

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 )

ORDER

By this Order the Commission issues the report of its investigation of alleged *ex parte* contacts and collusive or inappropriate behavior between members and employees of the Commission and Louisville Gas and Electric Company (“LG&E”) and Kentucky Utilities Company (“KU”). Finding no evidence of any improper *ex parte* contacts or collusive or inappropriate behavior, we conclude the phase of this proceeding involving allegations of improper conduct and establish a procedural schedule to address the issues for which we had previously granted rehearing.

On June 30, 2004, after investigation and hearing, the Commission authorized increased rates for LG&E and KU. Approximately one week later, the Attorney General (“AG”), who had been an active intervenor in these proceedings, initiated an independent investigation under the Consumer Protection Act.<sup>1</sup> In response to these

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<sup>1</sup> KRS 367.110-.300.

allegations, the Commission, on July 15, 2004, reopened the records of these proceedings to investigate these allegations.

During the course of the next seven months, the AG conducted his investigation. On February 28, 2005, the AG filed his investigative report with the Commission. KRS 367.250,<sup>2</sup> however, requires that this report remain confidential and prohibits publication of its contents except to law enforcement officials.<sup>3</sup>

At the AG's request, the Commission held its own investigation in abeyance pending the completion of the AG's investigation. Following receipt of his report,<sup>4</sup> the Commission instructed its Special Counsel<sup>5</sup> to conduct an investigation of the allegations and to prepare a report of his findings. He was given unrestricted access to the Commission's records and personnel and full and complete autonomy regarding the

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<sup>2</sup> To accomplish the objectives and to carry out the duties prescribed by KRS 367.110-.300, the AG, in addition to other powers conferred upon him by KRS 367.110 to 367.300, may issue subpoenas to any person, administer an oath or affirmation to any person, or conduct hearings in aid of any investigation or inquiry, provided that information obtained pursuant to the powers conferred by KRS 367.110 to 367.300 shall not be made public or disclosed by the AG or his employees beyond the extent necessary for law enforcement purposes in the public interest.

<sup>3</sup> See also *Kentucky Public Service Commission v. Gregory D. Stumbo*, No. 04-CI-00962, Order at 2 (Franklin Cir. Ct. Feb. 23, 2005).

<sup>4</sup> The Commission's actions must be based upon specific evidentiary findings clearly set forth in its Orders. See *Marshall County v. South Central Bell Telephone Co.*, 519 S.W.2d 616, 619 (Ky. 1978). As noted, KRS 367.250 prohibits the AG from disclosing any information obtained pursuant to his investigation except to law enforcement officials. The Commission has received the AG's report subject to these restrictions. The Commission, therefore, cannot discuss the information set forth in the Report in its Orders and hence cannot use that information as the basis for its actions.

<sup>5</sup> The Commission has retained Jonathan D. Goldberg of Goldberg & Simpson, P.S.C., as Special Counsel. Mr. Goldberg was retained after the AG raised his allegations. Mr. Goldberg is not otherwise affiliated with the Commission and did not participate in any Commission proceedings prior to July 15, 2004.

manner in which he conducted this investigation. During the next 10 months, he reviewed the record of these proceedings and took the sworn testimony of 38 persons. On December 6, 2005, the Commission's Special Counsel submitted his report to the Commission. A copy of this report is appended as Appendix A to this Order.<sup>6</sup>

The standard set forth in *Louisville Gas and Electric Co. v. Cowan*, 862 S.W.2d 897 (Ky.App. 1993), served as the Special Counsel's polestar. In *Cowan* the Kentucky Court of Appeals declared that "ex parte contacts make administrative agencies' decisions voidable, not void per se."<sup>7</sup> The *ex parte* contact, however, must be an improper *ex parte* contact. An improper contact relates to the merits of the proceeding.<sup>8</sup> "Legitimate procedural and status inquiries" are not improper.<sup>9</sup> An improper *ex parte* contact is one that so taints an administrative decision so as to make it unfair either to the innocent party or to the public interest the agency is supposed to protect."<sup>10</sup>

The Court in *Cowan* further described that analysis of any *ex parte* contact that must be performed:

The question of whether a decision has been tainted requires analysis of whether the improper contacts may have influenced the agency's ultimate decision; whether the contacting party benefited from the decision; whether the

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<sup>6</sup> Because this report is approximately 1,900 pages in length and its distribution in paper form to each party and the general public is cost prohibitive, a CD-ROM containing an electronic version of this report is appended to this Order and has been made available for download at the Commission's Web site at <http://psc.ky.gov>.

<sup>7</sup> *Id.* at 900.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 901.

contents of the contact were disclosed; and whether vacation and remand would serve a useful purpose. In analyzing the issue we must be concerned with protecting the integrity of the administrative process, which includes the question of the appearance of impropriety from *ex parte* contacts, and the fairness of the result.<sup>11</sup>

In undertaking his investigation, therefore, the Special Counsel had two tasks. First, he had to identify any *ex parte* contacts between the Commission and Commission Staff and the parties to this proceeding. Second, he had to determine whether such contacts constituted an improper *ex parte* contact that would taint the results of the proceedings and render them void.

The Special Counsel found that some *ex parte* contacts between Commission Staff and the parties occurred between November 24, 2003, when LG&E and KU filed notices of their intent to apply for rate adjustments, and June 30, 2004. These contacts, however, did not involve the merits of either utility's rate application. He found that none of the parties to this proceeding, including representatives of the AG's office, acknowledged any *ex parte* discussions on the merits of this proceeding with the Commission or Commission Staff or witnessed any *ex parte* discussions between the Commission or Commission Staff and other parties. He further found no evidence of inappropriate or collusive behavior between the Commission and the parties to these proceedings.

Having closely and carefully reviewed the contents of the Special Counsel's Investigative Report, the Commission finds that the Special Counsel has thoroughly examined and explored the conduct of all persons involved in this proceeding and that the evidence contained in his report as well as the evidence in the record of these

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<sup>11</sup> *Id.* (citations omitted).

proceedings support his findings and conclusions. The Commission further finds that the Special Counsel's findings and conclusions regarding alleged improper *ex parte* contacts between the Commission and its employees and parties to these proceedings and alleged inappropriate and collusive behavior in the conduct of settlement negotiations should be adopted as our own.

The issue of the Special Counsel's Investigative Report and our adoption of his findings and conclusions closes this chapter of these proceedings. Having thoroughly examined the allegations with the use of a special counsel, the Commission finds that further proceedings into the alleged improper *ex parte* contacts are unnecessary and inconsistent with the public interest. The public is entitled to a swift and complete resolution of these questions.

On August 12, 2004, the Commission granted the AG's Petition for Rehearing on the use of an appropriate tax rate to determine LG&E's and KU's state income tax expenses for rate-making purposes, but held its review of that issue in abeyance pending the completion of its investigation into alleged improper *ex parte* contacts. Having completed that investigation, the Commission is now prepared to proceed with its examination of the tax rate issue.

IT IS THEREFORE ORDERED that:

1. The findings and conclusions set forth in the Special Counsel's Investigative Report are adopted as the Commission's findings and conclusions and are incorporated by reference into this Order.

2. The Commission's investigation into alleged improper *ex parte* contacts between the Commission and its employees and parties to these proceedings and into the conduct of settlement negotiations in these proceedings is closed.

3. The proceedings on the use of an appropriate tax rate to determine LG&E's and KU's state income tax expenses for rate-making purposes shall resume. The parties shall follow the procedural schedule set forth in Appendix B to this Order.

4. Any party that requests an evidentiary hearing on the appropriate tax rate to determine LG&E's and KU's state income tax expenses for rate-making purposes shall state in its request the reasons why a hearing is required, identify the persons whom it intends to present as witnesses, and briefly describe those witnesses' expected testimony.

5. The Executive Director shall make available on the Commission's Web site an electronic version of the Special Counsel's Investigative Report that the general public may download.

Done at Frankfort, Kentucky, this 14<sup>th</sup> day of December, 2005.

By the Commission

ATTEST:



Executive Director

Case No. 2003-00433  
Case No. 2003-00434

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE  
COMMISSION IN CASES NO. 2003-00433 and NO. 2003-00434  
DATED December 14, 2005

(Due to the size of the document, Appendix A has been divided into individual documents for the report and the statements. All files will begin with the file name "200300433\_434\_12142005\_apxA\_\*\*\*.")

APPENDIX B

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE  
COMMISSION IN CASES NO. 2003-00433 and NO. 2003-00434  
DATED December 14, 2005

Intervenors and Commission Staff shall serve their first set of requests for information upon LG&E and KU no later than ..... 01/06/2006

LG&E and KU shall file with the Commission and serve upon all parties of record its responses to the first set of requests for information no later than..... 01/20/2006

Intervenors and Commission Staff shall serve their second set of requests for information upon LG&E and KU no later than ..... 02/03/2006

LG&E and KU shall file with the Commission and serve upon all parties of record its responses to the second set of requests for information no later than..... 02/17/2006

Parties may file memoranda or a request for an evidentiary hearing no later than ..... 03/03/2006

Parties may file reply to an opposing party's memoranda or a request for an evidentiary hearing no later than ..... 03/13/2006