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September 8, 2020

Mayor - President Josh Guillory
Lafayette City-Parish Consolidated Government
705 W. University Avenue
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City-Parish Attorney Greg Logan
Lafayette City-Parish Consolidated Government
705 W. University Avenue
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Re: Your "Complaint" of February 6, 2020
against Terry Huval and "certain individuals at LUS and LUS Fiber"

Gentlemen:

Regarding your "complaint", reference is made to my letter to you of August 10, 2020. As you were made aware by that letter, I responded to you that, as of that date, proof had not yet been presented to establish the **criminal intent** required of Malfeasance in Office, or other crimes suggested in the complaint. I also responded that, as of that date, no proof had yet been presented that any documents had been destroyed, as you earlier had strongly advocated.

Though your complaint also suggested inadvertence or negligence on the part of many persons connected to LCG, inadvertence, negligence, or even ethical violations or criminal negligence is insufficient to establish the **intentional crime** of Malfeasance In Office. The question of whether there were violations of the Louisiana Fair Competition Act or the administrative rules of the Public Service Commission (and the consequences of the such violations for LUS, LUS Fiber, and/or LCG), is within the exclusive jurisdiction of the Louisiana Public Service Commission, an administrative agency. Though a "self-report" has been made to the PSC by LCG, I am not aware that a definitive determination has been made by the PSC, that your "complaint" (with your conclusion, opinion, and ultimately your **admission** that a violation of the FCA, the rules of the PSC, or the policy of LCG had occurred) has officially been declared a "violation". The mere allegation of such a "violation" and/or even an administrative determination made by the PSC of such a "violation", is not, per se, the act of **criminal** Malfeasance In Office, without proof of the necessary element of criminal intent.

After sending my letter on August 10, 2020, I received an email from Greg, on August 12, 2020, at 6:30pm, with a reference "Subject: FW: Attorney-Client Privilege *** CONFIDENTIAL ***", and the email read:

“...Attached is the forensic investigation conducted by the independent auditors. I am looking at prescription issues, but intend to move forward with civil litigation against Doug Dawson and Terry Huval. There was clear misrepresentation and suppression of the truth to obtain an unjust advantage...”

I perused your “forensic report” briefly, fully intending to review it in more detail and to discuss the findings and to determine whether such would provide a basis for re-evaluation. I understood your transmittal was to be kept confidential. I was mistaken. Later in the evening of August 12, 2020, at 10:30pm, I received a text from Bernadette Lee of KPEL radio:

“...DA Stutes. This is Bernadette from KPEL. I’m putting together a story about the LUS/LUS Fiber audit. Have you read it? Do you have a comment for my story?”

I did not actually see the text until the next morning, Thursday August 13, 2020, after listening to your weekly radio broadcast with Ms. Lee. Much of the public broadcast was about your “confidential” forensic report, which you made available to Ms. Lee.

After reviewing your submitted forensic report, I requested, on August 21, 2020, from you and LCG **additional documents** (which it appeared had NOT been provided to me but had been provided to your forensic auditors) to further assist in the review of your “complaint”, as follows:

“Any and all documents, letters, emails, annual reports, memos, working papers, writings, acknowledgments, for years 11/1/10-10/31/11 and 11/1/11-10/31/12 relative to the LCG accounting staff’s “due diligence” work discussed and/or performed and/or approved and/or opinions rendered by any staff member of the LCG Office of Finance and Management and Department, in any way recognizing the requests for, the consideration of, and the recommendation for approval of POMS funding, as required for the budget process, regarding such years. This request, in lieu of formal subpoena, to include documentation of any and all information gathered, examined, and forming the basis of recommendations made by LCG accounting staff and the LCG Office of Finance and Management to the City-Parish Council for their approval of the budgets for such years.

Any and all documents or writings or memorandum, compiled by the LCG Office of Finance and Management, as a result of or in any way connected to any inquiries, audits, or examinations by LCG or any other public or private entities, including but not limited to the Louisiana Public Service Commission or the Louisiana Legislative Auditor, regarding the approval of POMS funding by the City-Parish Council in the budgets for such years...”

I received from you on September 2, 2020, a large package which included a copy of the complete forensic report with attachments (which I had already obtained directly from local media sites who had already obtained it from you), along with a “Zip Drive” which contained copies of several hundred or so emails recovered from LCG servers. Your submission also contained advice regarding the obtaining of additional information directly from the LCG Office of Finance and Management and from Burton Kolder. After reviewing the volume of emails produced, I then prepared a third request to you, sent on September 2, 2020, for the following:

“Any and all emails specifically From: Jeannette Pollet To Terry Huval and Randy Young with CC to Katherine King Subject: LUS Fiber, Sent: Tuesday, July 19, 2011 03:54pm, reading “Attached is July 19, 2011 correspondence to Lorrie Toups, CFO, from Randy Young. The original has been mailed to Lorrie Toups.”, including the attachment referred to therein.

Any and all emails specifically From Jeannette Pollet, Randy Young, or Katherine King to Terry Huval or Lorrie Toups dated at any time from July 19, 2011 – Through July 20, 2011.

Any and all letters, memos, or correspondence of Randy Young to Terry Huval or Lorrie Toups or any LCG employee during the year 2011, including the July 19, 2011 correspondence, as referred to in the above described email of July 19 2011 03:54pm.”

I was specifically requesting the July 19, 2011 correspondence by Randy Young to Lorrie Toups, which was attached to the July 19, 2011, 03:54pm email from Jeannette Pollet to Terry Huval and Randy Young, the original of which was sent to Lorrie Toups on July 19, 2011. I did receive very shortly thereafter, on September 2, 2020, from City-Parish Attorney Greg Logan, and staff of LCG, your response that emails were located and the results were to be delivered to me on Disk, on September 3, 2020. I did receive a copy of the July 19, 2011 correspondence specifically requested. I also received the Disk which contained copies of 400+ emails. I have reviewed all submitted information and have interviewed Burton Kolder as you suggested I do.

I am now even more convinced that your “complaint”, continues to be driven by **opinions and conclusions** only that **crimes** have been committed and those you accuse are “**guilty**”. The “evidence” received and reviewed, however, suggests to the contrary.

I received information directly from LCG independent auditor, Burton Kolder, (which I had not received earlier despite formal request), that further suggests reasonable doubt as to the required element of criminal intent in your **criminal** complaint:

1. An email of October 12, 2010, from Terry Huval to LCG attorney Michael Hebert, requesting comment on the proposed Electric Outage Monitoring System.
2. An email of October 13, 2010, from LCG attorney Michael Hebert to Huval, responding preliminarily that “this probably qualified under the ‘internal local government purposes’ exception” to the Fair Competition Act.
3. An email of October 14, 2010, from LCG attorney Michael Hebert to Huval detailing that:
“...It is my opinion that information provided to LUS Electric by LUS Fiber to assist with identifying electric customer outages qualifies under the ‘internal local government purposes exception to the LGFCA (See La. R.S. 45:844.45(B)(2))...Therefore, the prohibitions in the LGFCA upon LCG or LUS Fiber “making or granting an undue or unreasonable preference or advantage to itself” do not apply (See La. R.S. 45:844.53(3)).”
4. An email from Burton Kolder to LCG attorney Lawrence E. Marino, December 16, 2019, with documents attached, detailing that:
“1)-Schedules relative to the POMS charges which indicates that the charges of \$1,013,400 (#5 on the Schedule) appears to be the lowest of the methods for charges by LUS Fiber to LUS for the 3,574 monitor locations. I have provided you with cost

schedules for the years 2010, 2011 & 2012. Additionally, for the years 2013-2017, we computed these using the LUS Fiber annual financial statements based on the number of users for each respective year...”

“LCG-Communications System Fund...In attempting to price the POMS charge by LUS Fiber to LUS for 3,574 monitor tap locations, LUS Fiber management used judgments and obtained outside analysis or appraisals to attempt to price the service charges...[listing 5 methods used and concluding]...**CONCLUSION—Based upon the above comparisons of available options, the \$1,013,400...appears to be the lowest charge for the POMS service available to LUS in the market; therefore, no violation of the Fair Competition Act appears to have occurred during the year ended 10/31/12 relative to the POMS service provided. Additionally, in following up with the full cost accounting for the years 2013 to 2017, ... above remains the lowest of each of the pricing methods above...**”

From the most recent information provided, I learned that from beginning in or about June 2010, numerous emails and meetings occurred between LCG attorneys, LCG special counsels, PSC staff, LCG staff in various departments (including LUS, LUS Fiber, Finance, Accounting and Budget, CFO, CAO, Mayor, and others, in addition to Terry Huval). The specific discussion centered around the ill-fated issues of the necessity to balance budgets, allocation of costs for covered services, cross-subsidization, pricing for power outages services, and “full-cost accounting” (and its less than clear definition). Though the question of “full-cost accounting” was raised in 2011, annual attest audits done by the PSC and by auditors on behalf of LCG never addressed the specific question of whether, when, or how, a true cost of services study is done. Early on, in or about 2012, emails among LCG attorneys and LCG finance and budget opined that a “cost allocation study” may or may not be necessary in the future. Until very recently, no one, whether LCG legal, finance, or budget, or the PSC or external auditors, has opined as to what “full-cost accounting” is and its application to decisions made ultimately by many in and out of LCG, beginning in or about 2010-2011.

I must advise you that your criminal “complaint”, directed generally at “certain individuals at LUS & LUS Fiber”, most notably Terry Huval, is not supported by evidence of criminal intent. Again, as you know, though your conclusions are clear, a “crime” must consist of **proof** of elements specifically and statutorily defined. Proof must be by **facts and circumstances** known and/or made available to the prosecutor from any source, including but not limited to from a law enforcement agency. Ultimately, proof of those facts and circumstances must be established **beyond a reasonable doubt** in a **criminal** proceeding. There is considerable “reasonable doubt”.

From all of the information submitted and otherwise found, the issues raised by the “POMS” services and pricing, in or about 2010-2011, were known by many in and out of LUS, LUS Fiber, and LCG, including accounting professionals, independent auditors, independent consultants, administration, councils, and other LCG staff. Your forensic auditors recognized that in reporting the findings made by Kolder, Slaven & Co. **In or about 2013**, the Kolder, Slaven & Co. (hereinafter “Kolder”), independent auditors for LCG were aware of and reached their own professional conclusions contrary to your forensic auditors, for and on behalf of LCG, LUS, and LUS Fiber, that:

1. The “POMS” pricing was the “the lowest charge for the “POMS” service available to LUS in the market; therefore, no violation of the Fair Competition Act appears to have occurred”; and,
2. “...the sales and services between affiliated divisions are being charged at a reasonable market price and is consistent with the requirements of the Fair Competition Act”.

On the other hand, your privately retained forensic auditors, in 2020, now find fault and disagreement with the opinions of Kolder, and their conclusions, made very evident throughout their forensic audit report:

1. “Satisfied with that response, **KCSC (Kolder, Slaven & Co.) asked no further questions**”
2. “the 2011 POMS Memo justifying the price remained the basis for its pricing, **unchallenged by the PSC or KCSC auditors**”
3. The opinion of KCSC was “intentionally misrepresented” by Terry Huval and that Huval made the “**misleading representations to KCSC auditors and PSC staff with the intention of inducing reliance**”. (Burton Kolder disagrees and continues to stand by the opinion of KCSC in 2013.)
4. “KCSC auditors **did not obtain adequate documentation to support these conclusions** [the sales of services between affiliated divisions are being charged at a reasonable market price and is consistent with the requirements of the Fair Competition Act]”, your forensic auditors opining that:
“...KCSC did not obtain adequate documentation to support these conclusions. The **workpaper merely parroted the information provided by Huval...**”, and,
5. “KCSC’s calculated ‘**full cost**’ was **critically flawed and reflected a lack of understanding of both a ‘covered service’ and the manner with which costs are allocated...KCSC did not appear to understand the requirements of the Rules, in particular the rules requiring a full-cost accounting...**and the rule describing how that accounting was to be performed...” (Burton Kolder disagrees and continues to stand by the opinion of KCSC in 2013.)

Suffice it to say, Burton Kolder, of Kolder, Slaven & Co., disagrees with the opinions of your forensic auditor, and confirms that:

1. No matters came to his or their attention that might increase the risk of noncompliance with law or regulations whether due to error or fraud.
2. LCG counsels reviewed the calculation used to determine the amount to charge for the power outage monitoring and reported no issues with using this method.
3. Though a full cost accounting calculation was not done, Kolder did compute that the amount charged by LUS Fiber to LUS was less than full cost.
4. Kolder reviewed the work of LCG and other staff and saw no risks to question the competence, capabilities, and objectivity of studies used in the determination of charges.
5. Kolder disputes the conclusions reached by your forensic auditors based on their lack of understanding of full cost accounting as it is defined as all costs incurred by the local government in providing a covered service which includes all capital costs, direct and indirect costs. The ultimate determination can only be made by the Public Service Commission. The method of calculation made by LCG was supported by Kolder.

Regardless of any other factors, the competing opinions of Kolder and your privately retained forensic auditors commissioned by you, create, if nothing else, additional “reasonable doubt” which would defeat a criminal prosecution.

In addition, several other LCG officials and employees, knew of the potential issue of charges by LUS Fiber to LUS and their possible implications by way of the Fair Competition Act and the Public Commission Rules, **in 2010 and 2011**. Though your auditors report that “Kolder flatly denies meeting with Huval, providing an opinion, or even discussing POMS on July 20, 2011,” Burton Kolder was clear that though he was not present for such a meeting on that date, he did not state that such a “meeting” or that the providing of such an opinion did not occur. From other information obtained, it was clear that something did occur between LCG staff and attorneys on that date or thereafter:

1. An LCG accountant emailed Terry Huval 7/19/11, 10:27pm suggesting “service should be priced at full cost...”
2. Terry Huval texted Randy Young, an LCG attorney, 7/20/11, 7:59am for an answer to the question.
3. Huval sent an email to other LCG staff 7/20/11, 9:54am that “I am waiting on a call from Randy Young with Kean Miller to discuss this in light of Kerney’s indication to me that we may only be able to use full cost accounting to calculate this cost/value, per the Cost Allocation Manual”.
4. Attorney Young emailed Huval 7/20/11, 9:59am that “Terry, I have this and will review this morning”.
5. Attorney Young, of Kean Miller, did work on the issue, as reflected in the billing to LCG for services on 7/20/11 – “Conducted legal research and worked on analysis of pricing issues for electric outage services by LUS Fiber to LUS...4 hours.”

Finally, it also appears that none of the LCG accountants, attorneys, public officials, or employees, with knowledge of the issue, pursued (nor were they required to) a documented resolution of the issue of the appropriateness of the “POMS” charges by the Louisiana Public Service Commission. The “POMS” charges were included in proposed budgets in 2011, vetted by LCG administration and the financial office, reviewed in budget hearings conducted by LCG finance, and duly approved by LCG by the passage of the annual budgets thereafter.

The charges in question were paid not as directed by any one person but by the collective administrative and legislative discretion of the Mayor-President and Council of LCG. There has not been presented any proof of the criminal intent required to establish criminal Malfeasance in Office. There may have been inadvertence or negligence on the part of some. However, inadvertence, negligence, or even ethical violations and criminal negligence is insufficient to establish the crime of Malfeasance In Office. Even assuming a criminal charge could be filed, a prosecution regarding the acts which form the basis of your complaint, occurring in or about 2010-2011, if “criminal”, must have been instituted, by filing within four years after the 2011 offense had been committed¹, that is by 2015, or else “prescribed”.

The issue of whether there are violations of the FCA or the administrative rules of the Public Service Commission and the consequences of the such violations for LUS, LUS Fiber, LCG and/or the City of Lafayette, is within the exclusive jurisdiction of the Louisiana Public Service Commission. The conclusion of whether a “violation” of the FCA or the Rules of the Public Service Commission

¹ La. C.Cr.P. Art. 572.

has not been made by the PSC, nor has the ultimate “consequences” of such a PSC administrative conclusion been determined, to be imposed upon LUS Fiber, LUS, and/or LCG or the City of Lafayette. There is insufficient proof of criminal intent beyond a reasonable doubt, necessary to support the filing of, and the successful carrying of the criminal burden of proof in, a criminal proceeding, arising from your complaint.

As to the present pendency of the PSC administrative audit/review, I understand that then Mayor Joel Robideaux, along with Terry Huval, “self-reported” the potential issue (without conceding that the issue in fact was a “violation”) to the PSC. An audit by the PSC of the facts provided to and to be provided to the PSC should be addressed by the complete cooperation of LUS, LUS Fiber, LCG and/or the City of Lafayette. However, a finding of a “violation” by the PSC may have serious economic consequences to LUS, LUS Fiber, LCG and/or the City of Lafayette. Due process requires LCG to advocate a position **in favor of** LUS and LUS Fiber (and **in opposition to** the finding of a “violation”), rather than **against** LUS and LUS Fiber (**capitulating to** a finding of a “violation”, ultimately resulting in serious economic consequences to be suffered to LCG and/or the City of Lafayette). Ignoring the position of Burton Kolder and the arguments that should be made in opposition to a finding of “violation”, the position taken by your “complaint”, would appear to be a conflict of interest, contrary to your responsibility to represent the best interest of LCG and/or the City of Lafayette and in engaging in the due process critical to the adversary nature of the determination to be made by the PSC.

Thank you for your continuing cooperation.

Respectfully submitted,

Keith A. Stutes
District Attorney

KAS/