

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF JESSAMINE-SOUTH ELKHORN )  
WATER DISTRICT FOR A CERTIFICATE OF )  
PUBLIC CONVENIENCE AND NECESSITY TO ) CASE NO. 2012-00470  
CONSTRUCT AND FINANCE A WATERWORKS )  
IMPROVEMENTS PROJECT PURSUANT TO KRS )  
278.020 AND 278.300 )

ORDER

Jessamine-South Elkhorn Water District (“JSEWD”) has filed an application for rehearing (“Application for Rehearing”) of two Orders that the Commission issued on April 30, 2013. In one of those Orders (“Final Order”), we denied JSEWD’s application for a Certificate of Public Convenience and Necessity (“Certificate”) to construct a one million-gallon elevated water storage tank and for authority to borrow \$1.24 million from Kentucky Rural Water Finance Corporation (“KRWFC”) to finance the proposed construction. In the other Order (“Striking Order”), we struck portions of JSEWD’s brief. JSEWD also included in its Application for Rehearing a request for a declaratory order to address certain issues addressed in the Final Order. Having considered the application, we deny.

BACKGROUND

JSEWD, a water district organized pursuant to KRS Chapter 74, owns and operates two water distribution systems that serve approximately 2,720 customers in

Jessamine County, Kentucky.<sup>1</sup> Its territory is divided into two service areas: Northwest Service Area and Southeast Service Area. The distribution systems serving these areas are not physically connected.<sup>2</sup>

The Northwest Service Area covers the northwest corner of Jessamine County, Kentucky.<sup>3</sup> JSEWD serves approximately 2,400 customers within its Northwest Service Area.<sup>4</sup> It purchases the Northwest Service Area's total water requirements from Kentucky-American Water Company ("KAWC").<sup>5</sup> Based upon the 12-month period ended July 31, 2012, the average daily water usage for the Northwest Service Area is 709,200 gallons.<sup>6</sup> JSEWD currently has two water storage tanks that serve the Northwest Service Area. These storage tanks have a total capacity of 550,000 gallons.<sup>7</sup>

On October 16, 2012, JSEWD submitted an application to the Commission for a Certificate to construct a one million-gallon elevated water storage tank and for authorization to borrow \$1,240,000 from KRWFC.<sup>8</sup> We established this docket to

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<sup>1</sup> *Annual Report of Jessamine-South Elkhorn Water District to the Kentucky Public Service Commission for the Year Ended December 31, 2012* at 5 and 27. In the Final Order, we misstated JSEWD's total number of customers as 2,560. Final Order at 1. JSEWD actually reported 2,660 customers as of the year ended December 31, 2011.

<sup>2</sup> JSEWD's Response to Intervenor's First Request for Information, Item 31.

<sup>3</sup> For a detailed description of the Northwest Service Area, see JSEWD's Response to Commission Staff's First Request for Information, Item 11. For a map of JSEWD's territory, see Intervenor's Exhibit 3 at 3.

<sup>4</sup> App. Ex. A at 1.

<sup>5</sup> During the hearing, JSEWD witnesses testified that the water district is currently negotiating a contract with the city of Nicholasville for a second source of water for the Northwest Service Area. VR 03/13/2013 Hearing Transcript; 16:27:25-16:27:41; 03/13/2013 Hearing Transcript; 09:49:58-09:50:41.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.*

<sup>8</sup> The Commission accepted the application for filing on October 26, 2012, after permitting Jessamine-South Elkhorn District to deviate from 807 KAR 5:001, Section 11(2)(a).

consider that application and subsequently permitted Forest Hills Residents' Association, Inc. ("Forest Hills Residents") and William Bates (collectively "Intervenors") to intervene in this matter.

After affording the parties an adequate opportunity to conduct discovery, holding an evidentiary hearing in this matter, and receiving written briefs from the parties, the Commission on April 30, 2013, issued the Final Order denying JSEWD's application. We found that while JSEWD had shown that its existing storage facilities were inadequate and that the Northwest Service Area required additional storage capacity, JSEWD had failed to demonstrate that the proposed storage facility was necessary and would not result in excessive or wasteful investment. More specifically, we found that "JSEWD . . . [had] not demonstrated that system growth or enhanced services require a million-gallon storage tank or that a smaller facility could not as easily address these concerns."<sup>9</sup>

On the same day, we also issued the Striking Order in which we struck certain portions of JSEWD's brief for referring to materials that were not part of the record. These materials principally consisted of references to documents that had been filed in

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<sup>9</sup> Final Order at 11.

Case No. 2012-00096<sup>10</sup> and that had not been entered into the record of this proceeding at any time before the close of testimony. Our action followed the Intervenor's motion to strike those references.

On May 23, 2013, JSEWD filed its Application for Rehearing of both Orders and included therein a request for a declaratory order "on the standards to be applied to a determination as to the need for and proper sizing of a water storage tank."<sup>11</sup> The Intervenor filed a response in opposition to JSEWD's Application for Rehearing. JSEWD submitted a reply to this response. On June 7, 2013, the Commission granted JSEWD's Application for the limited purpose of further considering the questions presented.

#### APPLICATION TO REHEAR STRIKING ORDER

In the Striking Order, we struck several portions of JSEWD's brief that relied upon filings of KAWC and the Office of the Attorney General in unrelated proceedings. Neither JSEWD nor the Intervenor were a party to these proceedings. Many of the stricken references refer to documents in Case No. 2012-00096, which involved KAWC's application for a Certificate to construct two water storage facilities, a booster station and a lengthy water transmission main. We found that JSEWD's introduction of such materials through its brief after the close of testimony was contrary to 807 KAR

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<sup>10</sup> Case No. 2012-00096, *Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing Construction of the Northern Division Connection* (Ky. PSC filed Mar. 30, 2012); Case No. 2007-00134, *Application of Kentucky-American Water Company for a Certificate of Convenience and Necessity Authorizing the Construction of Kentucky River Station II, Associated Facilities and Transmission Main* (Ky. PSC filed Mar. 30, 2007); Case No. 2005-00039, *Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing the Construction of a Two (2) Million Gallon Elevated Storage Tank and 1200 Feet of 24-Inch Water Main* (Ky. PSC filed Jan. 21, 2005).

<sup>11</sup> Application and Petition for Rehearing at 2.

5:001, Section 11(4),<sup>12</sup> and that permitting JSEWD to submit such material through its brief deprived the Intervenor of their right to due process.<sup>13</sup> We did not, however, prevent or prohibit JSEWD from referring to any finding in any Commission Order, nor did we strike references to such findings in JSEWD's brief.<sup>14</sup>

JSEWD seeks rehearing of our decision. It argues that the sections that were struck are "already part of the PSC's permanent records . . . and are material to the issues and standards to be applied by the PSC in Case No. 2012-00470."<sup>15</sup> It argues that the references should be incorporated by reference into the record of the current proceeding and that the Intervenor should "be given the opportunity to state why any of the cited references are inaccurate or inapplicable to the issues in this proceeding and should be disregarded by the Commission."<sup>16</sup> It notes that the Intervenor "have not stated any instance in which the references are inaccurate or in which KAW misstated or misled the PSC with respect to any factual statement or legal issue."<sup>17</sup>

Commission Regulation 807 KAR 5:001, Section 11(4), clearly prohibits the sections ordered stricken. It provides:

Except as expressly permitted in particular instances, the commission shall not receive in evidence or consider as a part of the record a book, paper, or other document for consideration in connection with the proceeding after the close of the testimony.

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<sup>12</sup> Striking Order at 2 – 3.

<sup>13</sup> *Id.* at 4 – 5.

<sup>14</sup> The Commission may take official notice of its findings and holdings in other Commission proceedings. See *Louisville & Nashville Railroad Co. v. Com. Ex rel. Ky. Railroad Com'n*, 300 S.W.2d 777 (Ky. 1956). See also 2 Am. Jur. 2d *Administrative Law* § 349 (Nov. 2013).

<sup>15</sup> Application and Petition for Rehearing at 21.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 22.

The materials in question were not previously part of the record of this proceeding at any time before the close of testimony. JSEWD's efforts to insert the materials into the record came after the close of testimony.

The intent of Section 11(4) is twofold: (1) to impose some sense of order and closure on the evidentiary phase of Commission proceedings and (2) to ensure that the parties carefully and thoroughly prepare and present their case in a timely manner. It prevents parties from presenting their evidence in a piecemeal fashion or attempting to endlessly drag out the evidentiary phase to gain the last word. At some point the record must close. To permit a party in a contested case to present factual evidence after the closing of the record, and without Commission approval, would encourage parties to needlessly prolong Commission proceedings in an effort to achieve an unfair advantage by late evidentiary submissions that an opposing party has no opportunity to confront, cross-examine or rebut. Such action would also reward the party that fails to thoroughly prepare its case by allowing it a second bite at the apple.

We find no merit to JSEWD's suggestion that the problems related to the stricken evidence can be cured by offering the Intervenors an opportunity to identify any portions of the evidence that are inaccurate or inapplicable. Such an offer still does not afford the Intervenors an opportunity to cross-examine or confront or rebut the stricken evidence. Short of reopening the case record and taking additional evidence – an action that is contrary to the expressed language of Section 11(4) – there are no means to cure the procedural due process problems created by accepting the untimely filed factual evidence.

We further find no merit to JSEWD's argument that any material filed by any party in any Commission proceeding may be considered evidence in any other Commission proceeding merely because it is "part of the PSC's permanent records." Commission Regulation 807 KAR 5:011, Section 11(5), makes clear that at a minimum a document from another case record cannot be made part of the record of another case without a motion requesting such relief.<sup>18</sup> JSEWD never made such motion, nor did it ever specifically move for incorporation by reference of documents from Case No. 2012-00096 into the present case prior to our issuance of the Final Order.<sup>19</sup> Had JSEWD timely moved for the incorporation by reference of these documents as part of a JSEWD witnesses' testimony and had the procedural schedule permitted adequate time for the Intervenors to review these documents, to cross-examine the sponsoring JSEWD witness regarding these documents and to present any rebuttal testimony, the Commission may have reached a different result.

In its Application for Rehearing, JSEWD renews its "common counsel" argument.<sup>20</sup> JSEWD argues that, because the Intervenors employed the same law firm as KAWC employed in Case No. 2012-00096, they cannot assert surprise to the documents submitted by and arguments advanced by that very same law firm. "The idea that these cases are merely unrelated cases handled by the same law firm,"

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<sup>18</sup> This provision applies to a party's efforts to incorporate by reference documents that are in the record of other Commission proceedings or in the Commission's general files. A party may also submit a physical copy of the documents in question, but the submission must be in accordance with a Commission order addressing the submission of evidence or the party must move for the admission of the physical copy into the record.

<sup>19</sup> In its Application and Petition for Rehearing, JSEWD has moved in support of its request for a declaratory order that the record of Case No. 2012-00096 be incorporated by reference into the record of this proceeding. Application and Petition for Rehearing at 10.

<sup>20</sup> JSEWD's Motion to Strike at 3 – 5 and 10 – 12.

JSEWD asserts, "is incomplete if not illogical."<sup>21</sup> JSEWD asserts that the Intervenors, having retained the same law firm as KAWC, were fully aware of the evidence and chose not to discuss that evidence in their brief. "There was nothing hidden from either the PSC or Intervenors' counsel about that record."<sup>22</sup>

In the Striking Order, we noted that JSEWD had "provided no supporting authority for the proposition that, when a person retains an attorney or law firm, he or she adopts the positions of every other client that the attorney or his law firm has ever represented."<sup>23</sup> JSEWD has failed to provide such authority in its Application for Rehearing. Aside from noting the presence of the law firm that Intervenors and KAWC had retained in two different proceedings, JSEWD has offered no evidence to suggest that the Intervenors and KAWC were related or were acting in a joint enterprise or engaged in a common effort or purpose. In the absence of any legal authority in support of JSEWD's position, and in the absence of any substantial evidence to suggest a relationship or common purpose or effort between the Intervenors and KAWC, we find no basis to alter our original decision to grant the Intervenors' Motion to Strike.

#### REQUEST FOR DECLARATORY ORDER

In its Application for Rehearing, JSEWD requests pursuant to 807 KAR 5:001, Section 18, a declaratory order "on the standards to be applied in determining the reasonable determination as to the need for and proper sizing of a water storage tank."<sup>24</sup> In support of its requested relief, JSEWD asserts that the Commission "has

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<sup>21</sup> Application and Petition for Rehearing at 22.

<sup>22</sup> *Id.*

<sup>23</sup> Striking Order at 4.

<sup>24</sup> Application and Petition for Rehearing at 4.



applied inconsistent standards in determining the need for and the capacity of very similar storage proposals in concurrent cases”<sup>25</sup> and specifically refers to several findings and interpretations in the Final Order as either inconsistent with Commission Regulations or Commission precedent.

In its response, the Intervenor argue that the request for a declaratory order is a request for an advisory opinion intended to “obtain advice from the Commission as to how . . . [it] should have tried . . . [its] case.”<sup>26</sup> It argues that the purpose of 807 KAR 5:001, Section 18, which authorizes declaratory orders, was designed to permit persons to seek declaratory orders in the same fashion as declaratory judgments are available in court proceedings and not to serve as a vehicle to seek rehearing.

While the Commission has issued declaratory orders for some time,<sup>27</sup> the regulatory authority for such orders was only recently established when the Commission

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<sup>25</sup> *Id.* at 4.

<sup>26</sup> Intervenor's Response to JSEWD's Application and Petition for Rehearing at 2.

<sup>27</sup> See, e.g., Case No. 2011-00452, *Application of Duke Energy Kentucky, Inc. Regarding the Acquisition of Generation Step-Up Transformers and for a Declaration Order That It Is an Ordinary Extension in the Usual Course of Business* (Ky. PSC Feb. 14, 2012); Case No. 2010-00237, *Application of Kentucky Utilities Company and Louisville Gas and Electric Company to Retain Southwest Power Pool, Inc. to Perform Independent Transmission Organization Functions* (Ky. PSC Oct. 27, 2010); Case No. 2009-00405, *Petition of Mountain Water District for Disclaimer of Jurisdiction or Approval of Tariff*, (Ky. PSC Apr. 12, 2010); Case No. 2007-00509, *Application of East Kentucky Power Cooperative, Inc. For an Order Declaring the Maysville-Mason County Landfill Gas to Energy Project to Be an Ordinary Extension of Existing Systems in the Usual Course of Business* (Ky. PSC Mar. 26, 2008); Case No. 2002-00474, *Application of East Kentucky Power Cooperative, Inc. for an Order Declaring the Green Valley and Laurel Ridge Landfill Gas to Energy Projects to Be Ordinary Extensions of Existing Systems in the Usual Course of Business* (Ky. PSC Mar. 3, 2003); Case No. 2002-00352, *Application of East Kentucky Power Cooperative, Inc. for an Order Declaring the Green Valley and Laurel Ridge Landfill Gas to Energy Projects to be Ordinary Extensions of Existing Systems in the Usual Course of Business*, (Ky. PSC Dec. 18, 2002); Case No. 2001-361, *Application of Mountain Water District for a Certificate of Public Convenience and Necessity to Construct a Wastewater Project and for a Declaration of Jurisdiction and Approval of a Wastewater Treatment Contract Pursuant to KRS 278.020 and 278.300* (Ky. PSC Nov. 19 2001); Case No. 2000-543, *Petition of Smithland Hydroelectric Partners, Ltd. and Cannelton Hydroelectric Project, Ltd. for a Declaratory Order* (Ky. PSC Mar. 9, 2001); Case No. 2000-469, *Petition of PG&E Dispersed Generating Company, LLC For Declaratory Order* (Ky. PSC Jan. 23, 2001).

amended its rules of procedures to provide specifically for declaratory orders.<sup>28</sup> 807 KAR 5:001, Section 18(1),<sup>29</sup> gives the Commission discretion to issue declaratory orders but does not mandate the issuance of such orders. Declaratory orders are intended to provide some guidance with respect to some act or conduct that may be within the Commission's jurisdiction. The regulation establishes procedures for obtaining such guidance where no other available remedy or process is readily available to address the proposed act or conduct.<sup>30</sup>

In the present case, JSEWD has already availed itself of an alternative remedy. The issues for which JSEWD seeks a declaratory order have already been raised and addressed in the Final Order. To the extent that JSEWD takes issue with those findings as being in conflict with past Commission precedent or with Commission regulations, KRS 278.400 provides a remedy – an application for rehearing. As JSEWD has filed its Application for Rehearing, JSEWD's allegation of Commission errors should be addressed in the Commission's Order addressing JSEWD's Application for Rehearing, not in a separate declaratory order. Further, the issues to be raised, and the evidence that can be presented, on rehearing are limited by the provisions of KRS 278.400. To

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<sup>28</sup> 39 Ky.R. 295; 39 Ky.R. 995; 39 Ky.R. 1117.

<sup>29</sup> 807 KAR 5:001, Section 18(1), provides:

The commission may, upon application by a person substantially affected, issue a declaratory order with respect to the jurisdiction of the commission, the applicability to a person, property, or state of facts of an order or administrative regulation of the commission or provision of KRS Chapter 278, or with respect to the meaning and scope of an order or administrative regulation of the commission or provision of KRS Chapter 278.

<sup>30</sup> This approach is consistent with the approach that Kentucky Courts have taken regarding declaratory judgments. *See, e.g., Black v. Utter*, 300 Ky. 803, 190 S.W.2d 541, 542 (1945). *See also* 22A Am. Jur. 2d *Declaratory Judgments* § 47 (Dec. 2013).

now expand this case to include a declaratory order would be inconsistent with the limited scope of the Commission's jurisdiction over issues on rehearing. Accordingly, we find that JSEWD's request for a declaratory order should be denied.

#### APPLICATION FOR REHEARING

KRS 278.400 establishes the standard for review of applications for rehearing. It provides that "[u]pon rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing." The statute is intended to provide closure to Commission proceedings by limiting rehearing to new evidence not readily discoverable at the time of the original hearings.<sup>31</sup> It requires parties to Commission proceedings to use reasonable diligence in the preparation and presentation of their case and serves to prevent piecemeal litigation of issues. We have further interpreted the statute as providing an opportunity for the Commission to address any errors or omissions in our Orders.<sup>32</sup>

Based upon our review of JSEWD's Application for Rehearing, we find that it fails to satisfy the requirements of KRS 278.400 and, therefore, should be denied. JSEWD has presented no additional evidence with its application. While it has alleged several errors in the Final Order, we find no basis in the record to support these allegations.

In its Application for Rehearing, JSEWD has alleged that in the Final Order the Commission (1) incorrectly interpreted the minimum storage requirements established in 807 KAR 5:066, Section 4(4); (2) applied 807 KAR 5:066, Section 4(4), to JSEWD's

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<sup>31</sup> Case No. 96-524, *An Examination by the Public Service Commission of the Application of the Fuel Adjustment Clause of Louisville Gas and Electric Company from November 1, 1994 to October 31, 1996* (Ky. PSC Mar. 11, 1999) at 2.

<sup>32</sup> Case No. 2009-00127, *DPI Teleconnect, LLC v. Bellsouth Telecommunications, Inc. d/b/a AT&T Kentucky* (Ky. PSC Mar. 2, 2012) at 3.

proposed storage facilities in a significantly different manner than to the proposed storage facilities of other utilities; (3) failed to considered JSEWD's storage requirements to meet peak demand and demand during drought periods; (4) failed to consider the need for redundant storage capacity; (5) failed to consider that the proposed facilities were partially funded through grant funds; (6) incorrectly found that the proposed facilities were either wasteful or excessive; (7) incorrectly found that JSEWD had failed to provide adequate demand projections to support the proposed storage facilities; and (8) incorrectly and unlawfully found that JSEWD should have investigated the possibility of obtaining storage capacity from KAWC. Each of these alleged errors is addressed below.

First, JSEWD alleges that the Commission erred in interpreting 807 KAR 5:066, Section 4(4),<sup>33</sup> to require that a water utility have storage capacity at least equal to its average daily consumption as determined on an annual basis.<sup>34</sup> It asserts that the plain language of the regulation does not define "average daily consumption" and that a water utility's monthly average daily consumption or the average daily consumption during a peak demand period should be used to determine a water utility's minimum storage requirement. "While the PSC may have assumed in some past cases that this regulation is based upon an annual determination," JSEWD asserts, "the regulation does not state this limitation, and does not give any utility such as JSEWD any notice

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<sup>33</sup> 807 KAR 5:066, Section 4(4), states: "Storage. The minimum storage capacity for systems shall be equal to the average daily consumption."

<sup>34</sup> Application and Petition for Rehearing at 6 – 7 and 11 – 12. JSEWD raised similar arguments in its Post-Hearing Brief. See JSEWD's Post-Hearing Brief at 15 – 18.

that it will be limited in a CPCN to a minimum capacity as determined on an annual basis.”<sup>35</sup>

We find no basis for this allegation of error. JSEWD has provided no authority to support its argument that “average daily consumption” should be calculated using a period other than annual period. In its Application for Rehearing, JSEWD did not refer to any technical or industry treatise that advocates a different methodology. It provides no reference to any governmental unit or agency standard that provides a different methodology for calculating “average daily consumption.”

Our review of Commission decisions regarding 807 KAR 5:066 indicates that the Commission has long calculated average daily consumption based on a one-year period of consumption. Moreover, JSEWD cannot claim any lack of notice of the Commission’s use of this methodology. In Case No. 10131,<sup>36</sup> in addressing JSEWD’s request for a deviation from the water storage requirements of 807 KAR 5:066,<sup>37</sup> the Commission calculated the water district’s average daily consumption using this methodology to determine that the water district was not in compliance with 807 KAR 5:066.

JSEWD, moreover, appears to have misinterpreted our interpretation of 807 KAR 5:066, Section 4(4). We did not hold that 807 KAR 5:066, Section 4(4), limits a water utility to a level of storage capacity equal to its average daily consumption. Section 4(4) merely sets a minimum level of required capacity. We expressly found that JSEWD

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<sup>35</sup> Application and Petition for Rehearing at 11.

<sup>36</sup> Case No. 10131, *The Application of Lexington-South Elkhorn Water District for a Deviation from the Water Storage Requirements of 807 KAR 5:066, Section 5(4)* (Ky. PSC Nov. 30, 1988) at 1.

<sup>37</sup> Prior to revisions to 807 KAR 5:066 that became effective in 1992, Section 4(4) appeared in 807 KAR 5:066 as Section 5(4).

was not in compliance with Section 4(4) and that it required additional storage capacity.<sup>38</sup> We made no finding that Section 4(4) limited the amount of storage capacity that JSEWD should add. It is clear from the record that, based upon JSEWD's average daily consumption for the year ended December 31, 2011, JSEWD required at least 159,200 gallons of additional storage capacity. JSEWD had the burden of demonstrating the level of any additional storage capacity that would not result in excessive or wasteful investment.

Finally, using a shorter time period or a peak demand period to calculate average daily consumption, as JSEWD advocates, would effectively increase the volume of water storage capacity that most jurisdictional water utilities must have available. This increase in required storage capacity would in turn require the construction of additional storage facilities and could possibly require increases in utility rates to finance such construction. Given the consequences of adopting JSEWD's interpretation, the Commission finds that adoption of that interpretation unreasonable and that application of our longstanding interpretation should continue.

The Commission agrees with JSEWD's contention that "[o]nce a shortfall in minimum capacity is established, the actual capacity of a new tank must be based on the particular needs and service characteristics of the particular utility."<sup>39</sup> We stated such agreement in the Final Order.<sup>40</sup> The burden of proof, however, is upon the

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<sup>38</sup> Final Order at 10 and 12.

<sup>39</sup> Application and Petition for Rehearing at 15.

<sup>40</sup> Final Order at 5 and 11.

applicant to demonstrate the level of the need.<sup>41</sup> JSEWD has shown that a need for storage capacity exists, but it has failed to demonstrate that, given its particular needs and service characteristics, the construction of an additional million gallons of storage capacity is required.

Second, JSEWD alleges that the Commission has applied 807 KAR 5:066, Section 4(4), in an inconsistent manner. More specifically, it alleges that the Commission has not considered or discussed Section 4(4) when reviewing the applications of KAWC for Certificates to construct water storage facilities.<sup>42</sup> It notes the absence of any reference to that regulation in recent Commission Orders approving the construction of water storage facilities.<sup>43</sup>

The Commission finds no basis to the allegations that we have applied Section 4(4) in an inconsistent manner. Each case must be addressed on the particular circumstances presented. We acknowledge that in many of the Orders in which we reviewed KAWC's applications for a Certificate to construct new storage facilities, few references to 807 KAR 5:066, Section 4(4) appear. The lack of any references was at least partly due to previous Commission recognition of KAWC's significant lack of water

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<sup>41</sup> See *Kentucky Utilities Co. v. Pub. Serv. Com'n*, 252 S.W.2d 885, 890 (Ky. 1952) ("a determination of public convenience and necessity requires both a finding of the need for a new service system or facility from the standpoint of service requirements, and an absence of wasteful duplication resulting from the construction of the new system or facility"); *Energy Regulatory Commission v. Kentucky Power Co.*, 605 S.W.2d 46, 50 ("Applicants before an administrative agency have the burden of proof.").

<sup>42</sup> Application and Petition for Rehearing at 12 – 15. See also JSEWD's Post-Hearing Brief at 21 – 25.

<sup>43</sup> Application and Petition for Rehearing at 12.

storage capacity in its Central Division. In Cases No. 10237<sup>44</sup> and No. 94-432,<sup>45</sup> the Commission expressly found KAWC was not in compliance with 807 KAR 5:066, Section 4(4), and granted KAWC a deviation from the regulation to permit it time to develop and then implement a plan to build additional water storage capacity in a cost-effective manner.<sup>46</sup> Most of the subsequent cases to which JSEWD refers involve construction of water storage to implement the approved plan of compliance.<sup>47</sup> As JSEWD has noted in its Application for Rehearing,<sup>48</sup> KAWC's Central Division still lacks sufficient water storage capacity to comply with Section 4(4).

As to Case No. 2012-00096, which involved the construction of two storage facilities in KAWC's Northern Division, compliance with Section 4(4) was not an issue. KAWC's Northern Division had storage capacity that equaled 132 percent of its average

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<sup>44</sup> Case No. 10237, *Application of Kentucky-American Water Company for a Determination by the Public Service Commission that Its Existing Water Storage is Adequate Pursuant to 807 KAR 5:066, Section 5(4)* (Ky. PSC May 9, 1988).

<sup>45</sup> Case No. 93-432, *Application of Kentucky-American Water Company for a Determination by the Public Service Commission of the Adequacy of Water Storage Capacity Analysis and for a Deviation from 807 KAR 5:066, Section 4(4) Until December 31, 2005, Pursuant to 807 KAR 5:066, Section 18* (Ky. PSC Dec. 20, 1993).

<sup>46</sup> We subsequently extended the time period in which KAWC has to comply with Section 4(4) to December 31, 2020. See Case No. 2005-00546, *Application of Kentucky-American Water Company for a Determination by the Public Service Commission of the Adequacy of Its Water Storage Capacity Analysis Dated December 21, 2005 and for a Deviation from 807 KAR 5:066, Section 4(4), Until December 31, 2020, Pursuant to 807 KAR 5:066, Section 18* (Ky. PSC July 31, 2007).

<sup>47</sup> See, e.g., Case No. 2005-00039, *Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing the Construction of a Two (2) Million Gallon Elevated Storage Tank and 1200 Feet of 24-Inch Water Main* (Ky. PSC Apr. 21, 2005); Case No. 2004-00254, *Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing the Construction of a One (1) Million Gallon Ground Storage Tank and Pump Station* (Ky. PSC Sept. 7, 2004); Case No. 2003-00270, *Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing the Construction of a Three (3) Million Gallon Ground Storage Tank and 400 Feet of 24-Inch Main* (Ky. PSC Oct. 9, 2003); Case No. 94-292, *Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing the Construction of a Three (3) Million Gallon Ground Storage Tank And Pump Station, and 2,700 Feet of 30-Inch Main* (Ky. PSC Dec. 1, 1994).

<sup>48</sup> Application and Petition for Rehearing at 20 – 21.



daily consumption, but an existing storage facility that accounted for 36 percent of the division's total storage capacity was in a state of poor repair and could not be taken off line without significantly impairing the quality of service. KAWC proposed to construct a water storage facility to complement this existing storage facility and another water storage facility to enable the transmission of water through a 16-mile water transmission main.<sup>49</sup>

Third, JSEWD argues that the Commission failed to consider JSEWD's storage requirements to meet peak demand and drought-period demand.<sup>50</sup> We find little evidence in the record, however, regarding this issue. Aside from noting that its peak daily demand is 1.926 million gallons,<sup>51</sup> JSEWD offered no explanation as to why its peak demand level justified the proposed additional storage capacity. It provided no authority for the proposition that a water utility's storage capacity should be at least equal to the water utility's maximum-day demand. While the Commission recognizes that peak demand is a primary consideration in sizing a water storage tank,<sup>52</sup> JSEWD provided no analysis in this case to demonstrate that the proposed storage capacity is

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<sup>49</sup> The water storage facility approved in Case No. 2007-00134, to which JSEWD also refers in its Application for Rehearing, involves a similar factual pattern. KAWC proposed to construct a three-million gallon water storage facility to assist the transmission of water through 30.3 miles of 42-inch water transmission main from its Kentucky River Station II water treatment plant to the Central Division. Even with the construction of this water storage facility, however, KAWC still lacks storage capacity equal to its average daily consumption. See Case No. 2007-00134, *The Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing the Construction of Kentucky River Station II, Associated Facilities and Transmission Main* (Ky. PSC Apr. 25, 2008).

<sup>50</sup> Application and Petition for Rehearing at 13 – 15. See also JSEWD's Post-Hearing Brief at 21 – 25. Following the filing of its Application for Rehearing, JSEWD moved for the Commission to take notice of our decision in Case No. 2013-00155. Case No. 2013-00155, *Application of East Casey County Water District for Approval of Financing and Issuance of a Certificate of Convenience and Necessity* (Ky. PSC June 7, 2013). The Commission has considered that Order in rendering this decision.

<sup>51</sup> App. Ex. A at 2.

<sup>52</sup> See American Water Works Association, *Steel Water Storage Tanks* (AWWA Manual 42) (1<sup>st</sup> ed. 1998) 53.

necessary for the water utility to meet its peak demand or the level of benefits that the proposed storage capacity addition will produce as compared to the level of benefits that a lesser storage capacity addition would produce. JSEWD has not demonstrated the relationship between its storage capacity, pumping capabilities, and customer demand. Finally, JSEWD failed to explain why it has been able to meet its peak demand with its existing storage capacity without experiencing any significant service problems or complaints.<sup>53</sup>

Fourth, JSEWD argues that the Commission failed to consider the need for redundant storage capacity.<sup>54</sup> It points to the Commission's Order of February 28, 2013, in Case No. 2012-00096 in which the Commission in part approved the construction of additional water storage due to the need for redundant water storage facilities. It argues that JSEWD must have "redundancy in the event of planned and unplanned outages or emergencies and for system requirements."<sup>55</sup>

We find no merit in this argument. In the Final Order, the Commission considered the issue of redundancy. We found that JSEWD required additional water storage capacity and that it should investigate all possible sources for obtaining such capacity. Aside from brief references to redundancy, JSEWD failed to explain why the concept of redundancy supports the construction of an additional million gallons of storage capacity. Why not a 500,000-gallon storage facility or a 750,000-gallon facility? Such a facility would also duplicate JSEWD's existing facilities and provide redundancy.

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<sup>53</sup> VR 03/14/2013 Hearing Transcript; 09:52:10-10:00:29.

<sup>54</sup> Application and Petition for Rehearing at 7 and 12.

<sup>55</sup> *Id.* at 12.

JSEWD's emphasis on the outcome in Case No. 2012-00096, moreover, is misplaced. While the Commission identified redundancy as a primary reason for its approval of the proposed facilities, much of that reasoning centered on the inadequacies of KAWC's water treatment facility, which lacked redundant systems which would allow KAWC's Northern Division to continue producing water in the event of a water treatment problem. As to the water storage facilities, the primary reason for their construction was to assist in the transmission of water from a distant water treatment plant and to allow an existing water storage facility to be taken offline for extensive repairs.

Fifth, JSEWD argues that the Commission failed to consider that the proposed facilities were partially funded through grant funds when finding that JSEWD had failed to demonstrate that the proposed storage facility would not result in wasteful duplication or excessive investment.<sup>56</sup> Use of grant funds, JSEWD argues, lowers its level of investment and reduces the possibility of any rate increase.

We find no merit to this argument. In the Final Order, we expressly noted that the proposed project would be partially funded through a legislative appropriation.<sup>57</sup> Furthermore, "wasteful duplication" is defined as "an excess of capacity over need" and "an excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties."<sup>58</sup> A project's funding source, therefore, has no bearing on the determination.

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<sup>56</sup> *Id.* at 16 – 17. See also JSEWD's Post-Hearing Brief at 29.

<sup>57</sup> Final Order at 3.

<sup>58</sup> *Kentucky Utilities Co.* 252 S.W.2d. at 890.

As to JSEWD's contention that the use of a legislative appropriation reduces any adverse effect on JSEWD's rates from the proposed storage facility's construction, we note that JSEWD still plans to borrow funds to finance a portion of the project. The cost of this financing will affect JSEWD's financial condition and could eventually be recovered through its rates for water service. Moreover, should JSEWD seek a rate adjustment in the future, the Commission is required to include for recovery in JSEWD's rates the depreciation expense associated with the proposed storage facility.<sup>59</sup> JSEWD's ratepayers, therefore, may still be paying through their rates for the portion of the proposed storage facilities financed with the legislative appropriation.

Sixth, JSEWD argues that the Commission incorrectly found that the proposed facility was either wasteful or excessive.<sup>60</sup> In the Final Order, however, the Commission did not find that the proposed water storage facility was wasteful or excessive, but only that insufficient evidence has been provided to support the proposed facility's total capacity:

[W]e are unable to find that JSEWD has met its burden of proof that the proposed storage facility is necessary and will not result in excessive or wasteful investment. The record does not show that JSEWD has adequately investigated and eliminated all reasonable alternatives to obtain compliance with that regulation.

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<sup>59</sup> See *Pub. Serv. Com'n, v. Dewitt Water Dist.*, 720 S.W.2d 725, 731 (Ky. 1986) ("The Commission is required by statute to treat depreciation as an operating expense to provide an adequate fund for renewals, replacement and reserves. The proper rate-making treatment for depreciation expense of contributed property is to allow depreciation on contributed plant as an operating expense."). This treatment of depreciation expense of contributed property applies only to water districts and water associations. It does not extend to other types of utilities. See Case No. 2011-00096, *Application of South Kentucky Rural Electric Cooperative Corporation for an Adjustment of Rates* (Ky. PSC Mar. 30, 2012).

<sup>60</sup> Application and Petition for Rehearing at 8 – 9 and 16.

Our decision today should not be regarded as a rejection of JSEWD's request for additional storage capacity. As we have previously noted, the record demonstrates a need for additional storage capacity. JSEWD has failed to demonstrate that the level of storage capacity that the proposed facility will provide is necessary.<sup>61</sup>

Seventh, JSEWD argues that the Commission incorrectly found that JSEWD had failed to provide adequate demand projections to support the proposed storage facilities.<sup>62</sup> It, however, offers no new evidence in support of its position that the system growth and the need for enhanced services will require the construction of the proposed storage facility rather than the construction of a smaller water storage facility. It does not address the concerns that we raised in the Final Order. Instead JSEWD asserts that the Commission may and should rely upon "the informed and credible judgment" of its system engineer. As the record does not indicate that JSEWD's system engineer has any expertise in the areas of population projection, urban planning, or demographics, we are unable to accord the same weight to that engineer's findings that JSEWD has.

Finally, JSEWD argues that the Commission incorrectly and unlawfully found that JSEWD should have investigated the possibility of obtaining storage capacity from its current water supplier - KAWC.<sup>63</sup> JSEWD notes that KAWC currently lacks storage capacity to comply with 807 KAR 5:066, Section 4(4), that JSEWD's current supply contract with KAWC does not provide for such an arrangement, and that any effort to

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<sup>61</sup> Final Order at 10 – 12.

<sup>62</sup> Application and Petition for Rehearing at 17 – 18.

<sup>63</sup> *Id.* at 9 and 20 – 21.

require JSEWD to contract with KAWC as a precondition to approval of its proposed storage facility is beyond the Commission's authority.

We find no basis for the alleged error. In the Final Order, the Commission noted:

JSEWD should have investigated the availability of obtaining water storage capacity from Kentucky American. At a minimum, JSEWD should have demonstrated that such capacity was unavailable or insufficient to address the water district's requirements.<sup>64</sup>

This statement is consistent with long-established Commission precedent that an applicant for a Certificate must demonstrate that a thorough review of all alternatives has been performed.<sup>65</sup> It also reflects the Commission practice of permitting a water utility, such as JSEWD, to avoid the construction of water storage facilities through voluntary storage arrangements with its water supplier.<sup>66</sup>

In the Final Order, the Commission did not direct JSEWD to contract with KAWC for water storage capacity, nor did it condition the issuance of a Certificate upon such contract. We merely noted that JSEWD's failure to make even a cursory investigation of this alternative suggested that a thorough review of all storage capacity alternatives, including those that might reduce the need for storage capacity and thus the size of any new storage facility, was not conducted. As a prerequisite to obtaining a Certificate for

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<sup>64</sup> Final Order at 11, n. 41.

<sup>65</sup> See, e.g., Case No 2005-00142, *The Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for the Certificate of Public Convenience and Necessity for the Construction of Transmission facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky* (Ky. PSC Sept. 8, 2005).

<sup>66</sup> See, e.g., Case No. 94-011, *The Application of Dexter-Almo Heights Water District for a Deviation Pursuant to 807 KAR 5:066, Section 5(4), Regarding Water Storage* (Ky. PSC Mar. 11, 1994); Case No. 91-147, *The Application of Spears Water Company, Inc. for a Deviation from 807 KAR 5:066, Section 5(4), Regarding Water Storage* (Ky. PSC Jan. 29, 1992); Case No. 91-197, *The Application of Murray No. 2 Water District for a Deviation Pursuant to 807 KAR 5:066, Section 5(4), Regarding Water Storage* (Ky. PSC Oct. 21, 1991); Case No. 89-049, *The Application of Dewitt Water District for a Deviation from 807 KAR 5:066, Section 5(4), Regarding Water Storage* (Ky. PSC Aug. 14, 1989).

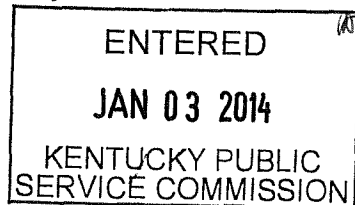
the proposed facility, JSEWD had the burden of proof to demonstrate that a thorough review had been conducted.

In summary, the Commission finds that JSEWD has not met the burden set forth in KRS 278.400 to require a rehearing in this matter. JSEWD has failed to present any new evidence or argument regarding the proposed storage facility to rebut the Commission's findings. The record, furthermore, does not support any of the errors that JSEWD alleges are present in the Final Order. In the absence of any new evidence or discernible error in the Final Order, JSEWD's Application for Rehearing should be denied and the Final Order should be affirmed.

IT IS THEREFORE ORDERED that:

1. JSEWD's Application for Rehearing as it relates to the Striking Order is denied and the Striking Order is affirmed.
2. JSEWD's request for a declaratory order on the issues set forth in its Application for Rehearing is denied.
3. JSEWD's Application for Rehearing as it relates to the Final Order is denied and the Final Order is affirmed.

By the Commission



ATTEST:

  
Executive Director

Honorable W. Randall Jones  
Attorney at Law  
Rubin & Hays  
Kentucky Home Trust Building  
450 South Third Street  
Louisville, KENTUCKY 40202

Honorable Anthony G Martin  
Attorney at Law  
P.O. Box 1812  
Lexington, KENTUCKY 40588

Bruce E Smith  
201 South Main Street  
Nicholasville, KENTUCKY 40356

Honorable Robert M Watt, III  
Attorney At Law  
STOLL KEENON OGDEN PLLC  
300 West Vine Street  
Suite 2100  
Lexington, KENTUCKY 40507-1801