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April 14, 2005

Hon. Beth A. O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40601

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APR 14 2005


PUBLIC SERVICE
COMMISSION

Re: Louisville Gas and Electric Company
Kentucky Utilities Company
Case No. 2004-00507

Dear Ms. O'Donnell:

We enclose for filing an original and ten copies of the Response of Louisville Gas and Electric Company and Kentucky Utilities Company to the Motions of IBEW and the Trades Council for Reconsideration and to Compel Discovery Responses in the above-captioned case. Best regards.

Sincerely,



Robert M. Watt, III

Rmw
Encl.

Cc: Mr. John Wolfram (w/encl.)
Counsel of Record (w/encl.)

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT APPLICATION OF LOUISVILLE GAS)
AND ELECTRIC COMPANY AND KENTUCKY)
UTILITIES COMPANY FOR A CERTIFICATE)
OF PUBLIC CONVENIENCE AND NECESSITY,)
AND A SITE COMPATIBILITY CERTIFICATE,)
FOR THE EXPANSION OF THE TRIMBLE)
COUNTY GENERATING STATION)

APR 14 2005
PUBLIC SERVICE COMMISSION
CASE NO. 2004-00507

* * * * *

RESPONSE OF LOUISVILLE GAS AND ELECTRIC
COMPANY AND KENTUCKY UTILITIES COMPANY TO
IBEW'S AND TRADES COUNCIL'S MOTIONS FOR
RECONSIDERATION AND TO COMPEL
DISCOVERY RESPONSES

Louisville Gas and Electric Company and Kentucky Utilities Company (collectively, the
"Companies") respectfully submit this Response to the Motions of Intervenors, International
Brotherhood of Electrical Workers, Local 2100 ("IBEW") and the Greater Louisville Building
and Construction Trades Council ("Trades Council") for Reconsideration [of the Order of March
4, 2005, herein] and to Compel Discovery Responses. As a procedural matter, the Motion for
Reconsideration has been filed too late and should not be considered by the Commission.
Substantively, the Commission acted within its authority when it issued the Order of March 4,
2005, herein and it should not accept the invitation of IBEW and the Trades Council to act
beyond the scope of its authority by injecting extraneous issues into this case. Since the
discovery requests seek information found not to be pertinent to this proceeding and which

finding the Commission should not disturb, the Motion to Compel Discovery Responses should also be denied.

First, the Motion for Reconsideration has been filed too late for Commission action. It was filed 33 days after the entry of the Order for which reconsideration is sought. There is no provision in the Commission's statutes or rules for a "motion for reconsideration," although they have been filed on several occasions. The closest statutory procedure to a motion for reconsideration is the motion for rehearing authorized by KRS 278.400. That statute calls for the filing of a motion for rehearing within 20 days after the service of the order at issue, plus three days for mailing. IBEW and the Trades Council missed this deadline by ten days. The Commission has found that a pleading styled "Request for Motion" was, in fact, a motion for rehearing pursuant to KRS 278.400 and denied it as untimely because it was filed more than 23 days after the date of the order at issue.¹ IBEW and the Trades Council also missed the deadline by which they could have appealed the March 4, 2005, order. KRS 278.410, which authorizes appeals, provides that they must be filed within thirty days after service of the order on appeal. Thus, IBEW and the Trades Council have filed their Motion for Reconsideration too late for it to be considered by the Commission.

Second, even if the Motion for Reconsideration had been timely filed, the Commission correctly delineated the scope of this proceeding in the Order of March 4, 2005, and reconsideration is unnecessary. The Order of March 4, 2005, herein grants the Motion of IBEW and the Trades Council for full intervenor status in this case, but further directs that "[this] case, however, is not the correct forum to raise" the labor force issues identified in the Motion to

¹ *In the Matter of: Petition of CTA Acoustics, Inc. To Retain Kentucky Utilities Company As Power Supplier*, 2003 WL 23471576, Case No. 2003-00226 (December 16, 2003)

Intervene.² The Commission went on to find that IBEW and the Trades Council “should limit the issues they address in this case to those issues properly before the Commission.”³ In the Motion for Reconsideration, IBEW and the Trades Council again request the Commission to include the labor force issues among those the Commission should consider in this case.

The efforts of IBEW and the Trades Council to expand the authority of the Commission to consider the labor force issues and to require certain employment practices by contractors on the construction project must fail. The statutes under which the Commission is proceeding simply do not authorize the Commission to go where IBEW and the Trades Council want it to go.

KRS 278.020(1) requires the Companies to obtain “a certificate that public convenience and necessity require the” construction before commencing same. It does not authorize the Commission to direct how that construction should proceed. Similarly, KRS 278.216, under which the Companies are seeking a site compatibility certificate, does not address the fashion or manner in which construction should proceed or how labor should be employed. The Supreme Court of Kentucky has held as follows:

The powers of the PSC are purely statutory and it has only such powers as are conferred expressly or by necessity or fair implication. *Croke v. Public Service Commission of Kentucky*, Ky. App., 573 S.W.2d 927 (1978). As a statutory agency of limited authority, the PSC cannot add to its enumerated powers. *South Central Bell Telephone Co. v. Utility Regulatory Commission*, Ky., 637 S.W.2d 649 (1982).⁴

The Commission would violate the precept of the *Boone County* case if it expanded its authority to the extent urged by IBEW and the Trades Council.

² Order of March 4, 2005, at 2.

³ *Id.* at 3.

⁴ *Boone County Water and Sewer District v. Public Service Commission*, Ky., 949 S.W.2d 588, 591 (1997) (reh. den. 1997).

IBEW and the Trades Council urge the Commission to include the labor force issues in this proceeding by reference to cases decided under two other statutes: KRS 278.706 and KRS 278.020(5). The first case was before the Kentucky State Board on Electric Generation and Transmission Siting (the “Siting Board”) and not this Commission. There the enabling legislation, KRS 278.706 explicitly requires an analysis of the economic impact of the proposed merchant power plant. Neither KRS 278.020(1) nor KRS 278.216 has any such requirement. The other cases cited by IBEW and the Trades Council were change of control proceedings decided under KRS 278.020(5). That statutory provision expressly gives the Commission the authority to “grant any application [for a change of control] under this subsection in whole or in part and with modification and upon terms and conditions as it deems necessary or appropriate.”⁵ The Commission is not given such authority by KRS 278.020(1) or KRS 278.216. To the contrary, the Commission is limited in KRS 278.020(1) to a determination of whether public convenience and necessity requires the proposed construction and is limited in KRS 278.216 to an assessment of site compatibility.

Efforts to expand the Commission’s statutory authority have uniformly been rejected both by the courts and this Commission. In 1946, the Court of Appeals held that the Commission did not have the authority to determine who should be entitled to bid on franchises under KRS 278.020(3), but only whether there is need and demand for the public service in question.⁶ In 1954, the Court of Appeals held that, under the version of KRS 278.020 then in effect, when considering approval of a sale of a utility, the Commission had the authority only to determine whether a proposed purchaser is ready, willing and able to provide adequate service and did not have the authority to determine whether public ownership is more beneficial than

⁵ KRS 278.020(5).

⁶ *Public Service Commission v. Blue Grass Natural Gas Co.*, 303 Ky. 310, 197 S.W.2d 765, 768 (1946).

private ownership or under whose ownership the lowest rates may be achieved.⁷ Recently, the Commission declined the invitation to expand its authority under one sentence of a statute by reference to another sentence of the statute. In *In the Matter of: Paddock at Eastpoint, LLC, Louis K. Klemenz and St. Joseph Catholic Orphan Society v. Louisville Gas and Electric Company*,⁸ the Complainants sought to have a good faith requirement imposed on an applicant for a CPCN. The Commission responded as follows:

While the statute clearly imposes a good faith requirement on a certificate holder, it does not impose it on an applicant. The Commission does not have the authority to take a statutory requirement from one sentence and impose it by analogy on another. If such requirement is to be added to the statute, that authority rests solely with the General Assembly.⁹

When the Commission limited the scope of this proceeding in its Order of March 4, 2005, it acted within the scope of the authority conferred upon it expressly or by necessity or by fair implication. That is the limit of its authority. It, therefore, acted properly and reconsideration of that action is not warranted.

Since reconsideration of the Order of March 4, 2005, should be denied, the Motion to Compel Discovery Responses should also be denied because the discovery requests at issue there seek information that this Commission has ruled is beyond the scope of this proceeding.

⁷ *Public Service Commission v. Cities of Southgate*, Ky., 268 S.W.2d 19, 21 (1954).

⁸ Case No. 2004-00293, Order of January 27, 2005.

⁹ *Id.* at 7.

For all of the foregoing reasons, the Companies respectfully submit that the Motions of IBEW and the Trades Council for Reconsideration and to Compel Discovery Responses should be denied.

Dated: April 14, 2005

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition for Confidential Protection was served on the following persons on the 14th day of April, 2005, U.S. mail, postage prepaid:

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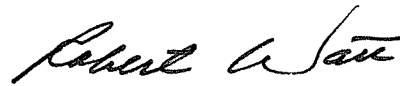
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