



Steven L. Beshear  
Governor

Leonard K. Peters  
Secretary  
Energy and Environment Cabinet

Commonwealth of Kentucky  
**Public Service Commission**  
211 Sower Blvd.  
P.O. Box 615  
Frankfort, Kentucky 40602-0615  
Telephone: (502) 564-3940  
Fax: (502) 564-3460  
psc.ky.gov

David L. Armstrong  
Chairman

James W. Gardner  
Vice Chairman

Linda Breathitt  
Commissioner

July 31, 2014

PARTIES OF RECORD

RE: Case No. 2014-00141  
Kurt and Layne Netherton v. Kentucky American Water Company

Attached is a copy of a memorandum which is being filed in the record of the above-referenced case. If you have any comments you would like to make regarding the contents of the memorandum, please do so within five days of receipt of this letter. If you have any questions, please contact Nancy Vinsel, Staff Attorney, at (502) 782-2582.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Derouen".

Jeff Derouen  
Executive Director

NJV/chh  
Attachment

**INTRA-AGENCY MEMORANDUM**

**KENTUCKY PUBLIC SERVICE COMMISSION**

**TO:** Case File No. 2014-00141

**FROM:** Nancy J. Vinsel  
Staff Attorney

**DATE:** July 30, 2014

**RE:** Kurt and Layne Netherton v. Kentucky American Water Company

On July 28, 2014, Commission Staff held an informal conference in this matter. Attending the conference were:

Nancy J. Vinsel	-	Commission Staff
Richard Raff	-	Commission Staff
J.E.B. Pinney	-	Commission Staff
Eddie Beavers	-	Commission Staff
George Wakim	-	Commission Staff
Ariel Turnbull	-	Commission Staff
Doug Brock	-	Manager of Field Operations, Kentucky American Water Company
Lindsay Ingram	-	Attorney for Kentucky American Water Company
Kurt B. Netherton	-	Complainant
Layne Netherton	-	Complainant

At the beginning of the informal conference, Ms. Vinsel explained the purpose of the conference was to gather additional information and determine the next steps. Ms. Vinsel provided an overview of procedures, explaining that, in a formal complaint matter, the Commission acts as an impartial trier of fact and decision maker, and that the party filing the complaint has the burden of proof to provide conclusive evidence to support the party's claim. Ms. Vinsel further explained the statutory and case laws that the Commission must apply in its decision. Pursuant to the filed rate doctrine, a utility cannot charge greater or less compensation for service than its filed tariff, nor can a utility give unreasonable preference to any customer. Pursuant to case law dating to 1915 and Commission precedent, in the absence of a defective meter, there is a presumption that the quantity of water did pass through the meter, and thus the customer is responsible for the quantity of water supplied. Ms. Vinsel distributed to the parties copies of KRS 278.160, KRS 278.170, and Kentucky American Water Company's ("Kentucky American") tariff sections 20(K) monitoring of customer usage, 21 accuracy requirements of water meters, and 22 bill adjustment.

Mr. Ingram stated his opinion that, with the discovery conducted in the matter, the case record is a full record. Mr. Ingram stated that Kentucky American did not wish to engage in a dispute with a customer and prefers to resolve the matter, reiterating the credit Kentucky American offered to the Nethertons. Acknowledging that the Commission does not have jurisdiction to broker a settlement between the parties, Kentucky American suggests that, if the parties are unable to resolve the dispute outside of this Case, the record is sufficiently developed that the Commission can make a decision based upon the written record as is, or, if the Commission prefers, the parties could submit a brief of five-to-ten pages with the relevant case law and facts. Kentucky American does not believe a hearing is necessary.

Kentucky American said its discovery requests and responses support its belief that something occurred between November 6, 2013 and December 27, 2013 to generate the water usage at issue. Kentucky American agrees with the Nethertons that the parties do not know what caused the high usage, but that Kentucky American does not bear the burden of proof. The meter at issue was tested twice, once by Kentucky American and once by Commission Staff, and met accuracy requirements both times it was tested. Thus, pursuant to case law, the water measured did pass through the meter. Mr. Ingram discussed possible causes for the amount of water at issue, such as a leaking toilet or irrigation system, and restated Kentucky American's preference to have the matter decided on the written record if it cannot be resolved outside of the case.

The Nethertons state they do not believe the amount of water at issue actually passed through the meter as there was no external evidence of high water usage, such as standing water or running faucets. The Nethertons request that Kentucky American re-calculate their bills for the period of November 6, 2013 through January 7, 2013 based upon the average water use they typically consume. As a basis for this request, Ms. Netherton asks that the Commission apply common sense, noting that only 2 people reside at the home and that they could not have used the amount of water alleged. As a further basis, the Nethertons point to the Commission's decision in Case No. 92-427, In the matter of Gifford Seymour Blyton v. Kentucky-American Water Company ("Blyton"). Ms. Netherton states that, in Blyton, the Commission held that it was unrealistic that the consumers utilized the amount of water alleged and that it would be "speculative and unreasonable" for the Commission to conclude the meter was functioning properly. Upon that basis, the Commission ordered the Blyton's bill to be recalculated based upon average usage.

Mr. Ingram countered that Commission precedent has been consistent that, in the absence of a defective meter, the presumption is that water actually passed through the meter in the quantity measured.

The Nethertons assert that the facts in this case more closely mirror the facts in Blyton than the three cases cited by Kentucky American in their Answer, and thus the Blyton reasoning should apply here, rather than the reasoning followed in the cases cited by Kentucky American.

Ms. Vinsel noted that the cases the parties were referencing were: Case No. 2011-00414, Moore's Chapel A.M.E. Church v. Water Service Corporation of Kentucky; Case No. 2006-00212, In the Matter of Robert Young Family v. Southeastern Water Association, Inc.; Case No. 99-109, In the matter of Susan Elizabeth Spengler and Mark Lewis Farman v. Kentucky-American Water Company. Ms. Vinsel also noted that a case referenced by the Nethertons in a prior email also set forth the rule of law the Commission must follow: Case No. 96-368, In the matter of Stanley Marcinek v. Kentucky-American Water Company. Ms. Vinsel noted that the Marcinek case was referenced by the Nethertons in an email that was filed into the record.

Ms. Vinsel asked questions to follow up on the Nethertons' discovery responses. First, Ms. Vinsel asked if the Nethertons conducted the dye test to detect toilet leaks that Kentucky American suggested they perform when the Nethertons first questioned the bill with unusually high water usage. Mr. Netherton indicated they had not, and then described the steps he took after learning of the high water usage when he determined there were no leaks at the Netherton residence. The Nethertons confirmed they did not hire a plumber to examine for leaks because Mr. Netherton made an extensive inspection, but did have the irrigation system checked. The Nethertons said the dishwasher leak referenced in the March 2013 home inspection report was repaired in April 2013, but was not included in their discovery responses because it fell outside the time period covered in the discovery request. The Nethertons indicated there were issues with the dishwasher not cleaning properly, which resulted in repairs in March 2014 and April 2014 that are not related to the water usage at issue in this matter.

Mr. Netherton believes he repaired the leak to the kitchen sink faucet on November 23, 2013, as listed in the Nethertons' discovery responses. Mr. Netherton also believes he made the repair after a plumber, working to unclog the garbage disposal, discovered a pin prick leak on the back of the faucet. The Nethertons will review their records and supplement their discovery responses as necessary. To clarify, Mr. Netherton said the leak was minor and was not the reason for the amount of water usage.

The Nethertons state that the meter may have been accurate when tested, but question whether there was a sporadic problem that caused the meter to incorrectly over measure the water usage. The Nethertons compared the problem to an automobile engine that malfunctions when being driven but not when it is being examined by a mechanic. Mr. Wakim explained how a water meter works and that typically a meter does not malfunction in the manner described by the Nethertons.

The Nethertons offered additional arguments that the meter may have been tampered with. In response to Mr. Raff's question, the Nethertons were not aware how a meter could be tampered with. The Nethertons also question whether the meter was misread, pointing to alleged reading malfunctions that occurred in Atlanta in the recent past. Mr. Brock explained the automated meter reading process and noted that the manual reading verified the automated meter readings.

The Nethertons reiterated that they do not believe the amount of water measured by the meter actually passed through the meter, that they did not use the amount of water alleged, and that it was not fair that they were billed for the alleged amount of water.

The Nethertons believed that the parties agreed that there were no leaks on their property. Ms. Vinsel clarified that the Commission had not made such a statement. Mr. Ingram and Mr. Brock said Kentucky American did not agree that there were no leaks on the Nethertons property, stating that whatever caused the high water usage started in early November 2013 and stopped before the water meter was pulled in late January 2014. Kentucky American clarified a statement made in an email dated January 25, 2014 to the Nethertons that, after the second manual meter reading, there were no leaks evident at that time. Kentucky American did not agree that there were no leaks prior to that date.

The parties dispute when the water usage returned to more typical usage. The Nethertons believe typical water usage resumed once the meter at issue was pulled on January 29, 2014. Kentucky American notes that the water usage for November 6 to December 5, 2013 was 145,860 gallons; that the subsequent billing period was higher than typical but less than the previous month; and that, based upon the December 27, 2013 manual reading, the high usage appears to have ceased by the end of December.

The parties were asked about submitting the matter to the Commission for a decision based on the written record. Mr. Raff proposed the parties enter into a stipulation of facts. After an explanation of a stipulation, it appeared that it would not be fruitful for the parties to discuss what, if any, facts they could stipulate.

Commission Staff understood the parties were in agreement to submit the matter to the Commission on the written record. But, based upon subsequent emails, which are attached, it appears that the Nethertons are now requesting the opportunity for a hearing.

No later than August 25, 2014, each party will advise in writing if they want to let the decision be made on the current record, submit a brief and let the decision be made on the written record, or for a hearing to be held. If a hearing is held, the parties will be able to present witnesses and question the other party's witnesses. If the parties choose to submit the matter based upon the current record or choose to submit briefs, the decision will be made based on the written record. Each party has the option of letting a decision be made based on what has already been submitted.

Also no later than August 25, 2014, the Nethertons will submit written documentation to clarify the date that their irrigation system was winterized. In their discovery responses, the Nethertons reference two different dates, November 4 and November 14, as the date the system was winterized.

The collection hold on the Nethertons' account expires on July 30, 2014. Mr. Brock will extend that hold out to a future date while this matter is pending before the Commission.

In their post-informal conference email, the Nethertons inquired about "obtaining possession" of the meter at issue in this case for an examination. Pursuant to 807 KAR 5:006 Section (2)(b), the meter at issue has been secured by the Commission's Meter Standards Laboratory and will be retained by the Laboratory until this proceeding is resolved. The Nethertons should submit, in writing, a request setting forth specifically what action they are seeking and clarify what they mean by "obtaining possession" of the meter. Upon service of the Nethertons' written request regarding further meter testing, Kentucky American shall have ten days to file its response to the request with the Commission.

cc: Parties of Record

## Vinsel, Nancy (PSC)

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**From:** Layne Netherton <layniemia@yahoo.com>  
**Sent:** Tuesday, July 29, 2014 10:01 AM  
**To:** Vinsel, Nancy (PSC); l.ingram@skofirm.com  
**Cc:** Kurt Netherton  
**Subject:** Re: Meeting Yesterday

One more item I forgot to ask--what is the process for obtaining possession of the meter? To meet the burden of proof that the meter was working properly, we'll need to examine it at some point.

Layne

On Tuesday, July 29, 2014 9:58 AM, Layne Netherton <[layniemia@yahoo.com](mailto:layniemia@yahoo.com)> wrote:

Hello all,

I wanted to thank you both for your time yesterday. It was nice to meet everyone in person. Nancy, is it possible for you to send me the hearing process procedures? I'm assuming the deposition process and the process for listing witnesses will be including in that procedure documentation, but if not, I would like to get a copy of that as well.

One more question about that process--is it permissible to submit a sworn affidavit in place of sworn testimony in the event the person is unable to attend the hearing?

Also, I noticed there is an appeal process as well. Can you provide me the process for that as well?

Thanks again and I look forward to working with you and your team on this in the near future.

Regards,

Layne Netherton  
859-536-8875

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KURT AND LAYNE NETHERTON )  
COMPLAINANT ) CASE NO.  
VS. ) 2014-00141  
KENTUCKY AMERICAN WATER COMPANY )  
DEFENDANT )

July 28, 2014

Please sign in:

NAME	REPRESENTING
<u>Nancy J. Vinsel</u>	<u>PSC - Legal</u>
<u>RICHARD RAFF</u>	<u>PSC LEGAL</u>
<u>Doug Brock</u>	<u>KAW</u>
<u>Lindsay Ingram</u>	<u>12AW</u>
<u>Kurt B. Netherton</u>	<u>self</u>
<u>Layne Netherton</u>	<u>Self</u>
<u>George W Wakim</u>	<u>PSC</u>
<u>J.E.B. Pinney</u>	<u>PSC - Legal</u>
<u>Ariel Turnbull</u>	<u>PSC - FA</u>
<u>Eddie Beavers</u>	<u>" "</u>