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Commonwealth of Kentucky  
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David L. Armstrong  
Chairman

James W. Gardner  
Vice Chairman

Linda Breathitt  
Commissioner

August 19, 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 addendum 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 blue 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:** August 15, 2014

**RE:** Kurt and Layne Netherton v. Kentucky American Water Company –  
Addendum to 7/31/14 Informal Conference Memorandum

On July 28, 2014, Commission Staff held an informal conference in this matter. On July 31, 2014, the Commission Staff prepared and filed into the record a memorandum memorializing the conference discussion. On August 5, 2014, Complainants, Kurt and Layne Netherton, filed their comments regarding the contents of the memorandum. On August 6, 2014, Mr. and Mrs. Netherton filed supplemental comments asking for clarification of the citation to a regulation regarding meter testing, and for citations to two rules of law discussed during the informal conference. By this addendum, Commission Staff is providing the requested clarification.

The last paragraph in the July 31, 2014 memorandum states that 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 regulation cited in that paragraph contains a typographical error. The correct citation is 807 KAR 5:006 Section 19, which sets forth procedures to be followed for meter tests made upon customer request; and 807 KAR 5:006 Section 19(2)(b) which provides that the Commission's Meter Standards Laboratory shall secure and maintain a meter that is the subject of a formal complaint until the proceeding is resolved.

The Nethertons ask for "identification of the case law references that state, in the absence of a defective meter, there is a presumption that the quantity of water did pass through the meter." Relevant Commission precedent and state court holdings are set forth in the following orders issued in cases referenced in filings in this case and at the informal conference: Case No. 2011-00414, Moore's Chapel A.M.E. Church v. Water Service Corporation of Kentucky; and Case No. 99-109, In the matter of Susan Elizabeth Spengler and Mark Lewis Farman v. Kentucky-American Water Company. These orders can be accessed from the Commission's web site at <http://psc.ky.gov/>, by selecting non-electronic cases from the menu bar. Each case is indexed under the year indicated in the case number.

The Nethertons also ask for clarification regarding the "statutes" that set forth the parties' burden of proof. As an initial matter, Commission Staff recognize that pro se

complainants may or may not have an understanding of the basis of the rule of law which the Commission must apply in its decisions. However, as indicated in previous communications filed in the case record, the Commission acts as the impartial trier of fact and decision maker, and thus cannot provide legal advice to a party appearing before the Commission. Only a lawyer representing a party may give that party legal advice. Therefore, if the Nethertons require additional clarification regarding the burden of proof beyond the below citations, they should consult legal counsel.

As set forth in the Commission's Order issued May 16, 2014 in this case, the party filing a complaint bears the burden of proof in matters before an administrative agency. See *Energy Regulatory Commission v. Kentucky Power Co.*, 605 S.W.2d 46, 50 (Ky. App. 1980). The complainant's burden of proof is also set forth in the Commission Orders issued in the following cases referenced in filings in this case and at the informal conference: 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.; and Case No. 99-109, In the matter of Susan Elizabeth Spengler and Mark Lewis Farman v. Kentucky-American Water Company. The burden of proof is also referenced in the Commission Order issued in Case No. 96-368, In the Matter of Stanley Marcinek v. Kentucky-American Water Company, which was referenced at the informal conference. A copy of that Order is attached.

cc: Parties of Record

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

STANLEY MARCINEK	)	
	)	
COMPLAINANT	)	
	)	
v.	)	CASE NO. 96-368
	)	
KENTUCKY-AMERICAN WATER COMPANY	)	
	)	
DEFENDANT	)	

O R D E R

On July 30, 1996, Stanley Marcinek filed a complaint against Kentucky-American Water Company ("Kentucky-American") concerning a disputed water bill he received for the three-month period from September 20, 1995 to December 19, 1995.<sup>1</sup> Kentucky-American was directed by Order to satisfy or answer the complaint. Kentucky-American filed its answer on August 21, 1996. As further proceedings were necessary, the Commission established a procedural schedule on October 14, 1996. The Commission issued an information request on November 15, 1996, to which Kentucky-American responded on November 22, 1996. While a hearing was scheduled in this matter for December 13, 1996, the Commission on its own motion rescheduled the hearing to January 24, 1997, on which day the hearing proceeded. Kentucky-American appeared represented by counsel, while Mr. Marcinek appeared pro se.

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<sup>1</sup> While Kentucky-American billed quarterly at the time Mr. Marcinek received the disputed bill, it has since switched to monthly billing.

The essence of the complaint is that Mr. Marcinek received a bill from Kentucky-American for the billing period between September 20, 1995 and December 19, 1995 for 8,800 cubic feet of water usage in the amount of \$312.33.<sup>2</sup> Mr. Marcinek believed that only a malfunction in his meter could have resulted in a bill of this magnitude. He and his wife are the only residents in the home located at 236 St. Ann Drive. Mr. Marcinek testified that he and his wife have resided at the same location for 40 years and have raised a family of eight children. During this time, they never before used this much water in a three-month period or received a bill of this proportion. Mr. Marcinek in fact offered testimony that he and his wife are very conservative water users.

After receiving the unusually large bill,<sup>3</sup> Mr. Marcinek contacted Kentucky-American regarding the matter. When Kentucky-American first examined the meter, it found no signs of a leak at the box and noted that the flow finder was not moving. Kentucky-American's second examination of Mr. Marcinek's meter revealed a slight leak, as indicated by the flow finder. A slow leak was subsequently discovered in one of Mr. Marcinek's toilets, which he testified he immediately repaired.

Kentucky-American removed the meter through which 236 St. Ann Drive receives service twice for testing. The test conducted by Kentucky-American on January 15, 1996

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<sup>2</sup> To have used 8,800 cubic feet of water over a 90 day billing period, 97.78 cubic feet of water would have had to pass through Mr. Marcinek's meter every day. As there are approximately 7.48 gallons of water in one cubic foot, this would equal 731.39 gallons per day, or 21,941.83 gallons a month.

<sup>3</sup> Mr. Marcinek had averaged 1,220 cubic feet per billing period for the 10 billing periods preceding the billing period which ended on December 19, 1995. For the three billing periods immediately following the period in question, Mr. Marcinek used an average of 967 cubic feet every three months.

showed that the accuracy of the meter serving Mr. Marcinek's property was within Commission standards pursuant to 807 KAR 5:066, Section 15, Accuracy Requirements of Water Meters. Attachment 1. The test conducted by Kentucky-American on February 22, 1996, which was witnessed by Mr. and Mrs. Marcinek, again showed that the accuracy of the meter was within Commission standards under 807 KAR 5:066, Section 15. Attachment 2.

While Mr. Marcinek contends that the leak in his toilet could not have resulted in the significant increase in his water usage indicated by the bill he received in December 1995, he offered no real evidence to support his position that the meter failed to accurately record the amount of water that flowed through it between September 10, 1995 and December 19, 1995. While Kentucky-American could not prove that Mr. Marcinek's increased water usage was the result of his leaky toilet or any other leak on his side of the meter, it does not bear the burden of proof. While the Commission understands Mr. Marcinek's position and recognizes that the bill in question is not consistent with his normal water usage, he failed to prove that the amount of water in question did not in fact pass through his meter. Two tests showed that the meter was accurately recording the amount of water which flowed through it.

Kentucky-American is a utility subject to the regulation of this Commission. KRS 278.160(2) states that:

No utility shall charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

Also, KRS 278.170(1) requires that no utility give an unreasonable preference to any person.

From the facts of this case, it does not appear that Kentucky-American is demanding greater compensation than it deserves for service rendered. The meter in question has been thoroughly tested and examined by Kentucky-American. It met the Commission's minimum accuracy requirements and no defects were discovered. While testimony confirmed that a leak, albeit a small one, was discovered in Mr. Marcinek's home, there was no evidence produced to show that the meter through which Mr. Marcinek received service functioned incorrectly at any time.

Unless Mr. Marcinek pays the amount still in dispute, which is \$209.21,<sup>4</sup> he will have received service from Kentucky-American for less compensation than prescribed in its schedules contrary to KRS 278.160(2). If Kentucky-American does not require Mr. Marcinek to pay in full for the service he received, the utility would violate KRS 278.170(1).

Pursuant to 807 KAR 5:006, Section 13(2), Mr. Marcinek may request Kentucky-American to establish a partial payment plan for the outstanding bill. The partial payment plan should be mutually agreed upon and subject to the conditions of 807 KAR 5:006, Section 13(2), and 807 KAR 5:006, Section 14. Any partial payment plan agreed upon should extend at least three months, the period during which the amount in question accrued.

IT IS THEREFORE ORDERED that:

1. The complaint of Stanley Marcinek against Kentucky-American is dismissed.

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<sup>4</sup> January 24, 1997 Transcript of Evidence at 112.

2. Kentucky-American shall offer Mr. Marcinek a partial payment plan extending at least three months, and file a copy of said partial payment plan with the Commission within 10 days of its ratification.

Done at Frankfort, Kentucky, this 13rd day of April, 1997,

PUBLIC SERVICE COMMISSION

Linda K Breaux  
Chairman

Ed Wilson  
Vice Chairman

B. J. Helton  
Commissioner

ATTEST:

Don Mills  
Executive Director



KENTUCKY - AMERICAN WATER COMPANY

\*\*\*\*\* OFFICE USE ONLY \*\*\*\*\*

Customer Name: S. Marcinek Account Number: 1970294-00  
 Service Address: 236 St Ann Dr Service Number: 28292  
 Meter: Size 5/8 Make N Number 38723049 Test Scheduled: Date 1-15-94 Time 3:15PM

	GPM	Readings Beginning	Readings Ending	Percent of Accuracy	Required Accuracy
Low Flow:	<u>14</u>	<u>0166.1500</u>	<u>0166.1600</u>	<u>100</u>	90% - 101%
Intermediate Flow:	<u>2</u>	<u>0166.1600</u>	<u>0166.1700</u>	<u>100</u>	98.5% - 101.5%
Maximum Flow:	<u>15</u>	<u>0166.1700</u>	<u>0166.2699</u>	<u>99.9</u>	98.5% - 101.5%

\*\*\*\*\*  
 \* IF ANY OF THE TESTS ABOVE ARE NOT WITHIN THE REQUIRED \*  
 \* ACCURACY LIMITS THEN FURTHER TESTING IS REQUIRED BELOW. \*  
 \*\*\*\*\*

Flow Rate % of Capacity	GPM	Readings Beginning	Readings Ending	Percent of Accuracy
25%	_____	_____	_____	_____
50%	_____	_____	_____	_____
75%	_____	_____	_____	_____

Average of all 3 tests: \_\_\_\_\_  
 Less Standard: \_\_\_\_\_ 100%  
 Equals % of Error: \_\_\_\_\_ Fast \_\_\_\_\_ Slow \_\_\_\_\_

Before Test Reading: 016615 After Test Reading: 016626

Customer Witness? YES \_\_\_\_\_ NO /

\*\*\* IF PERCENT OF ERROR IS GREATER THAN 2% THEN COMPLETE THE APPROPRIATE SECTION BELOW \*\*\*

Length of time error is known to exist: \_\_\_\_\_

FAST METER basis for refund: \_\_\_\_\_

Amount of refund: \_\_\_\_\_

SLOW METER basis for additional bill: \_\_\_\_\_

Amount of additional bill: \_\_\_\_\_

COMMENTS: \_\_\_\_\_

Copy to: Customer Service Supt.—Inside  
 Customer Service Supt.—Outside  
 Customer with letter

Meter Envelope \_\_\_\_\_ Meter Dept. File \_\_\_\_\_

**METER SHOP** \*\*\*\*\* OFFICE USE ONLY \*\*\*\*\* FEB 22 1996

Customer Name: MARINCK Account Number: 0197-0294  
 Service Address: 236 ST. ANN Service Number: 28292  
 Meter: Size 5/8 Make N Number 38723049 Test Scheduled: Date 2/22/96 Time 2:00 P/L

	CPM	Beginning	Readings Ending	Percent of Accuracy	Required Accuracy
Low Flow:	<u>44</u>	<u>0169.5320</u>	<u>0169.5418</u>	<u>98</u>	90% -- 101%
Intermediate Flow:	<u>2</u>	<u>0169.5418</u>	<u>0169.5518</u>	<u>100</u>	98.5% - 101.5%
Maximum Flow:	<u>15</u>	<u>0169.5518</u>	<u>0169.6514</u>	<u>99.6</u>	98.5% - 101.5%

\*\*\*\*\*  
 \* IF ANY OF THE TESTS ABOVE ARE NOT WITHIN THE REQUIRED \*  
 \* ACCURACY LIMITS THEN FURTHER TESTING IS REQUIRED BELOW. \*  
 \*\*\*\*\*

Flow Rate % of Capacity	CPM	Beginning	Readings Ending	Percent of Accuracy
25%	_____	_____	_____	_____
50%	_____	_____	_____	_____
75%	_____	_____	_____	_____

Average of all 3 tests: \_\_\_\_\_  
 Less Standard: 100%  
 Equals % of Error: \_\_\_\_\_ Fast \_\_\_\_\_ Slow \_\_\_\_\_

Before Test Reading: 016953 After Test Reading: 016965  
 Customer Witness? YES  NO \_\_\_\_\_

\*\*\* IF PERCENT OF ERROR IS GREATER THAN 2% THEN COMPLETE THE APPROPRIATE SECTION BELOW \*\*\*

Length of time error is known to exist: \_\_\_\_\_  
 FAST METER basis for refund: \_\_\_\_\_  
 Amount of refund: \_\_\_\_\_  
 SLOW METER basis for additional bill: \_\_\_\_\_  
 Amount of additional bill: \_\_\_\_\_  
 COMMENTS: \_\_\_\_\_

Copy to: Customer Service Supt.--Inside      Meter Envelope      Meter Dept File  
 Customer Service Supt.--Outside      Service File      Billing Dept File  
 Customer with letter      PSC Complaint File

EXHIBIT 4