

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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| PETITION OF MOUNTAIN WATER DISTRICT |) | CASE NO. |
| FOR MODIFICATION OF ORDER IN CASE NO. |) | 2016-00062 |
| 2014-00342 |) | |

ORDER

On January 29, 2016, Mountain Water District (“Mountain District”) filed a Petition for Modification of Order (“Petition”) seeking a modification of certain portions of the Commission’s October 9, 2015 Order in PSC Case No. 2014-00342 relating to the future management and operations of Mountain District.¹ Through this Order we deny Mountain District’s request to eliminate the request for proposals (“RFP”) and written report requirements contained in our October 9, 2015 Order. We also establish a new timeline for completion of the requirements.

BACKGROUND

On October 9, 2015, the Commission entered a final Order in Case No. 2014-00342, Mountain District’s most recent application for an adjustment of its water and sewer rates. The October 9, 2015 Order required Mountain District to, among other things, “obtain the services of an outside independent consultant that has no past history with Mountain District” to prepare and issue an RFP “to solicit bids from firms

¹ Case No. 2014-00342, *Application of Mountain Water District for an Adjustment of Water and Sewer Rates* (Ky. PSC Oct. 9, 2015). Mountain District timely applied for a rehearing of our October 9, 2015 Order, and that request for rehearing was denied by an Order entered in that case on November 17, 2015.

interested in providing managerial and operations services to Mountain District.”² Our October 9, 2015 Order also required that the outside independent consultant “[a]nalyze the bids received based on factors including costs and bidder’s qualifications, identify the top response, and document the analysis.”³ The foregoing requirements were to be completed within 180 days of the date of the October 9, 2015 Order.⁴

Further, our October 9, 2015 Order required Mountain District to “submit to the Commission a written report that discusses the results of the RFP solicitation for the management of its water and sewer divisions.”⁵ The report, which is to include a detailed analysis supporting Mountain District’s decision for the RFP process, was to be filed with the Commission within 240 days of the date of the October 9, 2015 Order.⁶

On October 28, 2015, Mountain District filed an Application for Rehearing of our October 9, 2015 Order in Case No. 2014-00342. With regard to the aforementioned requirements, Mountain District requested “a rehearing for the purpose of modifying or clarifying” the requirements.⁷ Specifically, Mountain District stated:

MWD seeks modification or clarification of whether it must issue the RFP and prepare the written report should it elect to operate with district employees, rather than with contractual employees.⁸

² *Id.*, Order (Ky. PSC Oct. 9, 2015) at 38.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*, Application for Rehearing (filed Oct. 28, 2015) at 2.

⁸ *Id.* at 3.

In support of its rehearing request, Mountain District stated that its management agreement with Utility Management Group (“UMG”) would expire on December 31, 2016, and that January 1, 2016, was the earliest that Mountain District could provide UMG with a notice of termination.⁹ Mountain District argued that the issuance of an RFP and submission of a written report on the analysis of the RFP were unnecessary if the Board adopted a resolution prior to January 1, 2016, to terminate the management contract with UMG and “resume management of operations of the district with employees of the district.”¹⁰ Mountain District stated that if the District had not notified UMG of the termination of the agreement by January 2, 2016, then the timeline for the issuance of the RFP, as specified in the October 9, 2015, should be revised so that the required action would commence on January 2, 2016.¹¹

On November 17, 2015, the Commission entered an Order that, in pertinent part, denied Mountain District’s request to modify or clarify the RFP and written report requirements in the October 9, 2015 Order. With regard to Mountain District’s argument that an RFP would be unnecessary if it chose to perform its operations internally, we stated, “the RFP would clearly still provide useful information for Mountain Water in assessing the most reasonable and cost-effective means for operating the district.”¹²

We further observed:

Moreover, Mountain Water has not presented any evidence or made any showing that conducting an RFP would be especially onerous in regards to costs or resources.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*, Order (Ky. PSC Nov. 17, 2015) at 5.

Conversely, the Commission finds that the RFP will provide value by enabling Mountain Water and its ratepayers to learn whether the UMG's continued operation of the utility is in the ratepayers' best interest. It will further provide valuable information for Mountain Water to utilize in ultimately assessing the efficacy of conducting its operations with its own employees. A utility board fully informed as to the range of methods and costs of operating its district will best serve its ratepayers in the most transparent and cost-effective manner. Accordingly, the Commission affirms the requirement that Mountain Water conduct an RFP as directed by our October 5, 2015 Order.¹³

Hence, in denying Mountain District's request for modification of the RFP provisions in our October 9, 2015 Order in Case No. 2014-00342, we determined that an RFP would provide useful, valuable information even if Mountain District opted to perform its operations internally.¹⁴ Mountain District did not seek judicial review of the November 17, 2015 Order on rehearing, and Case No. 2014-00342 became final upon the expiration of time pursuant to KRS 278.410(1) for Mountain District to bring an action for judicial review.

On January 29, 2016, Mountain District filed its Petition seeking a modification of certain portions of the Commission's October 9, 2015 Order in PSC Case No. 2014-00342. By an Order entered on February 11, 2016, we found, among other things, that the record in the instant case was inadequate to adjudicate the merits of the Petition and that further proceedings were necessary.¹⁵ Accordingly, we ordered Mountain District to provide responses to requests for information attached as an Appendix to that

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Order (Ky. PSC Feb. 11, 2016) at 6.

Order.¹⁶ Through the same Order, the record from Case No. 2014-00342, including the post case referenced correspondence file for that case, was incorporated by reference into the record of the instant case.¹⁷

On February 9, 2016, the Attorney General filed a Motion to Intervene and Objection to Mountain Water District's Request for Modification of Case No. 2014-00432 Order ("Motion to Intervene and Objection"). The Attorney General objected to Mountain District's Petition "on multiple grounds."¹⁸ The Attorney General argued that Mountain District's Petition is barred by the doctrine of *res judicata* and should be dismissed.¹⁹ The Attorney General further argued, in the alternative, that Mountain District's Petition should be dismissed because there has been no evidence submitted justifying the elimination of the independent consultant and RFP requirements of the Commission's October 9, 2015 Order.²⁰

On February 12, 2016, the Commission entered an Order that, among other things, granted the Attorney General's motion to intervene, granted him seven days to serve requests information to Mountain District, and deferred a ruling upon his objection and motion to dismiss.²¹ On February 15, 2016, Mountain District filed its Reply to Attorney General's Motion ("Reply"). Mountain District stated, among other things, that

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Attorney General's Motion to Intervene and Objection (filed Feb. 9, 2016) at 1.

¹⁹ *Id.* at 2–5.

²⁰ *Id.* at 5–7.

²¹ Order (Ky. PSC Feb. 12, 2016) at 2–3.

KRS 278.390 provides it with a statutory right to seek modification of an Order.²² Per Mountain District, the Attorney General's argument regarding *res judicata* makes the modification aspect of KRS 278.390 meaningless.²³ Mountain District argues that a change in circumstance "provides the opportunity to modify the prior order to reflect the current status of the management of the district."²⁴

Mountain District responded to the requests for information issued by the Commission on February 22, 2016, and to the requests for information issued by the Attorney General on March 24, 2016. On March 31, 2016, Mountain District filed its Supplemental Response to the Commission's requests for information, Item No. 11. The Supplement Response states, in part, that Mountain District's "Board, District Administrator and counsel have been engaged in the process of transitioning to self-management."²⁵ Per the Supplement Response, based upon the recommendation of potential consultants from the Kentucky Rural Water Association, Mountain District's Board of Commissioners has hired Blue Water Kentucky.²⁶ The matter now stands submitted to the Commission for a decision.

DISCUSSION

The Attorney General objects to Mountain District's Petition. He asserts that the doctrine of *res judicata* comprises claim preclusion and issue preclusion; further, he asserts that issue preclusion operates to bar the re-litigation of issues that were or

²² Mountain District Reply (filed Feb. 15, 2016) at 1.

²³ *Id.*

²⁴ *Id.* at 2.

²⁵ Mountain District Supplemental Response (filed Mar. 31, 2016) at 1.

²⁶ *Id.*

should have been litigated in Case No. 2014-00342.²⁷ Per the Attorney General, *res judicata* applies to the quasi-judicial acts of the Commission unless there has been a significant change of conditions or circumstances.²⁸ The Attorney General states that issues relating to the RFP and written report were litigated in Case No. 2014-00342, the Commission has already determined that an RFP and written report are required, and there has been no significant change in circumstance since the conclusion of Case No. 2014-00342.²⁹ He requests the dismissal of Mountain District's Petition.³⁰

The Attorney General argues, in the alternative, that even if Mountain District's Petition is not barred by the doctrine of *res judicata*, Mountain District fails to provide any evidence or justification to eliminate the RFP and written report requirements.³¹ Thus, he objects to the elimination of the RFP requirements which are set forth in the October 9, 2015 and November 17, 2015 Orders in Case No. 2014-00342.³² The Attorney General notes that the Commission has "stated that the RFP would provide useful information for the District in assessing the most reasonable and cost-effective means for operating the district, as well as addressing the efficacy of conducting its operations independently."³³ The Attorney General argues that the RFP will be exceptionally valuable to both the District and its ratepayers, and even if the

²⁷ Attorney General's Motion to Intervene and Objection (filed Feb. 9, 2016) at 2.

²⁸ *Id.* citing *Yeoman v. Commonwealth*, 983 S.W.2d 459, 464 (Ky. 1998).

²⁹ *Id.* at 3-4.

³⁰ *Id.* at 5.

³¹ *Id.*

³² *Id.* at 7.

³³ *Id.* at 6.

Commission permits Mountain District to eliminate the RFP-related requirements, Mountain District should still be required to retain “an outside independent consultant to assist the Board with any transition to in-house governance.”³⁴

In Reply to the Attorney General’s Motion, Mountain District asserts that it has a statutory right to seek the modification of a Commission Order and that the Commission has continuing jurisdiction to review and modify its orders.³⁵ Mountain District asserts that a change in circumstances provides a ground to modify an Order.³⁶ The only limitation on the Commission’s power to modify an Order, per Mountain District, is when a court order has been issued, and Mountain District notes that the limitation is not applicable in the instant case.³⁷

Mountain District states that its Board of Commissioners has the exclusive authority to manage the District and that “the decision about the type of management” for Mountain District is a matter for its Board.³⁸ Mountain District states: “The AG assumes that by forcing MWD to engage in the RFP process, it can dictate or at least influence the decision of the MWD board, which will avoid what he considers an uninformed decision.”³⁹ Further, per Mountain District:

The flaw in the argument of the AG is that even if the RFP is issued and a recommendation made by an independent consultant, that recommendation has no legally binding

³⁴ *Id.* at 7.

³⁵ Mountain District’s Reply (filed Feb. 15, 2016) at 1.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 2.

³⁹ *Id.* at 3.

effect on the MWD commissioners. The AG cannot force the MWD management to accept any bid for services Having made the decision to regain control of the day to day operations, it is highly unlikely that the board will reverse its position and operate under a contract for management. It would appear that the purpose of the original PSC order was to prevent an automatic renewal of the UMG contract. The District has agreed that if it ever elects to contract out management services again, it will abide by the terms of the PSC's order to use an independent consultant.⁴⁰

Mountain District also asserts:

Kentucky courts have held that *res judicata* applies to quasi-judicial acts of "public executive, or administrative officers and board acting within their jurisdiction," **unless there has been a significant change of conditions or circumstances that has occurred between two successive administrative hearings.** (emphasis in original; citations omitted)⁴¹

Mountain District contends that the decision by its Board of Commissioners to terminate the UMG contract is a "significant difference."⁴² Per Mountain District: "Had the [UMG] contract been terminated during the course of the prior case, the PSC's decision may have been different."⁴³ Mountain District argues that the termination of the contract was not a factor in the Commission's decision to mandate the RFP and *res judicata* cannot prevent a modification of the Order.⁴⁴

⁴⁰ *Id.* at 4.

⁴¹ *Id.* at 5.

⁴² *Id.*

⁴³ *Id.* at 6.

⁴⁴ *Id.*

FINDINGS

We find the doctrine of *res judicata* applies to the quasi-judicial acts of the Commission and precludes the re-litigation of claims unless a significant change of conditions or circumstances has occurred between two successive administrative hearings.⁴⁵ We find that both Mountain District and the Attorney General are in agreement that the foregoing statement is the correct legal rule to apply to Mountain District's Petition. The parties disagree on the questions of whether the termination of the contract was an issue in Case No. 2014-00342 and whether there has been a significant change of conditions or circumstances since Case No. 2014-00342.

We find that in Case No. 2014-00342, Mountain District filed an Application for Rehearing for the "limited purpose of modification or clarification of two issues."⁴⁶ In pertinent part, Mountain District stated that it sought "modification or clarification of whether it must issue the RFP and prepare the written report should it elect to operate with district employees, rather than with contractual employees."⁴⁷ We find that Mountain District expressly raised the issue of whether an RFP and written report requirements would be necessary if Mountain District's Board adopted a resolution to terminate the UMG contract.⁴⁸

⁴⁵ Case No. 2002-00317, *The Joint Petition of Kentucky-American Water Company, Thames Water Aqua Holdings GmbH, RWE Aktiengesellschaft, Thames Water Aqua US Holdings, Inc., Apollo Acquisition Company and American Water Works Company, Inc. for Approval of a Change of Control of Kentucky-American Water Company* (Ky. PSC Oct. 16, 2002) at 7.

⁴⁶ Case No. 2014-00342, *Mountain Water District* (filed Oct. 28, 2015), Application for Rehearing at 1.

⁴⁷ *Id.* at 3.

⁴⁸ *Id.*

We find that in our November 17, 2015 Order on rehearing in Case No. 2014-00342, we stated, in affirming the RFP and written report requirements, that even in the event of a termination of the UMG contract, “the RFP would clearly still provide useful information for Mountain Water in assessing the most reasonable and cost-effective means for operating the district.”⁴⁹ Mountain District offers its Board’s January 20, 2016 vote to terminate the UMG contract as the fact that distinguishes the issue of termination in Case No. 2014-00342 from the issue of termination in the instant case.

We find Mountain District’s arguments unconvincing. The issue of the necessity of the RFP-related requirements in the event of a termination was raised in Case No. 2014-00342 by Mountain District itself. The Commission fully considered that issue, and we decided in our November 17, 2015 Order on rehearing that a termination of the UMG contract would have no effect on the RFP and written report requirements. Therefore, Mountain District’s decision to actually terminate the UMG contract is not a change in circumstances sufficient to justify a reconsideration of our prior decision, and we reject Mountain District’s request on this basis to be relieved of the RFP and written report requirements contained in our October 9, 2015 Order in Case No. 2014-00342.

We also recognize that after the entry of our Order on rehearing in Case No. 2014-00342, Mountain District commenced its search for an independent consultant. Mountain District, based upon the recommendations from its engineers, sent requests for assistance to six firms.⁵⁰ Three of the firms did not respond, and the other three

⁴⁹ *Id.*, Order (Ky. PSC Nov. 17, 2015) at 5.

⁵⁰ Mountain District Petition for Modification (filed Jan. 29, 2016) at 3.

responded by declining to provide the assistance requested.⁵¹ Mountain District also, based upon a referral by its Counsel, sent a request for assistance to The Prime Group, LLC (“The Prime Group”). A response was submitted by The Prime Group with a contingency clause conditioning its interest in offering assistance upon Mountain District first obtaining permission to modify the time schedule contained in the Commission’s October 9, 2015 Order in Case No. 2014-00342.⁵²

We find that Mountain District’s request for its engineers to assist in the identification of potential independent consultants was, of itself, appropriate; however, we find that Mountain District’s near exclusive reliance upon its engineers to identify potential consultants was not an exercise of reasonable diligence because Mountain District’s search for potential consultants was far too limited. We also find that Mountain District failed to provide adequate explanations as to why it did not take follow-up actions with each of the three firms that did not respond. Mountain District has not demonstrated justification for abandoning its efforts so quickly, and we find that Mountain District’s search efforts were not sufficiently thorough.

Moreover, rather than seeking a modification of the time schedule established in Case No. 2014-00342 to either retain the one independent consultant that did offer assistance or to renew its efforts to contact other potential consultants, Mountain District opted to convey its belief that it should not have to comply with the RFP-related requirements and made a request to be relieved of them. We note that during this time

⁵¹ *Id.*

⁵² *Id.*, and also Mountain District’s Response to the requests for information contained in the Appendix to the Commission’s February 11, 2016 Order (filed Feb. 22, 2016), Items 5 and 6.

period Mountain District did hire a consultant to provide “independent assistance to oversee and assist with the transition process” to self-manage its system.⁵³

In view of the fact that Mountain District demonstrated that it was quite capable of quickly identifying and obtaining assistance and services of a consultant for its transition to self-management, the Commission notes its concern with Mountain District's failure to achieve a similar outcome for meeting our requirements that it obtain the services of an outside independent consultant, issue an RFP, and submit a written report as set forth in our October 9, 2015 Order in Case No. 2014-00342. Mountain District's lack of reasonable diligence in complying with those requirements does not constitute a change in circumstance or condition sufficient to permit re-litigation of the RFP and written report requirements of the Orders from that proceeding.

We nevertheless find that Mountain District should be provided additional time for compliance with the RFP and written report requirements. Accordingly, on our own motion, we find it necessary and appropriate to modify our Orders in Case No. 2014-00342 for the limited purpose of providing Mountain District with additional time to comply with the RFP and written report requirements. Mountain District will be afforded an additional 60 days from the date of this Order to comply with ordering paragraph 8 of our October 9, 2015 Order in Case No. 2014-00342. We further find that the written report required by ordering paragraph 9 in our October 9, 2015 Order in Case No. 2014-00342 should be submitted within 120 days of the date of this Order.

IT IS THEREFORE ORDERED that:

1. Mountain District's Petition for Modification is denied.

⁵³ Mountain District Supplemental Response (filed Mar. 31, 2016) at 1.

2. Ordering paragraph 8 of the October 9, 2015 Order in Case No. 2014-00342 is modified to the limited extent that the time schedule within which Mountain District shall obtain the services of an outside independent consultant to provide the services described therein is extended to 60 days from the date of this Order.

3. Ordering paragraph 9 of the October 9, 2015 Order in Case No. 2014-00342 is modified to the limited extent that the time schedule within which Mountain District shall submit to the Commission the required written report is extended to 120 days from the date of this Order.

4. All other provisions of the Commission's October 9, 2015 Order and November 17, 2015 Order on rehearing in Case No. 2014-00342 shall remain in full force and effect.

By the Commission

ENTERED ^{#W}
APR 08 2016
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:

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