COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN ADJUSTMENT OF THE GAS AND ELECTRIC RATES, TERMS, AND CONDITIONS OF LOUISVILLE GAS AND ELECTRIC COMPANY	)))	CASE NO. 2003-00433
AND		
AN ADJUSTMENT OF THE ELECTRIC RATES, TERMS, AND CONDITIONS OF KENTUCKY UTILITIES COMPANY	)))	CASE NO. 2003-00434

O R D E R

Pending before the Commission are two motions: one filed by the Attorney General's Office, Utility and Rate Intervention Division ("AG"), seeking to compel Louisville Gas and Electric Company ("LG&E") to respond to certain requests for information relating to an LG&E workpaper; and the other filed by LG&E to withdraw from the record that same workpaper. LG&E's motion to withdraw included an objection to the AG's motion to compel, and both parties have filed additional responsive pleadings.

The workpaper was filed by LG&E in response to the initial data request of Kentucky Industrial Utility Customers, Inc. ("KIUC"). The KIUC request, Item No. 1-78, sought "all workpapers … underlying the Companies' proforma [sic] adjustments reflected in the schedules comprising Rives Exhibit 1 that are not included in the Companies' filings." In response to KIUC No. 1-78, LG&E filed 441 pages of workpapers. In the upper right-hand corner of each page, LG&E printed certain identifying information, such as a consecutive number and the names of the witnesses

who could respond to questions relating to the document. The identifying information on each of the 441 pages appears as follows:

Attachment to LG&E's KIUC Question No. 78
Page ____ of 441
Rives/Scott

One of those workpapers, page 428 of 441, relates to an electric temperature normalization pro forma adjustment that was not included in LG&E's filing.

Approximately 2 weeks after LG&E filed workpaper 428, the AG filed a supplemental data request seeking additional information on that adjustment. Upon review of this AG supplemental data request, LG&E immediately notified counsel of record that workpaper 428 was a privileged document that had been inadvertently produced and LG&E requested the return of all copies. The AG declined to return workpaper 428, claiming, among other things, that it was already included in the public record of this case and was no longer subject to any privilege. The AG then filed his motion to compel LG&E to provide the additional information he requested, and LG&E moved to withdraw workpaper 428 from the record of this case.

LG&E claims that workpaper 428 is a communication between an attorney and client and is therefore a privileged communication. Absent a voluntary waiver, LG&E argues the privilege cannot be waived through inadvertent disclosure, based on KBA E-374, a copy of which is attached hereto as Appendix A. KBA E-374 states that:

> Whether or not the sending lawyer's inadvertence and possible violation of Rule 1.6 can waive a privilege presents a question of law. See KBA E-297 (1984) (the Committee does not decide questions of law). The question of what labels, headings or other notices are sufficient to preclude a claim of waiver is also a question of law.

LG&E argues that it was clear from the face of the workpaper that it relates to an adjustment that was not included in Rives' Exhibit 1, whereas KIUC No. 1-78 requested workpapers that were included in Rives' Exhibit 1 but not included in LG&E's filing. Further, LG&E cites a decision from the Florida Public Service Commission ("Florida Commission") which holds that, "An inadvertent disclosure of a privileged document does not constitute a waiver of the privilege when several factors are weighed." Those factors considered by the Florida Commission were:

> (1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a party of its errors.

In re: Fuel and Purchase Power Cost Recovery Clause with Generating Performance Incentive Factor, Docket No. 03001-EI, 2003 WL 22765546 (Fla. PSC 2003).

In resolving this issue, the Commission notes that KBA E-374 concludes that it "is not aware of any controlling caselaw [sic] in Kentucky" on the issue of inadvertent waiver. Applying the criteria set forth by the Florida Commission, the Commission finds that LG&E has failed to provide any evidence on the precautions it took to prevent an inadvertent disclosure of a privileged document. Other than a bald claim that precautions were taken, there is no disclosure of what the precautions were, who was responsible for reviewing documents to prevent inadvertent disclosure, exactly how workpaper 428 was identified by LG&E and labeled as responsive to KIUC No. 1-78, or why the disclosure was not detected for over 2 weeks after the workpaper was filed in

the public record. Presumably, had the AG not requested additional information, LG&E might still not know that it filed workpaper 428 in the public record of this case.

The Commission does not agree with LG&E's claim that it was clear from the face of workpaper 428 that it was unresponsive to KIUC No. 1-78. To the contrary, it was a workpaper, it had been labeled by LG&E as such, it specifically discussed a pro forma adjustment, and it was not included in LG&E's filings. Only upon scrutiny of Rives' Exhibit 1, in conjunction with workpaper 428, does it appear that the workpaper is unresponsive to KIUC's request.

Although workpaper 428 was an E-mail by an LG&E employee to other employees and counsel, LG&E has filed without objection other workpapers that were from, or distributed to, its counsel.[1]

The Commission also finds the decision in Transamerica Computer Co. v. International Business Machine Corp., 573 F.2d 646 (9th Cir. 1978), to be applicable here. In discussing inadvertent waiver of the attorney-client privilege as a result of compelled discovery, the court referred to the "extensive [document] screening procedures" followed by International Business Machine Corp. ("IBM"). Id. at 650. The court also noted the affidavit from one of the lawyers which "succinctly described 'the various steps [taken by IBM], from initial review through [ultimate] production….'" Id. at 649. The details of any LG&E procedures to screen documents are noticeably absent from the record here.

In summary, the Commission finds that LG&E has not provided any evidence to demonstrate that it had screening procedures in place to protect the confidentiality of

[1] See LG&E Response to KIUC No. 1-78, workpaper 274, 339, 382, and 425.

privileged documents and ensure that such documents were not inadvertently produced during discovery. Consequently, LG&E's motion to withdraw should be denied and the AG's motion to compel should be granted.

IT IS THEREFORE ORDERED that:

1. LG&E's motion to withdraw workpaper 428 filed in response to KIUC No. 1-78 is denied.

2. The AG's motion to compel LG&E to respond to the AG's supplemental data request Nos. 49 and 50 is granted.

Done at Frankfort, Kentucky, this 4th day of May, 2004.

By the Commission

ATTEST:

Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION
IN CASE NOS. 2003-00433 AND 2003-00434 DATED MAY 4, 2004

KBA E-374 (Revised)

Question 1: If a lawyer received materials that were not intended for the receiving lawyer, should the lawyer be disciplined if the lawyer attempts to use the documents pursuant to a good faith claim that any privilege or protection that would otherwise have obtained has been waived.

Answer: No. While such conduct is discouraged (see Answer to Question 2), a lawyer should not be disciplined if the lawyer is making a good faith legal argument on behalf of the lawyer's client.

References: KRPC Rules 3.1, 3.4(c). See also Maine Op. 146 (1994). Cf. D.C. Op. 256 (1995); Maryland Op. 89-53; Ohio Op. 93-11.

Question 2: If a lawyer received materials under circumstances in which it is clear that they were not intended for the receiving lawyer, should the lawyer refrain from examining the materials, notify the sender, and abide by the instructions of the sender regarding the disposition of the materials.

Answer: Yes.

References: ABA Formal Op. 92-368 (1992); DC Op. 256 (1995).

OPINION

The Board revisited the issues in KBA E-374 at the request of the Louisville Bar Association (LBA). After receiving the views of the LBA the Board affirms the substance of E-374, but changes the order in which the questions are presented, and emphasized the limits of and risks associated with the assertion of a claim of "waiver" of privilege.

The Committee and the Board are in agreement with the view expressed in ABA Formal Opinion 92-368 (1992) that when a lawyer receives materials under circumstances in which it is clear that they were not intended for the receiving lawyer, the lawyer should refrain form examining the materials, notify the sender, and abide by the senders instructions regarding the disposition of the materials. See ABA Formal Op. 92-368; D.C. Op. 256 (1995).

The controversial question appears to be whether a lawyer should be disciplined for attempting to use such materials pursuant to a claim of "waiver" of privilege. Whether or not the sending lawyer's inadvertence and possible violation of Rule 1.6 can waive a privilege presents a question of law. See KBA E-297 (1984) (the Committee does not decide questions of law). The question of what labels, headings or other notices are sufficient to preclude a claim of waiver is also a question of law. Whether or not there is such a thing as "inadvertent waiver" is a hotly debated question. The legal authorities are divided, and the Committee is not aware of any "controlling" caselaw in Kentucky. For a thorough discussion of the law in each federal circuit see Roberta Harding, Waiver: A Comprehensive Analysis of the Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege, 42 Cath. U.L. Rev. 465 (1993). See also ABA Litigation News (August/September 1995) pp. 1, 7.

A lawyer's duty of loyalty runs to the lawyer's client and not to his opponent's lawyer. Compare D.C. Op. 256 (1995)(D.C. law recognizes the concept of inadvertent waiver, and lawyer may attempt to use materials if lawyer read the materials before realizing it was inadvertently produced - duty to represent client zealously and diligently discussed.) Lawyers are strongly urged to return such materials unread, but if the caselaw permits a lawyer is entitled to argue a good faith claim of "waiver" before the court in which an action is pending. See KRPCs 3.1 and 3.4(c) (... "open refusal [to follow a rule] based on an

assertion that no valid obligation exists.") Maine Op. See also Resolution Trust Corp. v. First American Bank, 10 ABA/BNA Law.Man.Prof.Con. 365 (W. D. Mich. 1994); Kusch v. Ballard, 10 ABA/BNA Law.Man.Prof.Con. 366 (Fla.App. 1994) (refusing to disqualify counsel on the facts of the case, and alluding to the possibility [unlikely perhaps] that a lawyer might deliberately "fax" something to opposing counsel to set that lawyer up for disqualification).

However, the Committee and the Board caution counsel that any claim or "inadvertent waiver" is made at the risk of exclusion of evidence and disqualification. The concept of "inadvertent waiver" of attorney-client privilege has been rejected by many courts on the grounds that waiver is thought to require the voluntary relinquishment of a known right, and that only the client can waive the privilege.

RICHARD H. UNDERWOOD

ETHICS COMMITTEE CHAIR

11/95