. 10064, the $21.2 million refund benefits would be eliminated. If the courts reverse the Commission's decision in Case No. 9934, the ratepayers would be entitled to no benefits through December 31, 1990 and would thereafter be burdened with paying for 100 percent of Trimble County in rate base. Should either of these events occur, or should the Commission select a rate-making methodology

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37 $11.1 million annually prorated for the 9-month period from April 1, 1990 through December 31, 1990 equals $8.3 million.

that provides ratepayers with less than the maximum possible benefits from disallowing 25 percent of Trimble County CWIP, the ratepayer benefits would be substantially less than under the Settlement Agreement. While the possibility of these events occurring may be small, this risk and uncertainty must be weighed against the certainty, under the Settlement Agreement, of a definite $11 million ratepayer benefit through December 31, 1990, and at least $30 million annually thereafter.

In evaluating the merits of the settlement, the Commission has considered the interests of all the parties to this proceeding and has weighed all the evidence of record. The Commission finds that the evidence in its entirety demonstrates the reasonableness of the Settlement Agreement.

In summary, the Commission finds that:

1. The conduct of the settlement negotiation was proper and regular.

2. The Settlement Agreement is reasonable on its face.

3. Intervenors' motions to dismiss the Settlement Agreement should be denied.

4. The evidence of record demonstrates that the Settlement Agreement is reasonable on its merits.

5. The refunds and rate reductions provided by the Settlement Agreement will result in LG&E's electric rates being fair, just, and reasonable.

6. The Settlement Agreement, set forth in Appendix A, should be accepted, approved, and adopted in its entirety.

7. This investigation should be terminated.

IT IS THEREFORE ORDERED that:

1. All motions to dismiss the Settlement Agreement be and they hereby are denied.

2. The Settlement Agreement be and it hereby is accepted, approved, and adopted in its entirety.

3. LG&E shall refund $2.5 million to its electric customers in accordance with Article VII of the Settlement Agreement within 60 days of the date of this Order.

4. LG&E shall filed an exhibit detailing the allocation of the refund to the customer classes within 30 days of completing the refund.

5. LG&E shall reduce its electric rates by $8.5 million annually beginning January 1, 1990 in accordance with Article V of the Settlement Agreement.

6. Within 30 days of the date of this Order, LG&E shall file its revised tariff sheets setting out the reduced rates and charges to be effective with service rendered on and after January 1, 1990.

Done at Frankfort, Kentucky, this 2nd day of October, 1989.

PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

ATTEST:

Executive Director

Commissioner

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 10320 DATED 10/02/89

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

STIPULATION AND SETTLEMENT AGREEMENT

WHEREAS, the Public Service Commission for the Commonwealth of Kentucky ("Commission") is a body corporate, has exclusive jurisdiction over the regulation of retail rates and services of utilities in Kentucky, and has employed technical, legal and other professional employees which it has deemed necessary to carry out the provisions of KRS Chapter 278 ("Commission Staff");

WHEREAS, Louisville Gas and Electric Company ("LG&E" or "the Company") is a Kentucky corporation and a public utility as defined in KRS 278.010(3);

WHEREAS, LG&E began construction of a 495-megawatt coal-fired electric generating plant at a site in Trimble County, Kentucky ("Trimble County Unit No. 1") after the Commission, pursuant to KRS 278.020, granted the Company a Certificate of Public Convenience and Necessity and a Certificate of Environmental Compatibility by Order dated October 19, 1978 in Case No. 7113;

WHEREAS, the Commission, on its own motion, by Order dated July 19, 1988, initiated Case No. 10320 "An Investigation of Electric Rates of Louisville Gas and Electric Company to Implement a 25 Percent Disallowance of Trimble County Unit No. 1;"

WHEREAS, LG&E has filed in the Franklin Circuit Court Civil Action Nos. 89-CI-0678 and 89-CI-0679 challenging Commission Orders in Case Nos. 10064, "Adjustment of Gas and Electric Rates of Louisville Gas and Electric Company," and 9934, "A Formal Review of the Current Status of Trimble County No. 1;"

WHEREAS, certain issues, claims and controversies concerning Trimble County Unit No. 1 have arisen and the Commission's actions and decisions pertaining thereto are more fully described below;

WHEREAS, LG&E and the Commission Staff are willing to accept a compromise and settlement of the issues in Case No. 10320 and Franklin Circuit Court Civil Action Nos. 89-CI-0678 and 89-CI-0679, and, after extensive negotiations, have arrived at a settlement, the principal terms and conditions of which are contained in the Letter of Understanding dated August 7, 1989; and

WHEREAS, pursuant to the August 7, 1989 Letter of Understanding, LG&E and the Commission Staff desire to execute this definitive Stipulation and Settlement Agreement

("Settlement Agreement"), the terms and conditions of which are set forth herein;

NOW THEREFORE, in consideration of the mutual promises and covenants herein contained, it is agreed by and between LG&E and the Commission Staff as follows:

INTRODUCTION

The purpose of this Stipulation and Settlement Agreement is to resolve all pending issues in the following proceedings:

1) Franklin Circuit Court Civil Action No. 89-CI-0679 and PSC Case No. 9934, "A Formal Review of the Current Status of Trimble County Unit No. 1,"

2) Franklin Circuit Court Civil Action No. 89-CI-0678 and PSC Case No. 10064, "Adjustment of Gas and Electric Rates of Louisville Gas and Electric Company," and

3) Case No. 10320, "An Investigation of Electric Rates of Louisville Gas and Electric Company to Implement a 25 Percent Disallowance of Trimble County Unit No. 1."

The procedural history of these proceedings is summarized in the next section.

PROCEDURAL BACKGROUND

1) Case No. 9934. On May 27, 1987, the Commission, by Order, established Case No. 9934 "A Formal Review of the Current Status of Trimble County Unit No. 1." After a lengthy review of LG&E's Electric Load Forecast, 1987-2010 and Capacity

Expansion Study - 1987, the Commission issued an Order dated July 1, 1988 which held, inter alia, that:

> A disallowance of 25 percent of Trimble County shall be accomplished through a rate making alternative, which will assure the ratepayers of LG&E that they will receive the benefits of the reduced revenue requirements which will result if LG&E sold the 25 percent joint interest in Trimble County as described in its Capacity Expansion Study - 1987.

Order at p. 35. LG&E filed a Petition for Modification or Rehearing of the Commission's July 1, 1988 Order. On August 10, 1988, the Commission issued an order granting LG&E's Petition for Modification or Rehearing and requesting written briefs addressing certain issues. On April 20, 1989, the Commission issued a final order in Case No. 9934 which, except for certain clarifications contained therein, denied LG&E's Petition for Modification or Rehearing of the Commission's July 1, 1988 Order and reaffirmed that Order. On May 10, 1989, LG&E filed an Action for Review of the Commission's Orders in Case No. 9934 with the Franklin Circuit Court, styled Louisville Gas and Electric Company v. Public Service Commission of Kentucky, et al., Civil Action No. 89-CI-0679.

2) Case No. 10064. On November 20, 1987, LG&E filed an application with the Commission requesting authority to increase its electric and gas rates. On December 17, 1987, the Commission by Order suspended the proposed rates to allow for further proceedings to determine the reasonableness of the

proposed rates. This proceeding was styled, Case No. 10064, "Adjustment of Gas and Electric Rates of Louisville Gas and Electric Company." On July 1, 1988, the Commission issued a voluminous order which contained numerous determinations concerning the gas and electric rates proposed by LG&E. Among these determinations was a determination concerning the construction work in progress ("CWIP") associated with Trimble County Unit No. 1. The Commission found that all revenues associated with additions to the Trimble County Unit No. 1 CWIP since LG&E's last rate case should be collected subject to refund; the Commission calculated that this determination resulted in an annual provision of $11.4 million being collected subject to refund. Various parties to Case No. 10064 filed petitions for rehearing on this determination and others. On August 10, 1988, the Commission, by Order, granted rehearing on certain issues and denied rehearing on other issues. On April 20, 1989, upon rehearing, the Commission issued its final Order for purposes of appeal. On May 10, 1989, LG&E filed an Action for Review of the Commission's orders in Case No. 10064 with the Franklin Circuit Court, styled Louisville Gas and Electric Company v. Public Service Commission of Kentucky, et al., Civil Action No. 89-CI-0678.

3) Case No. 10320. On July 19, 1988, the Commission, by Order, established Case No. 10320 and initiated this "investigation of Louisville Gas and Electric Company's electric rates for the purpose of implementing its recent deci-

sion to disallow 25 percent of LG&E's costs of its Trimble County Unit No. 1." Order p. 1. On July 29, 1988, the Commission, by Order, postponed further procedural steps in Case No. 10320 until after the Commission ruled on LG&E's Petition for Rehearing in Case No. 9934. On April 20, 1989, having ruled on LG&E's Petition for Rehearing in Case No. 9934, the Commission, by Order, announced it would commence its investigation and scheduled an informal conference for this purpose.

On June 14, 1989, LG&E filed a proposed plan to settle the Trimble County issues and moved the Commission to adopt the settlement proposal. In response, the Commission issued an Order on June 23, 1989 which found that LG&E's settlement proposal "warranted serious consideration by the Commission and all parties" and adopted a procedural schedule to allow all the parties to file comments on the settlement proposal. After the parties filed their comments, and based upon its own further review of LG&E's settlement offer, the Commission issued an Order on July 20, 1989, scheduling a settlement conference for July 25, 1989. Settlement conferences were held on July 25, July 28 and July 31, 1989 in the Commission's offices in Frankfort, Kentucky. The parties to this proceeding were parties of record in Case No. 10064 or in Case No. 9934. These parties include the Utility and Rate Intervention Division of the Office of the Attorney General, the Legal Aid Society on behalf of a group known collectively

as the Residential Intervenors, Kentucky Industrial Utility Customers, Jefferson County, Kentucky, City of Louisville, Kentucky, Utility Ratecutters of Kentucky, Inc., the Paddlewheel Alliance, Save-The-Valley, Inc. and the Department of Defense of the United States. All such parties participated in the settlement conferences.

As a result of these conferences and further negotiations, this Stipulation and Settlement Agreement, as set forth below, is submitted for approval.

STIPULATION AND SETTLEMENT AGREEMENT

The Stipulation and Settlement Agreement represents a package settlement of the issues associated with Case Nos. 9934, 10064 10320 and Franklin Circuit Court Civil Action Nos. 89-CI-0678 and 89-CI-0679. The Settlement Agreement consists of thirteen (13) Articles as follows:

ARTICLE I

LG&E will not contest the Commission's finding of 25% over-capacity of Trimble County Unit No. 1. At LG&E's option, it shall not be precluded, however, from including the 25%, or any portion thereof, in its rate base, should the Commission find, after an affirmative demonstration by LG&E, that the capacity is the best available alternative to meet its projected demands. Any potential return of this 25% to the Company's rate base will be at fully-depreciated capital costs (net book value).

ARTICLE II

LG&E will place a cap on the final cost of original construction of Trimble County Unit No. 1 at $750,000,000. The Company will be entitled to full recovery of 75% of the total construction cost of Trimble County up to the $750,000,000 cap.

ARTICLE III

Within ten (10) days of the date the Commission approves this Settlement Agreement, by final order, LG&E will dismiss its appeal of the Commission's orders in Case No. 9934 pending in the Franklin Circuit Court, Civil Action No. 89-CI-0679.

ARTICLE IV

Within ten (10) days of the date the Commission approves this Settlement Agreement, by final order, LG&E will dismiss its appeal of the Commission's orders in Case No. 10064 pending in the Franklin Circuit Court, Civil Action No. 89-CI-0678.

ARTICLE V

LG&E will voluntarily reduce its electric rates by $8.5 million on an annual basis for the calendar year beginning January 1, 1990. This rate reduction will be allocated among the various customer classes in accordance with the allocations determined by the Commission in the July 1, 1988 Order at page

87 in Case No. 10064. The Company will file revised tariffs to implement this reduction effective January 1, 1990, within 7 working days from the date hereof.

ARTICLE VI

The Company will agree to a moratorium on increases of base electric rates beginning from the date the Commission approves this settlement agreement and continuing through and including December 31, 1990. The moratorium will be subject to force majeure considerations and will not apply to fuel adjustment clause changes. The Company may file for increased base electric rates during the period of the moratorium, provided that such increased rates shall not become effective until the end of the five-month suspension period or until the moratorium ends, whichever is later.

ARTICLE VII

The Company will voluntarily refund $2.5 million to its current customers, in the form of a one-time credit on their monthly bills, within 60 days from the date the Commission issues its final order approving the Settlement Agreement. The refund will be allocated among the various customer classes in accordance with the allocations determined by the Commission in the July 1, 1988 Order at page 87 in Case No. 10064. The amount to be refunded to each customer will be based upon the customer's historical consumption of kilowatt -

hours of electricity for the twelve (12) month period, July 1, 1988 through June 30, 1989.

ARTICLE VIII

The Commission will not order any further refunds or rate reductions beyond the previously-stated amounts, during the moratorium period set forth in Article VI hereof. The refunds and rate reductions referenced in Articles V and VII hereof will implement the Commission's decision in Case No. 10064. The Commission's approval of this Settlement Agreement will conclude and resolve Case No. 10320.

ARTICLE IX

The Company may use January 1, 1991 as the commercial operation date for Trimble County. Electric rates which will become effective in early 1991 after commercial operation of Trimble County will include full recovery of and on the 75% portion of the Company's investment in Trimble County Unit No. 1, including depreciation on the portion in rate base.

ARTICLE X

Any benefits, profits, or entitlements realized by the Company from any transaction associated with the 25% portion of Trimble County will be retained by the Company's shareholders and will not be available for the use or benefit of the Company's ratepayers; the Company will have no obligation to use the 25% portion of Trimble County to service any

native load of its customers in the future. Should any portion of the 25% be returned to the Company's rate base at any time in the future as provided for by Article I hereof, any such benefits, profits, or entitlements from that time forward will be reflected for rate-making purposes in accordance with standard rate-making procedures.

ARTICLE XI

The Company will not be subject to any further challenges to or reviews of the prudency of initiating the construction of Trimble County, continuing the construction of Trimble County, completing Trimble County, or of the cost of Trimble County, except for any issue involving fraud or criminal conduct during such construction.

ARTICLE XII

The forbearance by LG&E in Articles I and VI and the performance by LG&E of the rate reduction in Article V, and the refund in Article VII, and any other action taken or forbearance made in connection with this Settlement Agreement are and shall be deemed to be, in any further proceedings before this Commission or before any court of law, voluntary conduct taken as part of and in consideration of the other mutual covenants and promises contained in the Stipulation and Settlement Agreement. Such performance or forbearance shall not be argued or construed by any signatory hereto or otherwise deemed or

interpreted or argued by any third party to be an admission or precedent, or in any way to expand or alter the statutory powers of the Commission under Kentucky law.

ARTICLE XIII

This Settlement Agreement constitutes the entire agreement among the signatories hereto as to the subject matter hereof and supersedes any previous agreement, oral or written, as to such subject matter. In the event the Commission should fail to approve this Settlement Agreement in full and without modification, any signatory hereto may decline to accept any such modified agreement and the terms of such a modified agreement shall not be deemed to be binding upon any signatory hereto.

BENEFITS OF SETTLEMENT AGREEMENT

The signatories hereto believe the Settlement Agreement is in the public interest in that it provides significant and substantial benefits to the customers and the Company. These benefits include:

- a refund of $2.5 million to the Company's customers within 60 days after approval of the Agreement, instead of the possibility of future refunds payable in two to three years or longer (if at all) following the conclusion of all appeals;

- a rate reduction of $8.5 million annually, effective January 1, 1990;

- a moratorium on increases in electric rates from the present through December 31, 1990, that, together with the refunds and rate reductions, provides rate stability at a lower rate level for customers;

- significantly reduced future revenue requirements for customers' rates, due to 25% of the investment in Trimble County Unit No. 1 remaining outside the Company's rate base;

- a cap on the original cost of Trimble County Unit No. 1 that may be included in rate base (75% of $750 million). This cap protects customers against the risks of any cost overruns;

- dismissal of the Company's two pending appeals and resolution of Case No. 10320, which removes the uncertainty, should litigation continue, of obtaining any of the above-listed benefits should the Company prevail in either or both appeals, or in Case No. 10320, and which makes those benefits available to customers now, instead of two to three years from now or longer, if at all;

- a significant savings in money and human resources for the Commission, other public agencies and

customer groups, as well as for the Company, by avoiding further litigation in the two appeals, in Case No. 10320, and in one or two additional rate cases that would likely be filed by the Company in the absence of the rate moratorium; and

- certainty of outcome for the Company which will be of major importance in the Company's efforts to market the capacity of the 25% of the Unit which will remain outside the rate base.

Given the risks and uncertainties attendant to the outcome of the two court proceedings, as well as Case No. 10320, and in recognition of the substantial benefits set forth above, the signatories believe that this Agreement, which represents a compromise settlement of the respective positions of the signatories hereto, and which substantially fulfills the interests asserted by all parties, is clearly in the public interest.

CONCLUSION AND RECOMMENDATION

Louisville Gas and Electric Company and the Commission Staff agree that the foregoing Stipulation and Settlement Agreement is reasonable and in the public interest, and recommend and urge the Commission adopt this Settlement Agreement in its entirety.

AGREED TO BY:

Louisville Gas and Electric Company

By: C. Kent Hatfield
Its: Counsel

Date: 8/11/89

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By: Richard G. Raff
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Date: August 11, 1989

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