

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ADJUSTMENT OF THE RATES OF KENTUCKY-AMERICAN WATER COMPANY	)	CASE NO.
	)	2000-120

ORDER

The Attorney General (“AG”) has moved to limit the scope of evidence presented on rehearing to evidence “that could not with reasonable diligence have been offered” on the former hearing in this matter. He has further moved to strike in its entirety the testimony of Kentucky-American Water Company (“Kentucky-American”) witnesses Roy W. Mundy and Michael A. Miller as such testimony contains “restatements and reiterations of matters” presented at the original hearing. Having considered motions and the response thereto, we deny the Motion to Clarify and deny the Motion to Strike in part and grant it in part.

In its Motion to Clarify and Limit Order on Rehearing, the AG argues that the Commission’s Order of January 19, 2001, in which we granted Kentucky-American’s petition for rehearing, “appears to dictate and contemplate a full-scale *de novo* filing of testimony and relitigation of issues that have already been fully presented to the Commission during the original hearing.” Motion to Clarify at 2. KRS 278.400, the AG asserts, does not permit such action. In support of his position, he refers to Louisville Gas and Electric Co., Case No. 96-524 (Ky. PSC Mar. 11, 1999).

An agency’s authority to grant rehearing of a decision is discretionary and must be provided for by the legislature in the agency’s grant of authority. 2 Am. Jur. 2d

Administrative Law §§ 392 - 393 (1994). See also Phelps v. Sallee, 529 S.W.2d 361, 365 (1975) (citation omitted) (“[A]n administrative agency does not have any inherent or implied power to reopen or reconsider a final decision and that . . . power does not exist where it is not specifically conferred upon an agency by the express terms of the statute creating the agency.”).

KRS 278.400<sup>1</sup> expressly authorizes the Commission to rehear “any of the matters” determined in any hearing. It contains no express limitation upon the introduction at rehearing of the evidence introduced at the initial hearing. KRS 278.400 provides only that “[u]pon the rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing.” (Emphasis added). The General Assembly’s use of “may” is significant. “‘May’ is permissive.” KRS 446.010(20). Its use suggests that the General Assembly intended to permit the Commission upon rehearing to hear new evidence in addition to the existing record. Had the General Assembly intended otherwise, as the AG suggests, it would

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<sup>1</sup> After a determination has been made by the commission in any hearing, any party to the proceedings may, within twenty (20) days after the service of the order, apply for a hearing with respect to any of the matters determined. Service of a commission order is complete three (3) days after the date the order is mailed. The application shall specify the matters on which a rehearing is sought. The commission shall either grant or deny the application for rehearing within twenty (20) days after it is filed, and failure of the commission to act upon the application within that period shall be deemed a denial of the application. Notice of the hearing shall be given in the same manner as notice of an original hearing. Upon the rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing. Upon the rehearing, the commission may change, modify, vacate or affirm its former orders, and make and enter such order as it deems necessary.

have expressly prohibited the introduction of evidence introduced at initial hearing at any rehearing.

Allowing the parties to introduce at rehearing evidence that was introduced at the initial hearing does not conflict with the holding of Louisville Gas and Electric Co. In that proceeding, we refused to consider evidence presented in a petition for rehearing that clearly existed at the time of the initial hearing and that the petitioner for rehearing elected not to present at that hearing. In reaching our decision, we found that KRS 278.400 “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.” Louisville Gas and Electric Co. at 2 – 3. By our Order of January 19, 2001, we did not authorize the introduction of evidence at rehearing that existed at the time of the initial hearing and that the parties failed to introduce at that hearing.

The primary purpose of rehearing in this proceeding is to reconsider our Order of November 27, 2000 in light of alleged errors and omissions. In Kentucky Power Company, Case No. 7489 (Ky. PSC Jun. 27, 1980), addressing the applicability and scope of KRS 278.400 in such instances, we declared:

The administrative agency retains full authority to reconsider or modify its order during the time it retains control over any question under submission to it. The administrative record remains under the control of the agency until either (a) the time for seeking rehearing has passed, or (b) the Commission denies an application for rehearing, or (c) having granted rehearing, the Commission issues order on rehearing.

The “pendency” status of the case permits the Commission to reconsider its previous order without violating (which it has no intention of doing) the conditions of KRS 278.400 with respect to “additional evidence.”

Id. at 3. Just as in Kentucky Power Co. we are in this proceeding reconsidering our initial Order based upon evidence adduced at the initial hearing.

The Commission notes that the AG's interpretation of KRS 278.400 is very narrow and, if accepted, would severely limit a party's ability to present additional evidence that could not with reasonable diligence be offered at the initial hearing. Frequently when a rehearing is conducted, a party's witnesses must refer to or discuss in his or her testimony evidence that was offered at the initial hearing to place new evidence in context. Under the AG's interpretation of KRS 278.400, such testimony is impermissible.

Based upon the above discussion, we find that the AG's Motion to Clarify should be denied. The AG's narrow interpretation of KRS 278.400 is not reasonable and should not follow.

Alleging that Kentucky-American's testimony on rehearing fails to comport with KRS 278.400, the AG has also moved to strike the testimony of Kentucky-American witnesses Mundy and Miller in its entirety. The AG offers two grounds for his motion. First, he alleges that this testimony consists "of simple reiterations of testimony and evidence presented in the original hearing." Motion to Strike at 6. Secondly, he alleges that certain portions of the testimony constitute additional evidence that could have been offered at the initial hearing had Kentucky-American exercised reasonable diligence.

Having reviewed the AG's Motion to Strike, we deny it in part and grant it in part. For reasons stated above, we find no reason to strike any portion of the testimony merely because it restates evidence adduced at the earlier hearing. We find, however,

Mr. Miller's testimony regarding rate of return and cost of equity involve additional evidence that could reasonably have been produced at the initial hearing. We further find that Mr. Miller's testimony regarding Boonesboro Water Association also contains such evidence.<sup>2</sup> Finally Mr. Miller's testimony involving calendar year 2000 industrial sales involves evidence that was not in existence at the time of the initial hearing. We have consistently interpreted KRS 278.400 to preclude the introduction of evidence on rehearing that was not in existence at the time of the initial hearing. See, e.g., Louisville Gas and Electric Co., Case No. 90-158 (Ky. PSC Jan. 29, 1991) at 15 – 16. Accordingly, this testimony should be stricken.

IT IS THEREFORE ORDERED that:

1. The AG's Motion to Clarify and Limit Order on Rehearing is denied.
2. The AG's Motion to Strike is granted in part and denied in part.
3. The following portions of Kentucky-American witness Miller's Testimony on Rehearing are stricken:
  - a. Pages 1 through 7.
  - b. Page 9, line 21, through page 10, line 6.
  - c. Page 22, lines 15 through 16.
  - d. Exhibits MAM-1 and MAM-2.
4. Within 7 days of this Order, Kentucky-American shall file a revised version of witness Miller's Testimony on Rehearing that does not contain the stricken portions.

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<sup>2</sup> It in fact contains evidence that the Commission and the AG requested, but which Kentucky-American implied was not available.

Done at Frankfort, Kentucky, this 26<sup>th</sup> day of February, 2001.

By the Commission

ATTEST:

  
Executive Director