

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KENTUCKY UTILITIES COMPANY)	
)	
COMPLAINANT)	
vs.)	CASE NO.
)	89-349
HENDERSON-UNION RURAL ELECTRIC)	
COOPERATIVE CORPORATION)	
)	
DEFENDANT)	

O R D E R

This matter arising upon the motion of Kentucky Utilities Company ("KU") to strike from the record the April 24, 1990 letter of John C. Harman and to set a hearing to take Mr. Harman's testimony, and it appearing to the Commission as follows:

On April 12, 1990, a hearing was held to hear evidence on which retail electric supplier should provide electric service to Pyro Mining Company's mining operations at its Poplar Ridge mining site in Webster County, Kentucky. KU and Henderson-Union Rural Electric Cooperative Corporation ("Henderson-Union") presented evidence and were afforded the opportunity to cross-examine opposing witnesses. Among those witnesses testifying on Henderson-Union's behalf was John C. Harman, Engineering Manager of Pyro Mining Company ("Pyro"). Twelve days later, Mr. Harman wrote to the Commission setting forth Pyro's position on the location of a substation at the Poplar Ridge mining site.

KU has moved to strike Mr. Harman's letter from the record of this case. In support of its motion, KU contends that the letter was "submitted well after the record closed, is not under oath, and has not been subject to cross-examination." It is KU's position that any consideration of the letter's contents would be a denial of due process as KU was not afforded an opportunity to confront and challenge the letter.

Contending that striking the letter is an insufficient remedy, KU has further moved that Mr. Harman be directed to appear before the Commission to give his additional statement under oath and to be subjected to cross-examination. It compares this case to an ordinary civil case where an unsworn statement made to fact finders after the case had been submitted would be grounds for a mistrial. Only through Mr. Harman's additional appearance before the Commission, KU maintains, can the harm caused by his letter be undone.

In its response, Henderson-Union concurs with the basic premise of KU's motion that the record closed on April 12, 1990 and that Mr. Harman's letter should not be considered. It contends, however, that striking the letter is not necessary. Mr. Harman's letter, it submits, relates to substation location, not either utility's right to serve Pyro. The letter, in Henderson-Union's opinion, will not influence the Commission's decision nor prejudice either utility's rights.

The Commission must ensure that all parties to its proceedings are afforded due process. Despite the relaxed nature of Commission proceedings, each party must still have the

opportunity to confront and cross-examine adverse witnesses. The United States Supreme Court has previously noted:

The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. (Citation omitted.) But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. . . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.

ICC v. Louisville & N.R. Co., 227 U.S. 88, 93 (1912).

In this instance, KU had no opportunity to cross-examine Mr. Harman on the content of his letter or to offer rebuttal evidence. Therefore, to allow the letter to remain in the record would deny KU due process of law. Accordingly, the Commission finds that Mr. Harman's letter should be stricken.

The Commission does not accept Henderson-Union's argument in opposition. If Mr. Harman's letter involves irrelevant issues, as Henderson-Union seemingly suggests, we find no reason to allow it to clutter the record of this case. Clearly, if the letter relates to contested issues, then permitting its continued presence in the record would be offensive to notions of due process.

The Commission finds no compelling reason to require Mr. Harman's additional appearance before it. Striking his letter from the record will suffice. Unlike the ordinary citizens who

normally sit as the finder of fact in civil actions, the Commission has considerable experience and expertise in reviewing and evaluating evidence. Most assuredly, it can restrict its review to the evidence in the record and base its decision solely on that evidence.

The Commission finds no merit to KU's contention that an additional hearing is required to allow Pyro the opportunity to give competent evidence expressing its concerns on relevant matters. It has had that opportunity. It has been aware of this proceeding since its conception.¹ Although advised of its right to intervene in this proceeding,² Pyro refrained from doing so. Furthermore, to ensure its views were made known to the Commission, Pyro could have actively cooperated with either party. As Mr. Harman was the only Pyro representative to testify, and he appeared under subpoena, such cooperation was apparently not forthcoming. Having refused these opportunities to participate, the Commission will not now allow Pyro to circumvent the Commission's rules of procedure by submitting unsolicited written comments or making an eleventh hour appearance before it.

IT IS THEREFORE ORDERED that:

1. KU's motion to strike is granted. The April 24, 1990 letter of Mr. Harman to the Commission is hereby stricken from the record of this proceeding.

¹ See Letter from Catherine A. Behrens to Claude G. Rhorer, Jr. (December 12, 1989) (discussing KU's complaint).

² Letter from Lee M. MacCracken to Catherine A. Behrens (January 15, 1990) (discussing intervention).

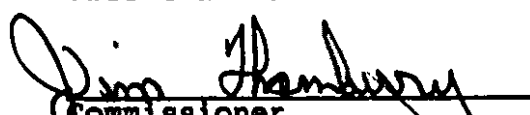
2. KU's motion to set a hearing to take additional testimony from Mr. Harman is denied.

Done at Frankfort, Kentucky, this 21st day of May, 1990.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director