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March 17, 2010

RECEIVED
MAR 17 2010
PUBLIC SERVICE COMMISSION

***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 Response of Kentucky Utilities Company and Louisville Gas and Electric Company to the Attorney General's 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

400001.134411/621994.1

**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 RESPONSE OF KENTUCKY UTILITIES COMPANY AND LOUISVILLE GAS AND ELECTRIC COMPANY TO THE ATTORNEY GENERAL'S 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 request the Commission to deny the Attorney General's ("AG's") Motion to Compel Responses to Data Requests and to Suspend Procedural Schedules in both of the Companies' pending base rate cases (collectively, "AG's motion") because (1) the information the AG seeks to compel the Companies to produce is privileged, and (2) there is no need to suspend the procedural schedule while the Commission considers this issue.

## I. The Commission Should Deny the AG's Motion to Compel the Companies to Respond to AG 1-30 Because the Attorney-Client and Work Product Privileges Protect from Disclosure the Information the AG Seeks.

The Companies respectfully request the Commission to deny the AG's motion to compel the Companies to respond to AG 1-30 in each rate case because the Kentucky Rules of Civil Procedure, Kentucky case law, and other relevant case law support the Companies' objections, particularly on the ground of attorney work product privilege. AG 1-30 asked each of the

Companies to list each pro forma adjustment it considered making, but did not ultimately make, in its rate application, and to state why it did not include each such potential adjustment. The Companies objected to these requests identically in the objections they filed with the Commission on March 9, 2010:

> All decisions regarding which adjustments to include in the application in this proceeding were made in consultation with legal counsel. Any response to this question necessarily requires the Company to reveal the contents of communications with counsel and the mental impressions of counsel, which information is protected from disclosure by the attorney-client privilege and the work product doctrine.

Unlike the AG's motion to compel, which cites no authority to support its contentions, the Companies' objection finds support in numerous authorities.

A. Any response to AG 1-30 would necessarily disclose the content of attorney-client communications, and therefore cannot be compelled.

Compelling any response to the AG 1-30 would necessarily entail compelling the disclosure of communications between the Companies and their counsel, which is clearly forbidden by Kentucky Rule of Evidence 503(b), the codification of the attorney-client privilege in Kentucky. As the Companies stated in their objection to AG 1-30, "All decisions regarding which adjustments to include in the application in this proceeding were made in consultation with legal counsel." Therefore, there is no way to disclose which, if any, proposed pro forma adjustments were considered but not included in the Companies' rate case applications without also disclosing the content of privileged communications between the Companies and their counsel.

B. The choice of which potential pro forma adjustments to exclude is opinion work product, the production of which the Commission should not compel.

The plain language of the Kentucky Rule of Civil Procedure concerning work product privilege, CR 26.02(a), supports the Companies' assertion of privilege with respect to AG 1-30

because the Companies determined which pro forma adjustments to include in their base rate cases to prepare for litigation (i.e., these proceedings) and are matters of legal strategy. The rule states in relevant part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, ... or agent) 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. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The Companies do not create or maintain lists of possible pro forma adjustments to revenues and expenses as part of their standard business practices; rather, they formulate such adjustments only in anticipation of filing base rate cases such as these. This makes any list of possible pro forma adjustments work-product privileged under the "because of" test the Kentucky Supreme Court recently endorsed:

> Prudent parties anticipate litigation and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.[1]

Moreover, the way in which the Companies create such adjustments and the determination of which adjustments to include in their base rate applications are always conducted in close consultation with in-house and outside counsel, making them inseparable. Indeed, one of most important components of rate case legal strategy is determining which potential adjustments

[1] *Duffy v. Wilson*, 289 S.W.3d 555, 559 (Ky. 2009), *quoting* 8 Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice and Procedure § 2024 (2d ed.1994).

meet legal muster for inclusion in an historical test year. These facts qualify any list of considered but rejected pro forma adjustments for opinion work product privilege under the plain language of Civil Rule 26.02(a), which makes them almost totally immune from discovery.[2]

Case law from other jurisdictions concerning attorneys' selections of documents for litigation-related compilations likewise supports the Companies' claim of opinion work product privilege. Most prominently, in *Shelton v. American Motors Corp.*, the Eighth Circuit Court of Appeals held that an attorney for American Motors could not be compelled to testify (or sanctioned for failing to testify) concerning the existence of documents about which plaintiff's counsel asked her during a deposition because such information was opinion work product.[3] The court reasoned that the American Motors counsel had sought out and reviewed certain documents because of the Shelton claim, and that requiring her to state whether certain putative documents existed would effectively require her to disclose her legal strategy because she had deemed those documents important enough to seek out to review from the thousands of documents American Motors maintained.[4] Like choosing which documents to review to prepare for product liability litigation, the Companies' selection of which potential pro forma adjustments not to include in base rate applications, formulated with the advice of counsel, is core opinion work product and immune from production.

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[2] *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997) ("Opinion work product, on the other hand, is virtually undiscoverable."); *Upjohn Co. v. U.S.*, 449 U.S. 383, 401 (1981) ("[Opinion] work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.").

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

[4] *Id.*

C. If the Commission determines the choice of which pro forma adjustments to exclude to be fact work product, production thereof still cannot be compelled because the AG has not shown substantial need or undue hardship concerning the information.

If, in the alternative, the Commission deems the Companies' choice of which pro forma adjustments to exclude from their base rate cases to be fact work product rather than opinion work product, the AG still bears the burden of showing that he has a "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."[5] This is an impossible burden for the AG to meet in these proceedings. The Companies' applications and supporting documents contained thousands of pages of financial and other data. Just two days ago, the Companies provided to the Commission, AG, and other intervenors over 41,000 pages of additional information in response to over 1,900 data requests. In addition to all of the data the Companies have already produced, the current procedural schedule in both rate cases contains another round of discovery. To process and evaluate all of this data, the AG has the benefit of experienced rate case counsel in these cases, and has retained three outside experts who regularly appear before state commissions on behalf of consumer advocates. With the AG's wealth of resources and demonstrated ability to criticize proposed pro forma adjustments, as well as to propose his own, he cannot credibly claim that his case preparation will suffer from not knowing which possible pro forma adjustments the Companies determined, with the advice of counsel, not to include. And perhaps most importantly, the AG has not attempted to make any showing of substantial need or undue hardship. The Companies therefore respectfully request the Commission to deny the AG's motion to compel a response to AG 1-30.

[5] KCRP 26.02(a).

## II. There Is No Reason to Delay these Proceedings While the Commission Considers this Matter.

Concerning the portion of the AG's motion asking the Commission to suspend the procedural schedule in each of the Companies' rate cases until the Commission has the opportunity to resolve this issue, the AG's motion provides no justification for such a request; indeed, the motion does not mention the AG's suspension request other than in the motion's title. The requested suspension is wholly unnecessary and unjustifiably disruptive to these proceedings. Neither the AG's, nor any other intervenor's, participation in these proceedings will be impeded if the Commission takes a reasonable amount of time to resolve this issue. For that reason, the Companies respectfully request the Commission to deny the AG's motion to suspend the procedural schedules in these proceedings.

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

Dated: March 17, 2010

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Joint Response was served via U.S. mail, first-class, postage prepaid, this 17th day of March 2010 upon the following persons:

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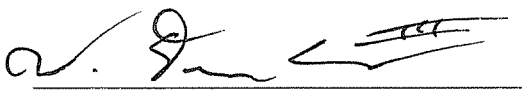

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