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March 25, 2010

VIA HAND DELIVERY

Jeff DeRouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

RE: ***Application of Kentucky Utilities Company for an Adjustment of Base Rates***
Case No. 2009-00548

Application of Louisville Gas and Electric Company for an Adjustment of Electric and Gas Base Rates
Case No. 2009-00549

Dear Mr. DeRouen:

Enclosed please find and accept for filing two originals and ten copies of the Joint Sur-Reply of Kentucky Utilities Company and Louisville Gas and Electric Company to the Attorney General's Reply Brief Concerning His Motions to Compel Responses to Data Requests and to Suspend Procedural Schedules in the above-referenced matters. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me in the enclosed self-addressed stamped envelope.

Should you have any questions please contact me at your convenience.

Yours very truly,

W. Duncan Crosby III

WDC:ec
Enclosures
cc: Parties of Record

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY UTILITIES COMPANY FOR AN ADJUSTMENT OF BASE RATES	)))	**CASE NO. 2009-00548**

In the Matter of:

APPLICATION OF LOUISVILLE GAS AND ELECTRIC COMPANY FOR AN ADJUSTMENT OF ITS ELECTRIC AND GAS BASE RATES	))))	**CASE NO. 2009-00549**

JOINT SUR-REPLY OF KENTUCKY UTILITIES COMPANY AND LOUISVILLE GAS AND ELECTRIC COMPANY TO THE ATTORNEY GENERAL'S REPLY BRIEF CONCERNING HIS MOTIONS TO COMPEL RESPONSES TO DATA REQUESTS AND TO SUSPEND PROCEDURAL SCHEDULES

Kentucky Utilities Company ("KU") and Louisville Gas and Electric Company ("LG&E") (collectively, "Companies") respectfully submit this Sur-reply to the Reply Brief the Attorney General ("AG") filed with the Commission on March 23, 2010, in support of his Motion to Compel Responses to Data Requests and to Suspend Procedural Schedules in both of the Companies' pending base rate cases. The Companies respectfully reiterate their request that the Commission deny the AG's motions.

I. The Commission Should Disregard the AG's Straw-Man Characterization of the Companies' Attorney-Client Privilege and Work Product Objections.

Rather than address the Companies' actual objections concerning the attorney-client privilege, the AG builds a straw man—namely that the Companies believe anything an attorney has touched or seen is privileged—then knocks him down by asserting that the scope of the privilege does not extend that far. What the Companies in fact argued is that disclosing which potential pro forma adjustments the Companies and their counsel considered and rejected would

necessarily disclose legal advice given to the Companies. That is what the Companies contend the privilege protects in these proceedings, which fully accords with the primary purpose the Supreme Court articulated for the privilege in *Upjohn Co. v. United States*: "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[1] It does not promote such full and frank communication to ask, as the AG is in essence asking, "No need to provide the actual communications between the Companies and their counsel. Just tell us what was said." And that is precisely what the AG seeks when he asks to know which pro forma adjustments the Companies considered and rejected; the Companies determined which adjustments not to include on the advice of counsel, and the determination of which adjustments to include or exclude are made solely exclusively in the context of these legal proceedings. These are matters of legal strategy. Thus, what the AG is requesting is necessarily and unavoidably the legal substance of privileged communications between the Companies and their counsel.

In sharp contrast to the AG's wild assertion that "discovery would be rendered nearly impossible" if the Companies' objection is sustained, the Companies have already demonstrated a clear willingness to produce relevant facts; indeed, they produced over 41,000 pages of information in response to over 1,900 data requests from the Commission Staff, AG, and other intervenors on March 15, all of which was in addition to the thousands of pages of information the Companies supplied in their applications. The Companies will continue to provide data relevant to these proceedings in response to the supplemental data requests, but they will not disclose the contents of attorney-client privileged communications.

[1] 449 U.S. 383, 389 (1981).

II. There Is Ample Court Precedent Supporting the Companies' Objection that Its Potential Pro Forma Adjustments Are Opinion Work Product.

The portion of the AG's Reply aimed at an Eighth Circuit Court of Appeals opinion the Companies cited in their Response, *Shelton v. American Motors Corp.*,[2] misses the mark entirely. The AG asserts *Shelton* does not apply here because the discovery dispute in that case concerned deposition testimony by counsel, and the AG is not seeking testimony from counsel in these proceedings. But the part of the *Shelton* opinion applicable to these proceedings does not concern testimony from counsel per se; rather, the holding of *Shelton* that squarely applies to the present dispute is that, in the context of litigation, a counsel's choice of which documents to seek out to review from a vast library of documents a company maintains is, like selecting which of an array of possible expense and revenues adjustments to include in a rate filing, the clear opinion work product of counsel. In *Shelton*, the court held that counsel could not be made to testify concerning whether certain documents existed because she would likely remember the existence only of the documents she had carefully selected to review, making her admission of the existence of any documents necessarily a revelation of her legal strategy, which is opinion work product: "If Burns were compelled to acknowledge whether specifically described documents exist, she necessarily would reveal her mental selective process ... . [T]he mere acknowledgment of the existence of those documents would reveal counsel's mental impressions, which are protected as work product."[3] As the Companies stated in their Response, one of most important components of rate case legal strategy is determining which potential adjustments meet legal muster for inclusion in an historical test year, which the AG's Reply does not dispute. It does not matter if counsel or a witness from the Companies is asked the question; to tell which potential pro forma adjustments were not used would unavoidably reveal counsel's

[2] 805 F.2d 1323, 1328-30 (8th Cir. 1986).
[3] *Id.* at 1329.

impressions of the legal strengths, weaknesses, and best strategic approach in these proceedings. The AG's contention, if sustained, would eviscerate the well-established and long-recognized attorney-client privilege and work-product doctrines and deprive regulated companies of their fundamental right to have effective representation by counsel.[4]

The Eighth Circuit Court of Appeals is not the only court to endorse treating an attorney's document selection in anticipation of litigation as opinion work product. For example, the Third Circuit Court of Appeals also embraced this approach in *Sporck v. Peil*: "[T]he selection and compilation of documents by counsel in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product."[5] In *Jaroslawicz v. Engelhard Corp.*, the U.S. District Court for New Jersey held that an attorney's selection of documents during a prior administrative agency's investigation was opinion work product in a related subsequent action:

> [T]hese documents fall within the "highly protected category of opinion work product" since they involve the selection and compilation of documents by counsel in preparation for discovery or in anticipation of litigation. *Sporck v. Peil*, 759 F.2d at 316. It has been reasoned that such material is accorded an almost **absolute protection** from discovery because disclosing the factual content of such items is outweighed by the interest in protecting an attorney's thought processes in insuring that discovery does not "enable a learned profession to perform its functions ... on wits borrowed from the adversary."[6]

The U.S. District Court for the District of Columbia has also held that document selection is opinion work product "absolutely protected" from discovery:

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[4] As the Kentucky Supreme Court has noted, even public utilities have rights. *Kentucky Power Co. v. Energy Regulatory Com.*, 623 S.W.2d 904, 908 (Ky. 1981) ("Even a public utility has some rights ...."). Among those rights is representation by counsel, including the discovery privileges attaching thereto. *See, e.g., Upjohn Co. v. U.S.*, 449 U.S. 383, 389-90 (1981) ("Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation ....").

[5] 759 F.2d, 312, 316 (3d Cir. 1985).

[6] 115 F.R.D. 515, 517 (D.N.J. 1987) (citations omitted) (emphasis added).

> Because the buck slips were thus prepared "for trial," the question becomes whether their disclosure threatens to reveal counsel's mental impressions, conclusions, or legal theories. FED.R.CIV.P. 26(b)(3). If so, they are absolutely protected from disclosure by that rule. *See Upjohn*, 449 U.S. at 400, 101 S.Ct. 677. In my view, the "buck slips" allow one to learn what documents were sent to counsel, thereby revealing what documents counsel thought she needed to answer the interrogatories. That necessarily discloses her theory of how to answer them as surely as asking her what information she thought was important to collect to answer the interrogatories. Such insight obviously invades the mental process counsel used to perform a legal task, and thus I cannot permit disclosure.[7]

Therefore, though admittedly from jurisdictions other than Kentucky,[8] there is ample authority holding such an exercise of an attorney's judgment to be opinion work product, immune from discovery.

In contrast, not a single precedent the AG cites to support his assertion, "the decision in *Shelton* repeatedly been distinguished and has not been widely adopted, followed or expanded in other jurisdictions," addresses the *Shelton* opinion work product argument in a comparable context. In *American Casualty Co. v. Krieger*, the court addressed a request for a protective order seeking to keep two attorneys from being deposed, not the issue of work product as applied to document selection.[9] Moreover, the *American Casualty* court actually applied the *Shelton* test for allowing counsel to be deposed, contrary to what that AG's citation might have led the Commission to believe.[10] The cited opinion in *Kaiser v. Mutual Life Insurance Co.* likewise concerned taking a deposition of counsel, not whether an attorney's document selection is work product.[11] The court in *aaiPharma, Inc. v. Kremers Urban Dev. Co.* similarly addressed only the *Shelton* opposing-counsel-deposition test, not the *Shelton* approach to treating counsel's

[7] *Marshall v. District of Columbia Water & Sewage Authority*, 218 F.R.D. 4, 6 (D.D.C. 2003).
[8] Kentucky's courts appear not to have produced any reported opinions concerning document selection and work product.
[9] 160 F.R.D. 582 (S.D. Ca. 1995).
[10] *Id.* at 589-90.
[11] 161 F.R.D. 378 (S.D. Ind. 1994).

document selection as opinion work product.[12] The issue under decision in *Nakash v. U.S. Dept. of Justice* was also whether opposing counsel could be made to give deposition testimony, and actually applied the *Shelton* standard.[13] Moreover, the *Nakash* court appears to have endorsed *Shelton's* substantive work product privilege holding: "This does not mean that the substantive privilege issue discussed in *Shelton* could not arise during these depositions. *See id.* at 1329 (holding that selection of individual documents from larger group may reveal attorney's litigation strategy)."[14]

Though *qad, Inc. v. ALN Assoc., Inc.*, does indeed disagree with *Shelton*, it addresses only the appropriate standard for deposing opposing counsel, never once mentioning work product privilege.[15] The same is true of *Munn v. Bristol Bay Hous. Auth.*[16]

The court in *Mead Corp. v. Riverwood Natural Resources Corp.* found *Shelton* inapplicable to the discovery dispute before the court, but it is noteworthy that the discovery sought in *Mead Corp.* was of facts and documents supporting claims and defenses a party had actually asserted, not, as here, facts concerning claims *not* asserted.[17]

The opinion the AG cites in *Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del., Inc. v. Friedman (In re Subpoena Issued to Dennis Friedman)*, deserves special mention.[18] First, the opinion addresses only the appropriate standard for deposing opposing counsel, not the work product privilege. Second, it notes that the Sixth Circuit has explicitly adopted the *Shelton* test for taking depositions of opposing counsel.[19] But third and most notably, the court states at the beginning and the end of the opinion that the entire appeal was

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[12] 361 F. Supp. 2d 770 (N.D. Ill. 2005).
[13] 128 F.R.D. 32 (S.D.N.Y. 1989).
[14] *Id.* at 35.
[15] 132 F.R.D. 492 (N.D. Ill. 1990).
[16] 777 P.2d 188 (Alaska 1989).
[17] 145 F.R.D. 512 (D. Minn. 1992).
[18] 350 F.3d 65 (2d Cir. 2003).
[19] *Id.* at 71, *citing Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621 (6th Cir. 2002).

made moot because the attorney in question agreed to be deposed during the pendency of the appeal, making all the points in the opinion *obiter dicta*. Therefore, though nearly all appellate opinions contain some *dicta*, the AG astonishingly cites to one of the rare opinions that is nothing but *dicta*.

The cited opinion in *First Sec. Sav. v. Kansas Bankers Surety Co.* addressed work product and *Shelton*, but did not address whether document selection or its equivalents, such as choosing pro forma adjustments to include in rate applications, had the protection of the privilege; rather, the court declined to interpret *Shelton* to shift to a discovering party "the burden of demonstrating the non-applicability of the work-product privilege to the documents," stating that such did not appear to be *Shelton's* intent.[20]

Finally, the AG cites to *Leviton Mfg. Co., Inc. v. Shanghai Meihao Elec., Inc.*, an opinion that does not cite *Shelton* even once.[21] The Companies believe the AG meant to cite to *Leviton Mfg. Co. v. Universal Sec. Instruments, Inc.*, which does address *Shelton*, but again only concerning the applicable standard for deposing opposing counsel.[22] Though the correct Leviton opinion does also address work product, it does not address the document-selection type of opinion work product argument the Companies are asserting herein.

In sum, the AG's Reply cites no precedent at all that contradicts the Companies' assertion of opinion work product privilege; indeed, rather than undermining the Companies' argument based on *Shelton*, one of the authorities the AG cites bolsters the Companies argument by noting that the Sixth Circuit Court of Appeals has explicitly applied one of the *Shelton* tests.[23]

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[20] 115 F.R.D. 181, 182-83 (D. Neb. 1987).
[21] 613 F.Supp.2d 670 (D. Md. 2009).
[22] 613 F. Supp. 2d 670 (D. Md. 2008).
[23] *Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del., Inc. v. Friedman (In re Subpoena Issued to Dennis Friedman)*, 350 F.3d 65, 71 (2d Cir. 2003), *citing Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621 (6th Cir. 2002).

III. The AG's Reply Blurs the Distinction between Discoverable Facts and Fact Work Product.

The AG's Reply cites two Kentucky appellate opinions for the proposition that underlying facts are not subject to the work product privilege. But what the AG sought and continues to seek in his data request AG 1-30 to both Companies is not underlying factual data; rather, he is seeking to know what the Companies, in close consultation with their in-house and outside counsel, made of certain data by formulating possible pro forma adjustments to prepare to file their applications in these proceedings. On the plain language of Kentucky Civil Rule 26.02(a), the potential pro forma adjustments of which the AG seeks discovery are clearly protected work product; the only question is whether they are opinion or fact work product. If the former, they are absolutely immune from discovery. The Companies believe they have shown that the potential pro forma adjustments are indeed opinion work product.

But if the Commission disagrees and believes they are only fact work product, the AG may have discovery of them "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[24] The AG's Reply fails to demonstrate his "substantial need" through a circular, bootstrap assertion: "if the information wasn't required by the Attorney General's experts, the question would not have been asked." There are no reported decisions of a court that has accepted the simple unsupported assertion, "Because I say I need it," as a sufficient showing of need to obtain another party's fact work product. In *Duffy v. Wilson*, the Kentucky Supreme Court recounted two previous sufficient showings of "substantial need," which in no way resemble the AG's wholly unsupported assertion of need:

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[24] KRCP 26.02(a).

> In *Vinson*, the work product determined to be discoverable was an investigation performed by a private investigator which consisted of surreptitiously made photographs and observations of the plaintiff's activities over a certain period of time. *Id.* at 486. Since the report was the only document which could possibly contain the eyewitness observations of the private investigator, and it was impossible to go back in time to duplicate it, the Court of Appeals found that the report was discoverable.
>
> ...
>
> [I]n *Haney* we held that certain documents containing the statement of a party taken by an investigator were discoverable because the only other witness to the accident was dead.[25]

The AG's contention, in contrast, does not begin to show such a hardship. The AG has been provided significant amounts of actual data and company documents and is afforded further supplemental discovery of this information on March 26, 2010. His simple demand for the impressions of counsel inherent in the potential pro forma adjustments excluded from the Companies' applications, cannot support the required showing of an "undue hardship" under the law.

As with "substantial need," the AG's claim of "undue hardship" is deeply insufficient. The AG asserts he must have the Companies' privileged information because "his office cannot duplicate the information concerning possible pro forma adjustments based on the information in the application alone." This claim is both misleading and incredible. It is misleading because it implies that all the AG and his team of experts have to work with are the Companies' applications in these proceedings. As noted above, the Companies have produced tens of thousands of pages of data in addition to what was in their applications. And it strains credulity to believe that the AG's capable legal team and three outside experts cannot devise a suite of possible pro forma adjustments without being made privy to the adjustments the Companies and

[25] 289 S.W.3d 555, 560 (Ky. 2009).

their counsel considered and rejected. The Companies' work product privilege should not be overcome by such weak justifications. As the Supreme Court stated in the opinion that created the work product privilege, *Hickman v. Taylor*: "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."[26]

IV. Neither a Suspension of the Procedural Schedule nor an Evidentiary Hearing Is Necessary or Appropriate in these Proceedings.

The AG's Reply erroneously suggests that a suspension of the procedural schedule while the Commission decides this issue would be reasonable and justifiable. In fact, it would be neither. It is the Companies' understanding that the AG will submit his supplemental data requests to the Companies tomorrow, March 26, in accordance with the Commission's February 17, 2010 Orders establishing the current procedural schedules in these proceedings, and pending the Commission's disposition of his motions. The Companies will make every reasonable effort to respond to the AG's and others' supplemental data requests in the time allotted by the current procedural schedules to ensure these cases continue to proceed efficiently and effectively. If the Commission ultimately determines that the Companies must respond to AG 1-30, the Companies are willing to respond on an expedited basis to supplemental data requests concerning their responses to AG 1-30. Therefore, there is no reason to delay these proceedings while the Commission decides a single issue concerning a single data request in each case.

With respect to holding an "evidentiary hearing" concerning this matter, the Companies do not believe such a hearing is necessary to protect the AG's due process rights. His views have been fully expressed to the Commission in his pleadings, negating any plausible claim that the AG has not received a hearing on this issue. Also, this is a fundamentally legal, not factual,

[26] 329 U.S. 495, 516 (1947).

question, making an oral argument the appropriate step to resolve this issue if the Commission believes it is necessary.

WHEREFORE, Kentucky Utilities Company and Louisville Gas and Electric Company respectfully reiterate their request that the Commission deny the Attorney General's Motions to Compel Responses and to Suspend Procedural Schedules.

Dated: March 25, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via U.S. mail, first-class, postage prepaid, this 25th day of March 2010 upon the following persons:

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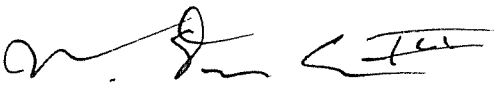

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