

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

AND

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

O R D E R

On October 21, 2004, the Office of the Attorney General ("AG") filed a motion requesting the Commission to take the following actions: (1) Cooperate with the AG's independent investigation by compelling Louisville Gas and Electric Company ("LG&E") and Kentucky Utilities Company ("KU") to produce certain documents, dating back to January 1, 2002, which the AG previously requested by Civil Subpoena and Investigative Demand ("Subpoena") pursuant to KRS 367.260; (2) Produce information of *ex parte* contacts with LG&E and KU; (3) Set aside the June 30, 2004 rate determinations in the above-captioned cases and require LG&E and KU to resubmit applications for any rate increases; and (4) Recuse any Commissioner or staff member who has engaged in undocumented *ex parte* contacts with LG&E or KU from participation in these rate cases. Responses in opposition to the motion were filed by LG&E, KU, and the Kentucky Industrial Utility Customers, Inc. ("KIUC"). The Kentucky Association for Community Action, Inc. and the Community Action Council for

Lexington-Fayette, Bourbon, Harrison and Nicholas Counties, Inc. also filed a joint response in which they take no position on whether the rate determinations should be set aside by the Commission. The AG also filed a reply in support of his motion.

BACKGROUND

On June 30, 2004, the Commission, after investigation and hearing, issued Orders in these two cases authorizing increased rates for LG&E and KU. Approximately one week later, the AG, who had been an active intervenor in these cases, initiated an independent investigation under the Consumer Protection Act, KRS Chapter 367.110, *et seq.*, to determine whether: (1) LG&E and KU had had improper *ex parte* contacts with Commission employees regarding these rate cases; and (2) the settlement negotiations that resulted in the Partial Settlement Agreement, Stipulation and Recommendation ("Partial Settlement Agreement") was the product of collusion. Based on allegations by the AG that improper *ex parte* contacts had occurred, and that the Partial Settlement Agreement was the product of collusion, the Commission reopened the records of these rate cases by Orders issued on July 15, 2004, to investigate those allegations.

The AG subsequently requested the Commission to hold its investigation in abeyance until the AG had an opportunity to conclude his investigation under KRS Chapter 367, *et seq.*, and issue an Investigative Report ("Report") which will be filed with the Commission. The Commission granted the AG's request and set October 12, 2004 as the due date for the AG to file his Report.

On October 12, 2004, the AG filed a status report which stated that he was unable to conclude his investigation, and needed more time to do so, because LG&E

and KU had not provided certain documents that he had requested pursuant to a Subpoena issued under KRS 367.240. The Commission then convened an informal conference on October 21, 2004 to discuss the AG's request for additional time. At the commencement of the conference, the AG filed the motion that is now pending.

As part of the AG's independent investigation, he has served a number of open records requests on the Commission and issued numerous Subpoenas to current and former Commission employees and to LG&E and KU. Pursuant to the Consumer Protection Act, under which the AG is conducting his investigation, the circuit court has jurisdiction to both hear objections to these Subpoenas and to issue protective orders.

DISCUSSION

1. AG Request to Compel Document Production Under KRS 278.230

The AG's motion states that the Commission is obligated by KRS Chapter 367 to cooperate with the AG's independent investigation under the Consumer Protection Act and that such cooperation should include compelling LG&E and KU to produce certain documents pursuant to the Commission's authority under KRS 278.230. The Commission is empowered with broad authority under KRS 278.230 to examine any books or records of a regulated utility and to require those books and records to be made available for inspection and examination.

The AG's motion states that LG&E and KU have hindered his investigation by refusing to produce certain documents previously requested by Subpoena under KRS 367.240. To expedite the AG's investigation, he calls upon the Commission to compel LG&E and KU to produce the documents specified in the AG's List of Requested Items, filed on October 26, 2004.

In their objections to this request, LG&E and KU state that all the documents the AG now seeks through the Commission have already been requested by the AG's second Subpoena, to which objections have been filed with the Franklin Circuit Court. LG&E and KU assert that under KRS 367.240(2), they have the right to invoke the jurisdiction of the circuit court to object to the scope of the AG's second Subpoena and to seek a protective order. Having filed such objections in the Franklin Circuit Court, LG&E and KU argue that the AG should not be allowed to nullify their statutory right by requesting the Commission to conduct discovery for the AG and, in doing so, usurp the jurisdiction of the circuit court.

On November 8, 2004, the Franklin Circuit Court issued an order granting in part the request by LG&E and KU for a protective order to limit the scope of the AG's second Subpoena. LG&E and KU subsequently filed on November 22, 2004 a notice with the Commission stating that they have complied with the terms of the AG's second Subpoena as limited by the Circuit Court's protective order.

Based on the arguments and being otherwise sufficiently advised, the Commission finds that the LG&E and KU documents sought here by the AG are the same as those sought by the AG in his second Subpoena issued in conjunction with his independent investigation. LG&E and KU objected to the scope of that Subpoena, and the Franklin Circuit Court has partially granted their request for a protective order. Thus, the AG's motion is essentially a request that the Commission disregard the decision of the Franklin Circuit Court and compel LG&E and KU to produce the documents that the Circuit Court has already found need not be produced. While the Commission possesses broad authority to compel the production of utility books and

records under KRS 278.230, that authority does not encompass compelling such documents for use by others to conduct their own independent investigations, particularly here, where the circuit court has already ruled that those documents need not be produced for that independent investigation.

2. AG Request For Production of Documentation of Commission *Ex Parte* Contacts With LG&E and KU

The AG's motion further requests that the Commission provide information on *ex parte* contacts with LG&E and KU during the pendency of the rate cases. While this request is listed, along with other requested actions, in the conclusion section of the AG's motion, it is not discussed or even mentioned anywhere else in the motion or the AG's reply. Thus, the AG has presented no argument or basis to support this request.

The Commission believes that it has complied fully with the AG's investigation of *ex parte* contacts in these cases. As part of the AG's independent investigation, he issued a number of open records requests to the Commission, and also issued approximately 17 Subpoenas to current and former Commission employees. All of the information sought by the AG appeared to relate to discovering the existence of *ex parte* contacts between Commission employees and LG&E and KU. The Commission and its current employees cooperated fully by producing all the documents requested, consisting of approximately 7,500 pages, and participating in sworn interviews, all of which were completed by the end of August 2004.

3. AG Request to Set Aside Rate Determinations And Resubmit Applications For Rate Increases

The AG's motion states that LG&E and KU had numerous *ex parte* contacts, both by telephone and in person, with Commission employees during the pendency of these

rate cases. Claiming that these *ex parte* contacts have created the appearance of bias or prejudice, the AG requests the Commission to set aside its June 30, 2004 Orders authorizing increased rates for LG&E and KU, and requiring LG&E and KU to resubmit applications for any increased rates.¹

Even though this relief requested is extraordinary in nature, the AG's motion is supported by nothing more than mere allegations that *ex parte* contacts occurred during the pendency of these rate cases. The AG has presented no evidence of any *ex parte* contacts relating to the merits of the LG&E and KU rate cases. Under Kentucky law as set forth in National-Southwire Aluminum Co. v. Big Rivers Electric Corp., Ky.App., 785 S.W.2d 503, 515 (1990), a Commission rate order can be set aside only upon a showing by tangible evidence that the case was "tainted by malice, fraud or corruption."

Even in the Kentucky case so heavily relied upon by the AG, Louisville Gas and Electric Co. v. Cowan, Ky.App., 862 S.W.2d 897, 900 (1993), the court held that, "ex parte contacts make administrative agencies' decisions voidable, not void per se." The court in Cowan then stated that an improper *ex parte* contact will void an agency decision "where the decision was tainted so as to make it unfair to the innocent party or to the public interest the agency is supposed to protect." Cowan at 901. Here, the AG has not supported his motion by even a showing of any actual *ex parte* contacts, much less the requisite showing under Cowan of improper *ex parte* contacts.

Thus, the Commission will deny without prejudice the AG's request to set aside the LG&E and KU rate determinations. The AG may renew his motion at such time as it

¹ The Commission notes that this request to set aside the rate determinations due to the occurrence of *ex parte* contacts certainly seems to be at odds with the request to compel discovery to determine the occurrence of *ex parte* contacts.

can be supported by tangible evidence that improper *ex parte* contacts occurred and that those contacts tainted the LG&E and KU rate determinations.

4. AG Request That Any Commission Employee Who Engaged in Undocumented *Ex Parte* Contacts Be Recused From Further Participation in These Rate Cases

The AG has included a request in the conclusion section of his motion that any Commission employee who engaged in undocumented *ex parte* contacts with LG&E and KU be recused from any further participation in these rate cases. Neither the AG's motion nor his reply includes any argument or basis to support this request. In fact, there is no identification of the specific employees who may have engaged in undocumented *ex parte* contacts and no evidence to demonstrate that any such contact related to the merits of these rate cases.

The Commission finds that a motion to recuse is an extreme sanction which must be supported by real and substantial evidence to overcome the presumption that public officers act in good faith in the performance of their duties. See Summit v. Mudd, Ky. 679 S.W.2d 225 (1984); see also Kroger v. Louisville & Jefferson County Air Bd., Ky., 308 S.W.2d 435, 439 (1957); Rawlings v. City of Newport, Ky.App., 121 S.W.2d 10, 15 (1938).

In the face of this burden, the AG has presented no evidence at this time that any Commission employee engaged in improper *ex parte* contacts with LG&E or KU on the merits of these rate cases. Consequently, the AG's request for recusal of Commission employees is denied. However, if the AG's Report does present evidence of improper *ex parte* contacts, the Commission will at that time determine the nature and extent of the investigation needed to verify those contacts and ascertain if they tainted the LG&E

and KU rate determinations. The Commission fully agrees with and supports the AG's commitment, set forth in his August 4, 2004 motion to hold these proceedings in abeyance, that, "If the Attorney General's investigation reveals improper actions, the affected parties will be afforded the opportunity to defend themselves."

Even assuming that evidence is forthcoming of improper *ex parte* contacts, the law in Kentucky certainly appears to require a full disclosure of those contacts and, if they tainted the agency's decision, a new hearing before the same decision-makers. Kentucky case law on *ex parte* contacts does not require, as suggested by the AG, the recusal from further participation by agency decision-makers or their staff.

5. AG's Report

Based on the decision herein to deny the AG's request to compel LG&E and KU to produce additional documents, and the November 22, 2004 notice by LG&E and KU that all documents required to be produced by the Franklin Circuit Court have been provided to the AG, the Commission finds that the AG should file his Report no later than December 17, 2004. Once the AG completes and files his Report, the Commission will then be able to determine whether *ex parte* contacts may have occurred and, if so, the extent to which a Commission investigation may be necessary to determine whether any *ex parte* contacts related to the merits of the LG&E and KU rate cases.

IT IS THEREFORE ORDERED that:

1. The AG's October 21, 2004 motion and all of the relief requested therein is denied.
2. The AG shall file his Report no later than December 17, 2004.

Done at Frankfort, Kentucky, this 2nd day of December, 2004.

By the Commission

ATTEST:

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

Executive Director

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