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 BASE RATES	)))	CASE NO. 2009-00549

JOINT REPLY BRIEF OF THE ATTORNEY GENERAL'S REGARDING HIS MOTION TO COMPEL RESPONSES TO DATA REQUESTS, AND TO SUSPEND PROCEDURAL SCHEDULE UNTIL SUCH TIME AS THE COMMISSION RULES ON THE OBJECTIONS OF KENTUCKY UTILITY COMPANY AND LOUISVILLE GAS AND ELECTRIC COMPANY AND THIS MOTION TO COMPEL

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and files his joint Reply to the Response of the petitioners Kentucky Utilities Co. ["KU"] and Louisville Gas and Electric Co. ["LGE"] and states as follows:

In his initial requests to the companies, the Attorney General posed the same question to each of the companies in AG-1-30, which states:

> AG-1-30. "List each proposed pro forma entry which was considered in this filing but not made and state the reason(s) why the entry was not made."

The companies objected to both questions identically in the objections filed with the Commission stating:

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The companies objected to both questions identically in the objections filed with the Commission stating:

"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."

In their Joint Response filed with the Commission on March 17, 2009, the Companies urge the Commission to deny the Attorney General's Motion to Compel because it seeks information the Companies' claim is protected by the Attorney-Client and Work Product privileges. Simply stated, the Companies interpretation of the case law and rules governing these privileges is too broad and the Attorney General is entitled to discovery with regard to this information.

As an initial matter, the Companies claim that the Kentucky Rules of Evidence forbids the disclosure of communications between the Companies and their counsel and asserts that "[a]ll decisions regarding which adjustments to include in the application in this proceeding were made in consultation with legal counsel". However, the attorney-client privilege only protects disclosure of communications and not disclosure of the underlying facts by those communicating with the attorney.[1] Further, information itself is not protected from disclosure simply because it was relayed to counsel.[2]

As incorporated entities, utilities are *required* to act through intermediaries representing the corporation and in practice before it, the Commission requires those intermediaries appearing on behalf of the corporation to be attorneys. As counsel is *required* to prepare and file the rate

[1] *Upjohn Company v. U.S.*, 449 U.S. 383, 395 (1981).
[2] *Wright v. Firestone Tire and Rubber Co.*, 93 F.R.D. 491, 493 (D.C. Ky., 1982).

applications with the Commission on behalf of corporations, it would be possible for a utility to assert attorney-client privilege to every discovery request, subjecting the Commission to endless hearings on issues related to discovery. If the Commission were to find that the privilege prevented disclosure in this matter simply because the information was conveyed to counsel, discovery would be rendered nearly impossible as *all* information in a rate case is conveyed through the utilities' counsel during the preparation and filing of the application. The result would be that, going forward, a review of a rate application would be limited to only what is disclosed in the application itself. Clearly, the application of the attorney-client privilege as suggested by the Companies in this matter is too broad.

Next, the Companies reference the Kentucky Rules of Civil Procedure, specifically Rule 26.02(a), to support their assertion that the information is protected from disclosure by the work product doctrine. In support of this assertion, the Companies state that they formulate pro forma adjustments to revenues and expenses "only in anticipation of filing base rate cases" and, therefore, they are protected from disclosure.[3]

The Companies cite the case of *Shelton v. American Motors* 805 F.2d 1323 (8th Cir. 1986) in support of their claims of work product privilege. However, Kentucky has held that law from other jurisdictions is not decisive and is only informational or persuasive at best.[4] Regardless, *Shelton* is clearly distinguishable as the case concerned a matter wherein a party sought to compel the testimony of opposing counsel. In this case, the Attorney General is not asking counsel for the Companies to testify, but merely for factual information from the

[3] Joint Response of Applicants, Page 3.
[4] *Commonwealth v. Nelson,* 841 S.W.2d 628, 631 (Ky. 1992).

companies' witnesses. Notably, the decision in *Shelton* repeatedly been distinguished and has not been widely adopted, followed or expanded in other jurisdictions.[5]

The Companies also cite the recent case of *Duffy v. Wilson*, 289 S.W.3d 555 (Ky. 2009) to support their assertion that documents prepared or obtained in anticipation of litigation enjoy protection from disclosure.[6] However, *Duffy* clearly states that "[n]otably, there is no work product privilege which protects the underlying facts contained in the documents."[7] This is also the rule of *Transit Authority of River City [TARC] v. Vinson*, 703 S.W.2d 482, where it is stated that the "work product immunity protects only the documents themselves and not the underlying facts."[8] In fact, *Vinson* states that "after the case is brought to trial, it becomes less important to protect "documents and tangible things...prepared in anticipation of litigation" and more important to place the relevant facts before the court or jury."[9] Thus, even if the documents were prepared in anticipation of litigation as asserted by the Companies, the underlying facts contained in those documents are not protected from disclosure. The Companies also assert that the Attorney General has not met his burden under CR 26.02(a) to show his substantial need and/or undue hardship concerning the information and states that this is an "impossible burden for the AG to meet in these proceedings."[10]

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[5] See e.g.: *American Cas. Co. of Reading, Pa. v. Krieger,* 160 F.R.D. 582, 32 Fed.R.Serv.3d 666 (S.D.Cal. 1995); *Kaiser v. Mutual Life Ins. Co. of New York,* 161 F.R.D. 378 (S.D.Ind. 1994); *Mead Corp. v. Riverwood Natural Resources Corp.*, 145 F.R.D. 512 (D.Minn. 1992); *Nakash v. U.S. Dept. of Justice*, 128 F.R.D. 32 (S.D.N.Y. 1989) (Distinguished by); *qad.inc v. ALN Associates, Inc.*, 132 F.R.D. 492 (N.D.Ill. 1990); *In re Subpoena Issued to Dennis Friedman,* 350 F.3d 65, 57 Fed.R.Serv.3d 296 (2nd Cir. N.Y. 2003) (Disagreed with); *Munn v. Bristol Bay Housing Authority*, 777 P.2d 188 (Alaska 1989); *aaiPharma, Inc. v. Kremers Urban Development Co.*, 361 F.Supp.2d 770 (N.D.Ill. 2005) (Declined to follow); *First Sec. Sav. v. Kansas Bankers Sur. Co.*, 115 F.R.D. 181 (D.Neb. 1987); *Leviton Mfg. Co., Inc. v. Shanghai Meihao Elec., Inc.*, 613 F.Supp.2d 670 (D.Md. 2009) (Declined to extend).

[6] Joint Response of Applicants, Page 3.

[7] *Id.* At 559.

[8] *Id.* At 486.

[9] *Id.* At 486.

[10] Joint Response of Applicants, Page 5.

Concerning substantial need, the Attorney General maintains that he has asked for this information because his experts require it for the proper evaluation of whether the Companies request for an increase comports with the fair, just and reasonable standard required under the statute. Simply stated, if the information wasn't required by the Attorney General's experts, the question would not have been asked. While discovery "fishing expeditions" may be common in the standard civil trial, such is not the case here. This information is relevant to the current proceedings, relevant to the Attorney General's evaluation and preparation concerning the matter and is propounded in good faith and not in any attempt to harass or annoy the Companies.

With regard to undue hardship, the Attorney General is simply without recourse should the information be denied him as his office cannot duplicate the information concerning possible pro forma adjustments based on the information in the application alone.

Finally, the Companies maintain that there is no reason to delay these proceedings until the Commission rules on the pending Motions of the Attorney General. To support this contention, the Companies state that such a delay has no justification, is wholly unnecessary and is unjustifiably disruptive to the proceedings. However, with the upcoming deadline for supplemental data requests to the Companies set for Friday, March 26th, a ruling of the Commission in favor of the Attorney General leaves him with no recourse as to supplemental discovery concerning the subject information except a motion requesting permission to modify the existing procedural schedule and propound additional data requests at a later time, which may or may not be granted by the Commission. In the interest of judicial economy, a short delay in the schedule until the Commission has heard the parties, examined the requested information and ruled upon the matter is not unreasonable or unjustifiable.

Finally, as the Companies have noted in their joint petition for confidential protection for certain of their responses to data requests and as is indicated by the cases cited by both the Companies and the Attorney General, a hearing of the issues is required by the Commission to determine whether the information requested is due any protection under either attorney-client privilege or the work product doctrine and, if so, the extent of that protection. The Attorney General states that an evidentiary hearing is required to protect the due process rights of the parties and to supply the Commission with a complete record to enable it to reach a decision with regard to this matter. *Utility Regulatory Commission v. Kentucky Water Service Company*, Inc. 642 S.W.2d 591, 592-94 (Ky.App. 1982). Otherwise, the Attorney General will be denied meaningful participation in this application for a rate increase to the detriment of thousands of ratepayers in which the public outcry is virtually unprecedented.

WHEREFORE, the Attorney General respectfully requests that his motions be sustained.

Respectfully submitted,
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Certificate of Service and Filing

Counsel certifies that an original and ten photocopies of the foregoing were served and filed by hand delivery to Jeff Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; counsel further states that true and accurate copies of the foregoing were mailed via First Class U.S. Mail, postage pre-paid, to:

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this 23rd day of March, 2010

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