

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PROPOSED ADJUSTMENT OF THE WHOLESALE)
WATER SERVICE RATES OF THE CITY OF) CASE NO. 2015-00039
AUGUSTA)

ORDER

The city of Augusta (“Augusta”) provides wholesale water service to the Bracken County Water District (“Bracken District”). On January 8, 2015, Augusta filed a revised tariff sheet setting forth a proposed adjustment to its existing rate for wholesale water service to Bracken District. Following the filing of an objection by Bracken District to the proposed adjustment, the Commission, finding that further proceedings were necessary to determine the reasonableness of the proposed rate adjustment, suspended the rate and established this case. The proceedings to date have included three rounds of prehearing discovery and an evidentiary hearing that was held on September 8, 2015 (“September 8, 2015 Hearing”). The Commission also granted Bracken District the opportunity to conduct additional, post-hearing discovery.

On September 16, 2015, Bracken District filed a Motion to Incorporate by Reference Into the Record the Record of PSC Case No. 98-497¹ (“Motion to Incorporate”). Augusta did not file a response to the Motion to Incorporate. The Commission finds that the record from Case No. 98-497 provides useful information for

¹ Case No. 98-497, *Proposed Adjustment of the Wholesale Water Service Rate of the City of Augusta, Kentucky* (Ky. PSC Sept. 14, 1998).

the pending case and that Bracken District has shown good cause to incorporate by reference the record of that case. Accordingly, the Commission grants Bracken District's Motion to Incorporate.

On September 29, 2015, Bracken District submitted a filing that included its Motion to Strike Documents and Dismiss the Proceeding ("Motion to Strike and Dismiss"). Bracken District requests that the Commission strike all references in the record to a financial statement prepared for Augusta that includes information concerning the calculation of Augusta's proposed wholesale rate. On October 6, 2015, the City of Augusta's Response to Bracken County Water District's Renewed Motion to Strike Documents and Dismiss the Proceeding ("Augusta's Response") was filed. On October 12, 2015, Bracken District filed its Reply to the City of Augusta's Response to Notice and Motion to Strike and Dismiss ("Bracken District Reply"). For the reasons stated herein, the Commission denies Bracken District's request to strike the documents at issue and also denies Bracken District's request to dismiss.

Relevant Procedural History for the Motion to Strike and Dismiss

Through the filing received by the Commission on January 8, 2015, Augusta submitted a proposed revised tariff sheet for wholesale water service to Bracken District. The proposed tariff sheet contained a new wholesale rate and an effective date of February 11, 2015, and the Commission identified the proposed tariff sheet within the Commission's tariff filing system as "TFS2015-00024." Along with the proposed tariff sheet, Augusta submitted a cover letter to the Commission that stated:

Per our [Augusta's] audit completed by Donna J. Hendrix, Bracken County's new water rate as of February 11, 2015 will be \$1.95 per thousand. Enclosed is a copy of the letter

sent to Bracken County Water District and also the rate change form.

Augusta's January 8, 2015 filing included a separate letter which was addressed to Bracken District and dated January 5, 2015. Augusta's letter to Bracken District stated:

Effective February 11, 2015 the water rate will increase to \$1.95 per thousand, the water rate was decided by the Public Service Commission.

Augusta's January 8, 2015 filing also included a one-page document captioned "City of Augusta, Kentucky Water Treatment Plant Costs for Year Ended June 30, 2014" ("Augusta Rate Calculation for 2014"). The document is a page from of the "City of Augusta, Kentucky, Audited Basic Financial Statements and Required Supplementary Information, Year [sic] the Year Ended June 30, 2104" ("Augusta Audited Financial Statements for 2014") prepared by Donna J. Hendrix, CPA, PSC ("Ms. Hendrix").² The document purported to demonstrate the supporting evidence for the \$1.95 per thousand wholesale rate case calculated by Ms. Hendrix for Augusta. It includes the following statement:

Operating costs for the fiscal year 2014 that were incurred by the City were consistent with cost calculations by Public Service Commission of Commonwealth of Kentucky.

On February 2, 2015, Bracken District filed a notice of objection to Augusta's proposed revised tariff sheet through which Bracken District, among other things, requested that the Commission "initiate a formal proceeding to investigate the proposed rate and issue all orders necessary to ensure that the proposed rate is not placed into

² The Augusta Audited Financial Statements for 2014 were filed into the record by Bracken District through a filing made by Bracken District on March 18, 2015, and appear as Exhibit 1 to that filing.

effect or otherwise assessed before the required hearing.”³ Bracken District did not object to the submission of any document filed by Augusta on January 8, 2015.

On February 10, 2015, the Commission, finding that further proceedings were necessary to determine the reasonableness of Augusta’s proposed rate adjustment, suspended Augusta’s proposed rate for wholesale water service for five months from February 11, 2015, up to and including July 10, 2015. Through the same Order, Augusta was required to file, no later than February 19, 2015, information requested in Appendix B to the February 10, 2015 Order. The requests for information to Augusta pursuant to the February 10, 2015 Order were substantially similar to requests for information normally made to municipal utilities in similar investigations of proposed municipal wholesale rate increases. Included in the requests for information was a requirement for Augusta to file the following:

Provide in written verified form the direct testimony of each witness that Augusta intends to call at the scheduled hearing in this matter.⁴

Although the Commission’s February 10, 2015 Order required Augusta to file testimony, it did not require that Augusta provide the written verified testimony of Ms. Hendrix. Further, the Commission’s February 10, 2015 Order also required Augusta to

³ In its February 2, 2015 letter providing notice of an objection, Bracken District expressed the view that “[p]ursuant to KRS 278.200 and to the Kentucky Supreme Court’s holding in *Simpson County Water District v. City of Franklin*, 872 S.W.2d 460 (Ky. 1994), a rate set forth in a contract between a city and a utility may not be changed until the KPSC holds a hearing on the proposed change.” However, as the Commission stated in Case No. 2011-00419, *Proposed Revision of Rules Regarding the Provision of Wholesale Water Service by the City of Versailles to Northeast Woodford Water District* (Ky. PSC Aug. 12, 2014) at 11, a case involving a proposed revision to the conditions under which a municipal water utility was providing water service to a public water utility, “Any interpretation or revision by a municipal utility to the rate or service standard for sales to a Commission-regulated utility triggers the Commission’s jurisdiction and requires **an opportunity for a hearing** by the Commission before the proposed revision can become effective” (emphasis added and footnote in original omitted).

⁴ Order (Ky. PSC Feb. 10, 2015), Appendix B at 1.

file the three most recent independent auditor's reports that were available for Augusta's water operations.⁵

On February 19, 2015, Augusta filed a Motion for Extension of Time in which to complete the filing with the Commission of the information listed in Appendix B of the Commission's February 10, 2015 Order. On February 27, 2015, the Commission entered an Order that granted Augusta's request for an extension.

On March 18, 2015, the Commission entered an Order that revised the procedural schedule established in the February 10, 2015 Order. Through the March 18, 2015 Order, Bracken District was provided with an opportunity to file three separate requests for information to Augusta.⁶ Bracken District was also provided with an opportunity to file intervenor testimony.⁷ While the March 18, 2015 Order did not establish a date for a public hearing, the Order did provide that a public hearing would be held.⁸

On March 18, 2015, Bracken District submitted a Notice of Filing through which Bracken District filed information into the record that it had obtained from Augusta. The documents submitted through the Notice of Filing were voluntarily filed by Bracken District and not in response to a Commission Order, Commission Staff request for information, or request for information made to Bracken District by Augusta. Included with the Notice of Filing, as Exhibit 1, were the Augusta Audited Financial Statements

⁵ *Id.*

⁶ Order (Ky. PSC Mar. 18, 2015), Appendix.

⁷ *Id.*

⁸ *Id.*

for 2014, which included the Augusta Rate Calculation for 2014.⁹ These are the documents that Bracken District now seeks to strike from the record.

On March 30, 2015, Augusta filed its Response to the Kentucky Public Service Commission's Request for Information on Appendix B of Order Dated February 10, 2015 ("Augusta's Response to Commission's Initial Request"). Augusta identified Ms. Hendrix, Gretchen Usleaman, and Susan Butts as the witnesses it intended to call at the public hearing; however, Augusta did not supply the written testimony of any of these individuals.¹⁰ Augusta supplied copies of its audit reports for the fiscal years 2012 through 2014, which included the Augusta Audited Financial Statements for 2014 and the Augusta Rate Calculation for 2014.¹¹

On April 13, 2015, Commission Staff's Second Request for Information to Augusta ("Staff's Second Request to Augusta") was filed into the record and served upon the parties. Staff's Second Request to Augusta again asked for Augusta to provide, in written verified form, the direct testimony of each witness that it intended to call at an evidentiary hearing.¹² Item 2 of Staff's Second Request to Augusta also required Augusta to provide, through the direct testimony of one or more witnesses that Augusta intended to call at an evidentiary hearing, the reasons for the proposed change in the wholesale rate, efforts made to discuss the proposed change in the wholesale rate with the purchaser prior to filing a tariff with the Commission, the factors utilized in and the manner of determining the proposed change in the wholesale rate, an

⁹ Bracken District's Notice of Filing (filed Mar. 18, 2015), Exhibit 1 at 45 of 53.

¹⁰ Augusta's Response to Commission's Initial Request, Item 1.

¹¹ *Id.*, Item 2.

¹² Staff's Second Request to Augusta, Item 1.

explanation that describes how the proposed wholesale rate is consistent with Augusta's contract with Bracken District, including a component-by-component description of the rate pursuant to the contract, and an explanation that identifies the factors or considerations that Augusta believes demonstrate that the proposed wholesale rate is fair, just and reasonable.¹³

On April 27, 2015, Augusta filed its Response to the Kentucky Public Service Commission's Second Request for Information ("Augusta's Response to Staff's Second Request to Augusta"). Augusta identified Ms. Hendrix, Ms. Usleaman, and Ms. Butts as the individuals it intended to call at the scheduled hearing.¹⁴ Augusta, for a second time, did not file testimony that had been requested by Commission Staff. With regard to the specific questions concerning Augusta's proposed rate that were requested by Item 2 of Staff's Second Request to Augusta, a response was provided by Augusta through an answer under oath by Ms. Usleaman.¹⁵ Augusta did not, however, supply the information through direct testimony in written verified form.

On August 14, 2015, following an abeyance in this case granted by the Commission on June 17, 2015, upon the joint motion of the parties, the Commission entered an Order that, among other things, established September 8, 2015, as the date for a hearing in this matter and required Augusta, no later than August 21, 2015, to pre-file with the Commission the testimony of each witness it intended to call at the hearing.¹⁶ On August 20, 2015, Augusta and Bracken District filed a Joint Motion to

¹³ *Id.*, Item 2.

¹⁴ Augusta's Response to Staff's Second Request to Augusta, Item 1.

¹⁵ *Id.*, Item 2.

¹⁶ Order (Ky. PSC Aug. 14, 2015) at 4.

Modify Procedural Schedule that requested a Commission Order that would permit the parties to file their written testimony no later than August 27, 2015. On August 27, 2015, Augusta pre-filed the testimony of Ms. Usleaman and Doug Padgett (“Mr. Padgett”), and Bracken District pre-filed the testimony of Anthony Habermehl (“Mr. Habermehl”). On August 28, 2015, the Commission entered an Order that granted the Joint Motion to Modify Procedural Schedule.

Bracken District’s Motion to Strike at Hearing

At the September 8, 2015 Hearing, Augusta called Mr. Padgett as its first witness. During Bracken District’s cross-examination of Mr. Padgett, Mr. Padgett stated that Ms. Hendrix would not be testifying during the hearing regarding her calculations.¹⁷ Bracken District then asked: “Will there be anyone here that can answer questions regarding her [Ms. Hendrix’s] rate calculations?”¹⁸ Mr. Padgett testified in response: “Not directly.”¹⁹ Bracken District then moved to strike all references to the Augusta Rate Calculation for 2014. Bracken District stated:

Your Honor, if there is no one here present that can, the rate calculation is the integral part of this case. It’s what the city bases its proposed rate upon, and everything revolves around it. In fact, the 1993 contract specifically provides for that rate calculation. If there is no witness here that we can cross-examine on how that rate calculation was done, the District would move to strike all references to the rate calculation that are currently in the record, since we have no ability to cross-examine how or question how it was performed.²⁰

¹⁷ Video Recording of the September 8, 2015 Hearing (“Sept. 8, 2015 VR”) at 10:23:54 et seq.

¹⁸ *Id.* at 10:24:00–10:24:07.

¹⁹ *Id.* at 10:24:08–10:24:10.

²⁰ *Id.* at 10:24:19–10:24:56.

In response to Bracken District's Motion to Strike at Hearing, Augusta stated that it was presenting a clerk, Ms. Usleaman, who was prepared to respond to all the underlying information contained in the audit report.²¹

Bracken District then stated, in pertinent part:

Your Honor, the contract specifically said that the rate calculation, the audit, is to be performed by an auditor.

...

That document is part of the CPA's report. It's her [Ms. Hendrix's] document. And, it should, that person should be the one that should be answering the questions.

...

She's not here. And, we would argue that it's her work, it's not anyone else's. And because the contract requires it to be prepared by a CPA, that, that we need her available. If we cannot cross-examine her, then we don't have an opportunity to confront, I guess, the major piece of evidence in this case.²²

In response to the Commission's question as to whether Bracken District had considered subpoenaing Ms. Hendrix, Bracken District noted that Augusta was the party with the burden of proof and that Bracken District did not want to bring in someone to prove Augusta's case.²³ Augusta, in response, then stated that all of the underlying information that went into those calculations was contained in the record and that Augusta was presenting a witness who could respond regarding all the information that went into the audit report.²⁴ Augusta further argued that Bracken District was aware of

²¹ *Id.* at 10:24:58–10:25:25.

²² *Id.* at 10:25:25–10:26:45.

²³ *Id.* at 10:26:53–10:27:24.

²⁴ *Id.* at 10:27:25–10:28:25.

the fact that Ms. Hendrix would not be presented as a witness by Augusta and that Bracken District could have subpoenaed her.²⁵ Augusta stated that that it was unable to get Ms. Hendrix to attend on “short notice.”²⁶ Finally, Augusta stated that Bracken District, pursuant to the contract, had the right to hire its own auditor and have an independent audit performed at Bracken District’s own expense, and Bracken District had chosen not to hire its own auditor.²⁷

The Commission overruled Bracken District’s Motion to Strike at Hearing.²⁸ The Commission stated that that Bracken District could renew its Motion to Strike at Hearing following the testimony of Augusta’s second (and last) witness.²⁹ Bracken District then stated that while it accepted the Commission’s ruling, the ruling had placed Bracken District in the position of “actually trying to figure out the details of the actual document” and, thereby, proving Augusta’s case for it.³⁰ Bracken District argued that Augusta should have provided the case in chief itself.³¹

After the presentation of evidence at the September 8, 2015 Hearing, the Commission discussed issues pertaining to Ms. Hendrix with the parties.³² The Commission noted that Ms. Hendrix had not attended the hearing and that Bracken

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 10:29:39–10:29:57.

²⁹ *Id.*

³⁰ *Id.* at 10:29:58–10:30:40.

³¹ *Id.* at 10:30:40–10:30:47.

³² *Id.* at 16:40:47–16:46:30.

District wanted to ask Ms. Hendrix questions.³³ The Commission then affirmed its denial of Bracken District's Motion to Strike at Hearing, but the Commission amended the procedural schedule to allow Bracken District the opportunity to issue additional interrogatories or discovery regarding Ms. Hendrix.³⁴ The Commission stated that Bracken District was being afforded an opportunity for additional discovery to address Bracken District's due process concerns. We further stated that Bracken District and Augusta each had the ability to move the Commission for an additional evidentiary hearing following the additional discovery.³⁵ Bracken District stated that the Commission's amended procedural schedule was "satisfactory" to Bracken District.³⁶

On September 16, 2015, the Commission entered an Order consistent with the amended procedural schedule announced at the September 8, 2015 Hearing. Pursuant to that Order, Bracken District was authorized to, among other things, submit requests for information to Augusta concerning Ms. Hendrix and her rate calculation.³⁷ The Order also authorized either party to move for an additional evidentiary hearing following the post-hearing discovery requests and responses.³⁸

Bracken District's Motion to Strike and Dismiss
Filed After the September 8, 2015 Hearing

On September 29, 2015, Bracken District filed its Motion to Strike and Dismiss, which stated that it would not be submitting any requests for information to Augusta

³³ *Id.* at 16:40:47–16:41:10.

³⁴ *Id.* at 16:42:14–16:44:02.

³⁵ *Id.* at 16:44:13–16:46:25.

³⁶ *Id.* at 16:46:45–16:46:57.

³⁷ Order (Ky. PSC Sept. 16, 2015) at 3 and 4.

³⁸ *Id.*

“regarding documents created by Augusta's auditor and submitted in support of Augusta's proposed rate.”³⁹ Bracken District stated:

Written requests for information are an inadequate substitute for live cross-examination. They offer virtually no opportunity to confront and challenge a witness. There is no opportunity for immediate follow-up questions based on a witness's response nor is there any means to view the witness's demeanor or otherwise assess the veracity of the witness through verbal and visual cues. Furthermore, when responding to written questions a witness has the opportunity to consult with and rely upon the assistance of counsel to prepare his or her response.⁴⁰

Bracken District further stated:

Any request for information that Bracken District now poses at this late stage of the proceeding merely allows Augusta another bite at the apple to meet its burden of proof and to offer the evidence that it consciously chose not to present earlier.⁴¹

Augusta filed a response to the Motion to Strike and Dismiss and argued that Bracken District had adequate opportunities to gather the evidence that it was seeking, and that Bracken District failed to take advantage of the opportunities it had been provided. Bracken District's Reply reiterated its arguments, including its position that Augusta was required to present Ms. Hendrix as a witness.

Discussion

The issue before the Commission is Bracken District's request to strike from the record Augusta's Audited Financial Statements for 2014, including the page containing the Augusta Rate Calculation for 2014. Bracken District states:

³⁹ Motion to Strike and Dismiss at 1.

⁴⁰ *Id.* at 2.

⁴¹ *Id.* at 2 and 3.

In the current proceeding, there is no sponsoring witness for the rate calculation and financial statements. Such a witness is essential to establish the proper foundation for the introduction of the financial statements and rate calculation.⁴²

The Commission finds that Bracken District is the party that introduced Augusta's Audited Financial Statements for 2014 into the record in this case as part of Bracken District's filing on March 18, 2015. The Commission further finds that Bracken District's filing of Augusta's Audited Financial Statements for 2014 was a voluntary submission into the record. Bracken District did not file those documents in response to a Commission Order, Commission Staff request for information, or in response to a request for information by Augusta. The Commission finds that Bracken District fails to demonstrate how its due process rights are violated by the Commission's consideration of evidence that Bracken District itself deliberately placed into the record. We further find that Bracken District's act of voluntarily filing the information into the record waived any objection to the introduction of Augusta's Audited Financial Statements for 2014, including the page containing the Augusta Rate Calculation for 2014. Accordingly, the Commission denies Bracken District's request to strike, as filed in its Motion to Strike and Dismiss.

Further, the Commission rejects the two additional arguments that Bracken District makes to support its Motion to Strike and Dismiss. These objections are: 1) that its procedural due process rights were violated; and 2) that Augusta had the burden of proof, and by not calling Ms. Hendrix, Augusta did not satisfy this burden. On August 27, 2015, Augusta filed the pre-hearing written testimony of Mr. Padgett and Ms. Usleman; therefore, by no later than August 27, 2015, Bracken District had notice that

⁴² *Id.* at 5.

Augusta did not plan to call Ms. Hendrix as a witness at the September 8, 2015 Hearing. Bracken District had the option of seeking Ms. Hendrix's attendance at the scheduled hearing through a subpoena or subpoena *duces tecum* pursuant to KRS 278.320; however, Bracken District did not pursue this option. In response to the Commission's question as to whether Bracken District had considered subpoenaing Mr. Hendrix, Bracken District stated that Augusta was the party with the burden of proof and that Bracken District did not want to bring in someone to prove Augusta's case.⁴³

While Bracken District correctly states that Augusta is the party with the burden of proof in this rate case, Bracken District's reliance on this fact is unpersuasive and does not support its Motion to Strike and Dismiss. The assignment of the burden of proof in an administrative proceeding is a separate and distinct issue from Bracken District's procedural due process right to engage in cross-examination. It is the Commission's role as trier of fact to determine from the evidence of record whether Augusta has satisfied its burden of proof by showing that its existing wholesale rates for water service to Bracken District are not fair, just, and reasonable and that the rates should be increased, whereas procedural due process affords Bracken District the right to know the issues and have an opportunity for a hearing.⁴⁴

With respect to Bracken District's procedural due process rights, Bracken District asserted in its Motion to Strike at Hearing and in its pending Motion to Strike and Dismiss that it wanted to confront and challenge Ms. Hendrix through a live

⁴³ Sept. 8, 2015 VR at 10:26:55–10:27:25.

⁴⁴ See *Utility Regulatory Commission v. Kentucky Water Service Company, Inc.*, 642 S.W.2d 591, 593 (Ky. App. 1982).

examination.⁴⁵ Augusta argues that Bracken District failed to afford itself of its opportunities to participate in an established process for pursuing evidence from Ms. Hendrix.⁴⁶

We find that Bracken District has been afforded all of the due process that it is legally entitled to receive, since it had ample opportunities to pursue an examination of Ms. Hendrix. As noted previously, Bracken District, which introduced the financial statement at issue into the record, could have subpoenaed Ms. Hendrix pursuant to KRS 278.320. Further, if Bracken District had wanted to examine Ms. Hendrix, it could have also: 1) sought deposition rights pursuant to KRS 278.340; 2) asked for a continuance upon the Commission's denial of its Motion to Strike at Hearing in order to request her attendance at a hearing or secure it by process; or 3) pursued additional discovery concerning Ms. Hendrix, including a request for an additional evidentiary hearing. Bracken District did not pursue any of these options.

"Procedural due process is not a static concept, but calls for such procedural protections as the particular situation may demand."⁴⁷ We find that the various options that were available to Bracken District to pursue an examination of Ms. Hendrix were more than adequate to allow Bracken District to confront and challenge Ms. Hendrix through a live examination and that Bracken District has been afforded procedural due process. We find that Bracken District fails to demonstrate a denial of procedural due process.

⁴⁵ *Id.* at 10:25:25–10:26:45; and Motion to Strike and Dismiss at 2.

⁴⁶ Augusta Response to Bracken District's Notice and Motion to Strike and Dismiss at 4.

⁴⁷ *Kentucky Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583, 590 (Ky. 1995).

Bracken District, although maintaining that it wanted to question Ms. Hendrix, also argues that it was Augusta's responsibility to call Ms. Hendrix as a witness because Augusta has the burden of proof. We see no merit to this additional argument that Augusta is the applicant and under KRS 278.190(3) bears the burden of proof. This burden of proof issue is separate and distinct from the procedural due process issues discussed and rejected above.

Bracken District's argument is that Augusta cannot satisfy its burden of proof unless Ms. Hendrix testifies. We note that while the Commission required Augusta to support its request for a new rate through the filing of written testimony, there is no Commission rule or precedent that required a particular witness to testify in order for Augusta to satisfy its burden of proof. The fact that Augusta did not submit the written testimony of Ms. Hendrix or call her to testify may or may not be fatal to Augusta's ability to meet its burden of proof, but it certainly doesn't preclude Augusta from attempting to meet its burden through other witnesses and other evidence.

Although the applicant has the burden of proof, it is the Commission that decides whether the applicant has met its burden of proof based upon all of the evidence in the record and in light of the arguments of the parties made in their briefs. We will address whether Augusta met its burden of proof in the context of deciding the merits of the case once the matter has been briefed and submitted for a decision. It would be premature for the Commission to now decide whether Augusta has met its burden of proof, since the parties have not yet filed briefs on the merits of the case. Accordingly, for these reasons, we deny Bracken District's Motion to Strike and Dismiss.

Bracken District also moves to dismiss the proceeding. In support of its request, Bracken District relies upon the Commission's Order in Case No. 98-283⁴⁸ that dismissed a proposed wholesale rate increase by the city of Owenton ("Owenton"). The facts of Case No. 98-283 are readily distinguishable from the facts in the current proceeding. In Case No. 98-283, Owenton was twice ordered to file the direct testimony of its witnesses.⁴⁹ In response to each request, Owenton stated that it did not intend to offer any witnesses to support its proposed rate increase.⁵⁰ In assessing the conduct of Owenton in refusing to file any testimony, we found the conduct to be unreasonable.⁵¹

In the current case, Augusta twice failed to file written testimonies in response to requests by the Commission. Nonetheless, unlike Owenton in Case No. 98-283, Augusta stated its intent to present witnesses. Eventually, in response to the Commission's August 14, 2015 Order, Augusta did file testimony in support of its proposed rate increase and its witnesses appeared at a hearing and were subject to cross-examination. While we find that Augusta twice failed to file the testimony requested by the Commission, we find that the conduct of Augusta does not constitute a

⁴⁸ Case No. 98-283, *Proposed Adjustment of the Wholesale Water Service Rates of the City of Owenton, Kentucky* (Ky. PSC Sept. 22, 1998).

⁴⁹ *Id.* at 1.

⁵⁰ *Id.*

⁵¹ *Id.* (Ky. PSC Nov. 4, 1999) at 4.

refusal to present witnesses such as occurred in Case No. 98-283 and which warranted a dismissal in that instance.⁵²

As Augusta notes, in Case No. 98-283, Owenton moved for rehearing of the September 22, 1998 Order of dismissal.⁵³ Upon review of our Orders from that proceeding, we find that Owenton also tendered with its motion for rehearing the prepared direct testimony of its witnesses.⁵⁴ We thereafter granted rehearing, accepted the tendered testimonies, and set aside the September 22, 1998 Order that is now relied upon by Bracken District. Thus, in Case No. 98-283, once Owenton complied with the Commission's request for it to file testimony, the Commission set aside the dismissal and allowed the case to proceed. Bracken District fails to convince us that our September 22, 1998 Order in Case No. 98-283 supports a dismissal in this case.

Finally, we note that at the conclusion of the September 8, 2015 Hearing, the Commission discussed with the parties the procedural schedule for the remainder of the case, and the procedural steps were subsequently set forth in the Commission's Order entered in this case on September 16, 2015. As set forth in that Order, Bracken District was granted an additional opportunity for discovery, both parties were permitted time to file a motion for an additional evidentiary hearing, and both parties were permitted to file

⁵² In its Motion to Strike and Dismiss, at 4, Bracken District states that Augusta offered no reason why Ms. Hendrix did not testify and thereafter suggests that her absence was the result of a deliberate and calculated decision. The allegations are repeated in Bracken District's Reply. At the September 8, 2015 Hearing, Augusta stated that it was unable to get Ms. Hendrix to attend on short notice. Sept. 8, 2015 VR at 10:27:23–10:28:25. We do not find Bracken District's argument on this point convincing, and we find that Bracken District does not demonstrate a "refusal" on the part of Augusta. We again point out that Bracken District could have asked for a continuance in order to pursue Ms. Hendrix's attendance.

⁵³ Augusta Response to Bracken District Notice and Motion to Strike and Dismiss at 7.

⁵⁴ Case No. 98-283, *City of Owenton* (Ky. PSC Oct. 28, 1998), Order at 1.

briefs.⁵⁵ Bracken District stated at the hearing that the procedural schedule was satisfactory.⁵⁶ Bracken District now wants to accelerate the procedural schedule by having the Commission engage in an examination and weighing of the evidence through its request to dismiss the application.

We find that Bracken District already has the opportunity, through the briefing schedule, to comment upon the evidence and make its arguments regarding whether Augusta has met its burden of proof. We find that Bracken District fails to demonstrate good cause for the Commission to engage in a weighing of the evidence prior to the submission of briefs by the parties. For these reasons, we deny Bracken District's request to dismiss as filed in its Motion to Strike and Dismiss.

IT IS THEREFORE ORDERED that:

1. Bracken District's Motion to Incorporate by reference into the record in this proceeding the record of PSC Case No. 98-283 is granted.

2. Bracken District's request to strike from the record all reference to a rate calculation set forth in Augusta's Audited Basic Financial Statements for the Year Ended June 30, 2014, as filed in its Motion to Strike and Dismiss, is denied.

3. Bracken District's request to dismiss, as filed in its Motion to Strike and Dismiss, is denied.

⁵⁵ Order (Ky. PSC Sept. 16, 2015) at 3 and 4.

⁵⁶ Sept. 8, 2015 VR at 16:46:37–16:46:58.

By the Commission

ENTERED
FEB 03 2016
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Executive Director

Case No. 2015-00039

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