

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF MONROE )  
COUNTY WATER DISTRICT FOR RATE ) CASE NO.  
ADJUSTMENT PURSUANT TO 807 KAR 5:076 ) 2017-00070

ORDER

The matter is before the Commission upon a motion filed on August 29, 2017 by Monroe County Water District (“Monroe District”) to reconsider and clarify portions of the Commission’s August 18, 2017 Order in the instant case. Monroe District requested the establishment of a procedural schedule that permits discovery to be conducted upon Commission Staff, a requirement that all parties and the Commission file a list of witnesses and exhibits with the Commission at least seven days prior to the scheduled hearing, and specific identification of the factual issues upon which evidence will be taken at the scheduled hearing.<sup>1</sup> Monroe District requested that the evidence taken at the hearing be limited to the factual issues identified.<sup>2</sup>

In support of its motion, Monroe District argued that refusal to permit pre-hearing discovery of Commission Staff is not supported by 807 KAR 5:076 and violates Monroe District’s right to due process.<sup>3</sup> Monroe District also stated that the Order requiring it to identify witnesses and exhibits in advance of the September 27, 2017 hearing should

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<sup>1</sup> Motion for Reconsideration and Clarification (“Motion for Reconsideration”) (filed Aug. 29, 2017) at 7 and 8.

<sup>2</sup> *Id.* at 8.

<sup>3</sup> Motion for Reconsideration at 1–4.

also apply to the Attorney General<sup>4</sup> and the Commission.<sup>5</sup> Finally, Monroe District argued that the Commission should identify the issues it finds insufficiently addressed in the Commission Staff Report (“Staff Report”) and limit the hearing to these issues and the issue of the water main service lives.<sup>6</sup> Monroe District further stated on this point that “the Commission should clarify whether, as to those issues that the PSC has identified as requiring hearing, and which the parties had waived any objections, the Parties are prohibited by [807 KAR 5:076] Section 11 from presenting evidence or argument contrary to the waived Commission Staff findings or otherwise contesting the finding.”<sup>7</sup>

The Attorney General filed a response to Monroe District’s motion stating that Monroe District bears the burden of proof, and for this reason, Monroe District alone should give notice of its witnesses and exhibits.<sup>8</sup> The Attorney General further stated that per 807 KAR 5:076, Section 11(e), the failure by a party to object to the findings in a Staff Report does not preclude the Commission from conducting a hearing on the application, taking evidence on the applicant’s financial operations, or ordering rates that differ from or conflict with the findings and recommendations established in the staff report.<sup>9</sup> The Attorney General argued that the limitation on the hearing urged by Monroe District is “contrary to the administrative process for reviewing small rate cases.”<sup>10</sup>

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<sup>4</sup> The Attorney General of the Commonwealth of Kentucky, by and through his office of Rate Intervention (“Attorney General”).

<sup>5</sup> *Id.* at 4 and 5.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.*

<sup>8</sup> Response to Motion for Clarification (filed Aug. 29, 2017) at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

Monroe District filed a reply to the Attorney General's response in which Monroe District argued that its burden of proof and procedural due process are separate considerations.<sup>11</sup>

Monroe District stated, in pertinent part that:

Requiring Monroe District to identify its witnesses and exhibits in advance of the hearing while not placing a similar requirement on the AG or Commission Staff squarely places Monroe District at a procedural disadvantage and affords it less of an opportunity to adequately prepare for the scheduled hearing than is afforded the other participants.<sup>12</sup>

Monroe District reasserted its arguments regarding the intent of 807 KAR 5:076, Section 11, and added that the Commission's April 12, 2017 Order "make[s] clear that a party's failure to object to a finding or recommendation contained in the Commission Staff Report results in the waiver of any right to later object or question that finding."<sup>13</sup>

Having reviewed the motion and being otherwise sufficiently advised, the Commission finds that it should grant in part and deny in part Monroe District's motion. The Commission agrees that Monroe District should be on equal footing with the other parties and finds that all parties to the proceeding should be required to file a list of witnesses and exhibits with the Commission seven days prior to the scheduled hearing. The Commission finds that the Attorney General should file with the Commission, no later than September 20, 2017, a list of witnesses and exhibits to be presented at the September 27, 2017 hearing. A party shall file six copies of any exhibit it intends to introduce into evidence at the hearing.

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<sup>11</sup> Monroe County Water Districts Reply to the Attorney General's Response to Motion for Reconsideration and Clarification (filed Sept. 6, 2017) at 1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 2.

The Commission notes that the examination by another party, Commission Staff, or the Commissioners, during the hearing may result in a party's pursuit of the introduction of witnesses not identified or exhibits not filed prior to the hearing. The Commission places the parties on notice that a party seeking to call a witness who was not listed prior to the hearing, or seeking to introduce an exhibit not in the record or filed by the party as an exhibit prior to the hearing, will be required to demonstrate good cause in support of the request.

With regard to Monroe District's request for a list of witnesses and exhibits to be presented by Commission Staff, the Commission finds that Commission Staff is not a party to the proceeding. The record in this proceeding includes a Staff Report prepared by Jack Scott Lawless, CPA, and Jason Green. The Commission further finds that Monroe District has been in possession of the Staff Report since June 30, 2017, the date of its filing into the record in the instant case. On September 18, 2017, Commission Staff filed a notice into the record stating Jack Scott Lawless is no longer employed by the Commission and that Ariel Miller, Division of Financial Analysis, Water and Sewer Branch, is adopting the findings and recommendations relating to Monroe District's overall revenue requirement.<sup>14</sup> The September 18, 2017 notice by Commission Staff stated that Ariel Miller and Jason Green, Division of Financial Analysis, Water and Sewer Branch, will testify at the September 27, 2017 hearing.

The Commission, in response to Monroe District's initial request for discovery, stated that 807 KAR 5:076 specifies the record upon which the Commission decision will

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<sup>14</sup> Notice (filed Sept. 18, 2017) at 1.

be made and does not provide for a party to conduct discovery upon Commission Staff.<sup>15</sup> In support of its motion for reconsideration, Monroe District argued that the current proceeding is “strikingly similar to *Kentucky-American Water Co. v. Cowan*, 847 S.W.2d 737 (Ky. 1993).<sup>16</sup> Upon review of the Supreme Court of Kentucky’s decision in *Kentucky-American Water*, the Commission finds that Monroe District’s reliance is misplaced.

In the *Kentucky-American Water* proceeding, Commission Staff “conducted direct negotiations” with the Kentucky-American Water Company (“KAWC”) which was applying for a rate increase.<sup>17</sup> Per the Supreme Court of Kentucky’s Opinion in *Kentucky-American*:

On April 25, 1988, a document styled ‘Proposed Settlement’ was executed by the Staff and KAWC memorializing the agreement concluded in the settlement negotiations and recommending that the Commission increase KAWC’s rates by eight hundred forty-two thousand six hundred ten dollars (\$842,610). At no time did either the AG and the City concur in any respect with the agreement concluded between the Staff and KAWC.<sup>18</sup>

The proposed settlement was received into evidence, and the Commission entered an Order adopting the less than unanimous settlement.<sup>19</sup> In that case, Commission Staff acted in “an adverse manner by negotiating, signing, and publicly recommending a compromise of the case which did not include” all the parties.<sup>20</sup> Further, Commission

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<sup>15</sup> Order (Ky. PSC Aug. 18, 2017) at 2.

<sup>16</sup> Motion for Reconsideration at 2.

<sup>17</sup> *Kentucky-American Water*, 847 S.W.2d at 738.

<sup>18</sup> *Id.* at 739.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 741.

Staff did not testify at the hearing.<sup>21</sup> The Commission finds that the primary concerns manifest in *Kentucky-American Water* are that the parties who did not sign the agreement did not have the same access as KAWC to the evidence that Commission Staff relied upon and did not have “an opportunity to test, explain and/or refute that evidence.”<sup>22</sup>

Comparatively, in the instant case, the Staff Report is the product of Commission Staff’s independent review, comprehensively conveys the evidence that Staff considered and relied upon, and explains how Commission Staff arrived at its various findings and recommendations. Staff has not negotiated for or signed a written stipulation or agreement similar in nature to the settlement agreement discussed in *Kentucky-American Water*. The Commission in this proceeding provided the parties with an opportunity to file written comments into the record regarding the report and is providing an opportunity for the parties to present evidence and argument at an evidentiary hearing and, further, an opportunity to cross-examine members of Commission Staff with responsibility for the Staff Report.

The Commission does not find the facts of the instant case “strikingly similar” to those in *Kentucky-American Water*. As noted, a detailed Staff Report containing findings and recommendations is part of the record, and all parties have had equal access to the Staff Report. The parties will have the opportunity to cross-examine members of Commission Staff responsible for the findings and recommendations.

The present proceeding is a rate case filed under 807 KAR 5:076, which establishes the alternative rate adjustment procedure for small utilities. The regulation

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<sup>21</sup> *Id.* at 739.

<sup>22</sup> *Id.* at 741.

specifically states in Section 10 the means by which a party may conduct discovery and allows the Commission to establish different arrangements to protect a party's right to due process. Monroe District has not shown that their right to due process would be infringed upon if not allowed to conduct pre-hearing discovery on Commission Staff.

This issue was addressed in the August 18, 2017 Order. 807 KAR 5:076 does not give parties a right to conduct discovery on Commission Staff outside of the hearing. Monroe District concedes that decisions regarding discovery rights are within the Commission's discretion.<sup>23</sup> The Commission finds that the Monroe District does not demonstrate good cause to deviate from 807 KAR 5:076 in order to permit discovery upon Commission Staff. The Commission further finds that pre-hearing discovery upon Commission Staff is not necessary to protect Monroe District's due process rights. The Commission, therefore, finds that it should deny Monroe District's request for relief on this point.

807 KAR 5:076, Section 11(e), states:

Acceptance of the findings and recommendations contained in the commission staff report by all parties in a proceeding shall not preclude the commission from conducting a hearing on the application, taking evidence on the applicant's financial operations, or ordering rates that differ from or conflict with the findings and recommendations established in the commission staff report.

Monroe District, relying upon 807 KAR 5:076, Section 11(c), and the Commission's April 12, 2017 Order, argues that "conducting a hearing on all issues is a wasteful and unnecessary exercise and is contrary to the intent of Section 11."<sup>24</sup> To the extent that

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<sup>23</sup> Motion for Reconsideration at 3.

<sup>24</sup> *Id.* at 7.

Monroe District notes that 807 KAR 5:076, Section 11(c), assists the Commission and the parties in identifying the issues in dispute, Monroe District is correct. However, Monroe District's interpretation of 807 KAR 5:076, Section 11(c), would render 807 KAR 5:076, Section 11(e), meaningless.

The Commission finds that the plain and ordinary language of 807 KAR 5:076, Section 11(e), states that the agreement by the parties on an issue or all issues does not preclude the Commission from ordering a full hearing on any or all issues. The Commission finds that the intent of 807 KAR 5:076, Section 11(c), is to require a party to assist the Commission in reviewing the Staff Report and the record in determining whether a hearing should be held and in rendering a decision. Additionally, the intent of 807 KAR 5:076, Section 11(c), is also to preclude a party that remains silent on an issue from later asserting a claim of Commission error in the absence of an objection.<sup>25</sup> The Commission finds that the above construction harmonizes the provisions of 807 KAR 5:076, Section 11.

The Commission finds 807 KAR 5:076, Section 11(e), does not require the Commission to limit the hearing or limit a party's ability to participate in the hearing in this case. The Commission finds that it should deny Monroe District's request for a limited hearing.

IT IS THEREFORE ORDERED that:

1. Monroe District's motion to reconsider and clarify is granted in part and denied in part.

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<sup>25</sup> 807 KAR 5:076, Section 11(d), provides a similar procedural bar for parties that fail to file a written response.



2. Monroe District and the Attorney General shall file with the Commission, no later than September 20, 2017, a list of witnesses and exhibits to be presented at the September 27, 2017 hearing. Monroe District and the Attorney General shall provide six copies of any exhibit to be introduced into evidence at the hearing.

3. Monroe District's renewed request to establish a procedural schedule to conduct discovery of Commission Staff is denied.

4. Monroe District's renewed request to limit the issues to be heard at the evidentiary hearing is denied.

By the Commission



ATTEST:



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