

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF)	CASE NO.
KENTUCKY-AMERICAN WATER COMPANY)	2018-00358
FOR AN ADJUSTMENT OF RATES)	

ORDER

By petition filed on July 22, 2019, the Attorney General of the Commonwealth of Kentucky, by and through the Office of Rate Intervention (Attorney General), requests a rehearing of the Commission's final Order issued on June 27, 2019 (Final Order), pursuant to KRS 278.400. Among other things, the Final Order approved a \$13,399,169 increase in Kentucky-American Water Company's (Kentucky-American) base rate and granted Kentucky-American's request for a qualified infrastructure plan (QIP) rider.

The Attorney General raises multiple issues on rehearing, which are addressed below. Kentucky-American and Lexington-Fayette County Urban County Government (LFUCG) filed their respective responses to the rehearing petition on July 29, 2019. The Attorney General filed a reply to Kentucky-American's and LFUCG's responses briefs on August 2, 2019. This matter stands submitted for a decision.

DISCUSSION AND FINDINGS

Legal Standard

KRS 278.400 establishes the standard of review of applications for rehearing. KRS 278.400 provides that, upon rehearing, a party may offer additional evidence that could not with reasonable diligence have been offered at the time of the original hearing. Rehearing does not present parties with the opportunity to re-litigate a matter fully

addressed in the original Order. KRS 278.400 is intended to provide closure to Commission proceedings by limiting rehearing to new evidence not readily discoverable at the time of the original hearings. Thus, final orders remain undisturbed absent extraordinary circumstances, such as a material error or omission in the order. KRS 278.400 provides an opportunity for the Commission to address any errors or omissions in an order.

Request to Deny Rehearing

In its response, Kentucky-American asserts that the Attorney General failed to satisfy the standard for rehearing set forth above, and therefore the request for rehearing should be denied. Kentucky-American explains that the Attorney General did not provide new evidence, instead criticizing the language used in the Final Order and asserting that the Commission did not sufficiently review the Attorney General's evidence and argument.

In his reply, the Attorney General disputed that KRS 278.400 provides for rehearing only when there is new evidence or to correct a material mistake or omission. The Attorney General argued that the standard of review on rehearing established in KRS 278.410 is whether an order is unlawful or unreasonable.

The Commission finds that Kentucky-American failed to establish good cause to dismiss the Attorney General's petition for failure to satisfy rehearing standards, and therefore Kentucky-American's motion should be denied. The Attorney General correctly points out that the Commission has granted rehearing for the purpose of more fully developing the record or modifying an order to enter a finding. As discussed below, to the extent that further clarification is needed, the Commission will address any errors or omission in our Final Order on an issue-by-issue basis.

Representation of a Party's Witness Testimony as a Party's Position

The Attorney General asserts that the Final Order incorrectly represents that the testimonies of Lane Kollen and Richard Baudino, expert witnesses jointly sponsored by the Attorney General and LFUCG, are the Attorney General's position and that such representation results in a manifest injustice. The Attorney General argues that his position is reflected in the post-hearing brief, and that his retained experts' pre-filed testimonies reflect the recommendations of expert witnesses proffered by the Attorney General, but does not reflect the position of the Attorney General. The Attorney General further argues that, by conflating expert testimony proffered by the Attorney General with the Attorney General's legal and factual positions set forth in his post-hearing brief, the Attorney General was deprived of a fair trial because he was deprived of his right to be heard.

Kentucky-American asserts that, contrary to the Attorney General's allegation otherwise, the Commission considered all of the Attorney General's arguments advanced at the hearing and in his post-hearing brief. Kentucky-American further asserts that the Attorney General is merely dissatisfied with the Commission's decisions, which does not entitle the Attorney General to re-litigate those issues.

LFUCG states that it is in general agreement with the Attorney General on all matters raised in the petition for rehearing and did not address this issue specifically.

Having reviewed the relevant pleadings and being otherwise sufficiently advised, the Commission finds that the Final Order reflects the Commission's consideration and evaluation of the entire evidentiary record, and that further clarification is unnecessary. The Commission further finds that a party's position is based upon the evidence sponsored and introduced into the record by that party, including, but not limited to, expert

opinion, testimony, and discovery responses. In the rehearing request, the Attorney General does not disavow expert witness testimony that he sponsored nor does the Attorney General indicate that his recommendations or positions were at odds with the witness testimony that he sponsored. Thus, the Attorney General does not establish that there was a material error in the Final Order.

Regarding his claim that he was denied the right to be heard, the Attorney General offers only a conclusory statement that his right to be heard was denied without providing specific evidence in support of this statement. The Attorney General was an active participant in this proceeding, submitting and responding to discovery requests, submitting expert testimony, presenting witnesses and conducting cross-examination at the formal hearing, and filing briefs. Further, the Attorney General's unsupported assertion is refuted by the unambiguous language of the Final Order, in which the Commission expressly addressed arguments presented in the Attorney General's brief and expressly cited to the Attorney General's brief to document said arguments.¹

For the reasons set forth above, the Commission finds that the Attorney General failed to demonstrate a material error or omission in the Final Order, or that the Final Order was unlawful or unreasonable, and therefore failed to satisfy the standard of review for rehearing. The Attorney General's request for rehearing on this issue is denied.

¹ See FN 22, 23, 32, 41, 42, 46, 47, 48, 52, 96, 97, 122, 124, 127, 128, 131, 135, 140, 141, 176, 177, 193, 244, 245, 261, 262, 263, 264, 265, 289, 290, 291, 294, 311, 312, for examples of citations to the Attorney General's brief, either in conjunction with the expert witness that the Attorney General sponsored or only to the Attorney General's brief when presenting the Attorney General's arguments. See also pages 5, 10, 18, 22 for examples of references to the Attorney General's brief in the body of the Final Order.

Representations of Jointly Sponsored Witness Testimony as Arguments of Both Parties

Similar to the above argument, the Attorney General asserts that the Final Order inappropriately referred to arguments presented by witnesses jointly sponsored by the Attorney General and LFUCG as arguments of both parties, and thus foreclosed each parties' ability to effectively plead their case.

Kentucky-American responds that the Attorney General merely criticizes the language used by the Commission and that, contrary to the Attorney General's allegation otherwise, the Commission considered all of the Attorney General's arguments advanced at the hearing and in his post-hearing brief.

LFUCG states that it is in general agreement with the Attorney General on all matters raised in the petition for rehearing and did not address this issue specifically.

The Commission finds that the Final Order reflects our consideration and evaluation of the entire evidentiary record presented individually and jointly by the Attorney General and LFUCG. The Attorney General and LFUCG entered into an agreement to jointly share the cost for certain expert witness testimony.² The agreement included the provision that LFUCG could adopt or co-sponsor the expert witness testimony in its entirety or any portion, and acknowledged that the agreement did not preclude either party from taking a contradictory position from the other.³ The expert witness testimony was filed as jointly sponsored by the Attorney General and LFUCG.

The Attorney General provides no specific example of the Final Order incorrectly referring to a position as proffered by both the Attorney General and LFUCG that was, in

² LFUCG Notice of Filing OAG Agreement (filed February 19, 2019).

³ *Id.*

fact, only proffered by one or the other. Further, the Attorney General's claim is refuted by the unambiguous language of the Final Order, which expressly addressed positions that were raised by only the Attorney General or LFUCG, positions in which the Attorney General or LFUCG differed from the other, and positions that arose from the jointly sponsored evidence that were not otherwise identified as being in conflict.⁴

For the same reasons set forth above, the Commission finds that the Attorney General's request for rehearing on this issue is denied because the Attorney General failed to demonstrate a material error or omission, or that the Final Order was unreasonable or unlawful, and therefore failed to satisfy the standard for rehearing on this issue.

American Water Employee Stock Purchase Program Discount

The Attorney General asserts that the Commission should have disallowed \$17,459 in expense that Kentucky-American included in its cost of service for its employee stock purchase plan (ESPP). The ESPP allows Kentucky-American employees to purchase shares of its parent company's, American Water Works Company, Inc. (American Water), common stock at a discount. In his petition for rehearing, the Attorney General argues that this type of benefit should only be funded by shareholders and not customers.

Kentucky-American responds that the Commission evaluated all of the evidence regarding employee benefits and compensation that was proffered by Kentucky-American, the Attorney General, and LFUCG, and reached an Overall Revenue

⁴ See Final Order, pages 5, 10, 18, 22, 23, 38, 44, 48, 49, 51, 69, 70, and 71 for examples in which the Final Order unambiguously and expressly discussed positions in which the Attorney General and LFUCG were in conflict or positions that were unique to the Attorney General or to LFUCG.

Requirement based on that evaluation. Noting that the ESPP expense is 0.02 percent of the approved revenue requirement, Kentucky-American asserts that the Commission is not required to explicitly address all *de minimus* items discussed in the case if the overall result is reasonable.

LFUCG states that it is in general agreement with the Attorney General on all matters raised in the petition for rehearing and did not address this issue specifically.

The Commission acknowledges that the Final Order makes no express mention of the ESPP, and that the Commission determined the ESPP expense was reasonable and included in the revenue requirement determination. The Commission finds that rehearing should be granted to clarify the Final Order as discussed below:

The ESPP is a voluntary, optional employee benefit available to all full- and part-time employees. Employees who make this election pay 85 percent of the cost to purchase American Water common stock through payroll deduction with post-tax dollars. While the Commission historically denies recovery for portions of incentive compensation benefits that are tied to financial performance measures such as earnings per share, the ESPP is not tied to financial performance measures. This distinction is important because incentive plans in which stock awards or other financial compensation to employees that are tied to financial performance measures are designed to primarily benefit shareholders rather than ratepayers, and therefore the Commission disallows recovery of such plans. The ESPP is more akin to employee benefits, such as health, dental, vision, life, and disability insurance; retirement plans; and paid time off, in which the employers' costs are included in the cost of service. Employee benefits are designed to hire and retain a qualified workforce. Because retaining a qualified workforce ultimately benefits ratepayers, the Commission evaluates employee benefits to ensure that they are not

excessive, but instead are reasonable and market competitive as measured against other utilities and state, regional, and national industries. Here, Kentucky-American provided evidentiary support, including a wage and benefit study, regarding the reasonableness of the ESPP.⁵ The Commission finds that, based on the substantial evidence of record, that Kentucky-American satisfied its burden and that the ESPP is reasonable.

Lobbying Expenses as Portion of Membership Dues to Certain Organizations

The Attorney General asserts that the Commission failed to disallow \$3,453 in ineligible lobbying expenses arising from portions of membership dues paid to Commerce Lexington, Greater Lexington Apartment Association, and the Kentucky Chamber of Commerce that are attributable to lobbying expense. As a basis for its assertion, the Attorney General points to Kentucky-American's response to a post-hearing data request in which Kentucky-American agreed that it inadvertently left \$3,453 in ineligible lobbying expenses in base rate for account 52524000, Co Dues/Membership, and agreed that the \$3,453 should be removed for ratemaking purposes.⁶

Kentucky-American did not address this issue specifically but asserts that the Commission appropriately considered and weighed all evidence in determining rates that are fair, just, and reasonable.

LFUCG states that it is in general agreement with the Attorney General on all matters raised in the petition for rehearing and did not address this issue specifically.

⁵ See Application, Direct Testimony of Kurt Kogler at 14; Direct Testimony of Robert V. Mustich, at Exhibit RVM-1; Direct Testimony of James S. Pellock at 8, 10; Kentucky-American Responses to Commission Staff's First Request for Information, Item 33; Kentucky-American Responses to Commission Staff's Second Request for Information, Item 29.

⁶ Kentucky-American response to the Attorney General's Post-Hearing Request for Information (filed May 24, 2019) at Item 2.

In the Final Order, the Commission disallowed \$262,641 in external affairs and public policy costs. As explained in Kentucky-American's response to Commission Staff's Second Request for Information, Item 70,⁷ the \$262,641 in external affairs and public policy costs included \$3,110 in account 52524000, Co Dues/Membership, for the lobbying portion of the membership dues to Commerce Lexington, Greater Lexington Apartment Association, and Kentucky Chamber of Commerce. Thus, of the \$3,453 at issue on rehearing, \$3,110 was disallowed in the Final Order. To the degree that Kentucky-American revised its figures in its response to the Attorney General, the \$343 difference is *de minimus* and would not impact rates approved in the Final Order.

For the above reasons, the Commission finds that the Attorney General failed to establish a material error or omission in the Final Order, or that the Final Order was unreasonable or unlawful, and therefore fails to satisfy the standard for rehearing. The Attorney General's request for rehearing on this issue is denied.

Cash Working Capital

The Attorney General asserts that the Final Order failed to make findings regarding cash dividend and service company charges expenses. The Attorney General further asserts that the Commission failed to properly consider proffered by the Attorney General's expert witness, Lane Kollen, contending that, despite the Commission's finding otherwise, Mr. Kollen actually presented new evidence regarding expense lag days.

Kentucky-American did not address this issue specifically but asserts that the Commission appropriately considered and weighed all evidence in determining rates that are fair, just, and reasonable.

⁷ Kentucky-American response to Commission Staff's Second Request for Information (filed Jan. 25, 2019) at Item 70, Attachment 1, page 3 of 4.

LFUCG states that it is in general agreement with the Attorney General on all matters raised in the petition for rehearing and did not address this issue specifically.

The Commission notes that, in the Cash Working Capital section that begins on page three of the Final Order, the Attorney General's three arguments are set forth in numbered sections, and that the findings paragraph was not similarly labeled or set off sufficiently, so that it appears that the finding paragraph was attached to only one of the three numbered sections. The Commission finds that rehearing should be granted to the limited extent of clarifying that our finding applies to the entirety of the Attorney General's arguments, and not just to one argument. To that end, the following two sentences are inserted as the first sentence in the second full paragraph on page eight of the Final Order: "Based upon the evidence of record, the Commission finds that Kentucky-American met its burden of proof and that Kentucky-American's proposed treatment of cash working capital is reasonable. We are not persuaded by the Attorney General's arguments regarding service company charges, cash dividend expense, and non-cash items."

In regard to the Attorney General's assertion that the Commission failed to consider Mr. Kollen's argument regarding lag expense day, the Commission disagrees that it did not consider the evidence, but will grant rehearing to the limited extent of clarifying the Final Order. The following sentence is inserted before the second to last sentence of the first paragraph on page nine of the Final Order: "We are not persuaded by the Attorney General's argument that the expense lag day should be infinity, which removes non-cash items from cash working capital and is contrary to our long-held position that cash working capital requirements should be recognized for the lag in receipt of operating income."

Incentive Compensation: Annual Performance Plan (APP)

The Attorney General asserts that the Commission should have disallowed 100 percent of the APP expense but instead erroneously disallowed only 50 percent of the APP expense based on the reasoning in Case No. 2014-00396⁸ that distinguished between performance measures and funding measures for a similar plan. Classifying the APP as base compensation rather than incentive compensation, the Attorney General contends that the Commission ignored recent precedent in Case No. 2017-00321⁹ that did not distinguish between performance and funding measures, but instead disallowed the plan expense because it was in the form of restricted stock units. According to the Attorney General, the Commission expressly held that the form of the compensation was the basis for the disallowance. The Attorney General argues the facts in Case No. 2017-00321 are analogous to facts in this proceeding, and therefore the reasoning set forth in Case No. 2014-00396 should not have been applied.

Kentucky-American asserts that the Attorney General's dissatisfaction with the Commission's reliance on Case No. 2014-00396 is inconsistent with the Attorney General's own expert, who relied upon that case for the expert's argument for disallowance of 100 percent of the APP expense.

LFUCG states that it is in general agreement with the Attorney General on all matters raised in the petition for rehearing and did not address this issue specifically.

⁸ Case No. 2014-00396, *Application of Kentucky Power Company for: (1) A General Adjustment of Its Rates for Electric Service; (2) An Order Approving Its 2014 Environmental Compliance Plan; (3) An Order Approving Its Tariffs and Riders; and (4) An Order Granting All Other Required Approvals and Relief* (Ky. PSC June 22, 2015) at 24–26.

⁹ Case No. 2017-00321, *Electronic Application of Duke Energy Kentucky, Inc. for: 1) An Adjustment of the Electric Rates; 2) Approval of an Environmental Compliance Plan and Surcharge Mechanism; 3) Approval of New Tariffs; 4) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; and 5) All Other Required Approvals and Relief* (Ky. PSC May 23, 2018) at 12–14.

Based upon a review of the final order in Case No. 2017-00321, the Commission notes that the Attorney General's arguments and analysis of that Order do not fully align with the facts and legal reasoning set forth in that Order. First, the Attorney General confuses or conflates base compensation with a total compensation package. The Attorney General erroneously terms the plan in Case No. 2017-00321 as base compensation, but that plan, like the Kentucky-American plan at issue here, is incentive compensation that is part of a total compensation package. Second, the incentive compensation plan in Case No. 2017-00321 was tied to financial performance only and did not include non-financial performance measures, such as safety and service. In this proceeding, as in Case No. 2014-00396, a percentage of the incentive plan is based on financial performance, and the remaining percentage is based on non-financial performance. Third, the order in Case No. 2017-00321 never discussed funding measures versus performance measures. Fourth, in Case No. 2017-00321, the Commission did not distinguish the form of compensation as controlling the outcome, despite the Attorney General's arguments otherwise. Based on a review of the Final Order in this proceeding and the referenced orders in Case No. 2014-00396 and 2017-00321, the Commission finds that the facts and legal reasoning set forth in Case No. 2017-00321 are not analogous to the facts and legal reasoning applicable to this proceeding, and that the facts and legal reasoning in Case No. 2014-00396 are analogous to the facts and legal reasoning contained in this proceeding.

For the above reasons, the Commission finds that the Attorney General failed to establish a material error or omission in the Final Order, or that the Final Order was unreasonable or unlawful, and therefore fails to satisfy the standard for rehearing. The Attorney General's request for rehearing on this issue is denied.

QIP

The Attorney General asserts that the Commission improperly shifted the burden of proof by granting Kentucky-American's request for a QIP rider solely because the Attorney General failed to rebut portions of Kentucky-American's evidence supporting the QIP. The Attorney General also takes umbrage at the language in the Final Order that states that the Attorney General and LFUCG declined to address the reasonableness and prudence of the QIP. The Attorney General asserts that rehearing must be granted to clarify that the burden of proof is not on the Attorney General.

Kentucky-American did not address this issue specifically but asserts that the Commission appropriately considered and weighed all evidence in determining rates that are fair, just, and reasonable and that Kentucky-American met its burden of proof.

LFUCG agrees with the Attorney General's assertion that the Commission improperly shifted the burden of proof to the Attorney General and to LFUCG regarding the reasonableness of the QIP. LFUCG also disputes that it declined to address the reasonableness or prudence of the QIP, asserting that six pages of its post-hearing brief addressed that issue. LFUCG also argues that there is insufficient evidence in the record to demonstrate that there would be rate shock in the next rate case if the QIP were not approved.

KRS 278.190(3) states that, in a rate case, the burden of proof is on the utility to prove that the increased rate is just and reasonable. As an initial matter, the Commission agrees with Kentucky-American that an intervening party's failure to provide evidence regarding an issue does not equate to a shifting of the burden of proof. Similarly, when a utility's evidence is the only evidence in the record, it does not equate to the utility meeting its burden of proof. The Commission also agrees that when a utility has met its

burden of proof, an intervening party has the opportunity, but not the requirement, to rebut the utility's proof through evidence. In the discussion of an issue for which a party does not file evidence into the case record, the Commission often makes note of that in an order to be thorough and to avoid the misperception that a party's argument has been omitted.

In the Final Order in this proceeding, the Commission expressly found that Kentucky-American "established the need" for the QIP and that the QIP was "reasonable" based on the substantial evidence of record.¹⁰ Also in the Final Order, the Commission evaluated the Attorney General's and LFUCG's arguments regarding the QIP and determined that they were "unpersuasive,"¹¹ which is not the same as shifting the burden of proof or finding the Attorney General and LFUCG failed to meet a burden of proof. Nowhere did the Final Order state or imply that the QIP was reasonable because the Attorney General (or LFUCG) failed to proffer evidence or testimony on certain issues.

In regard to the Attorney General's arguments that the testimony of his witness should not be conflated with the position of the Attorney General, we reiterate what we held above: a party's position is based upon the evidence sponsored and introduced into the record by that party, including, but not limited to, expert opinion, testimony, and discovery responses.

The Commission notes that LFUCG did not file a petition for rehearing and that the statutory period to request rehearing has passed. Therefore, LFUCG's newly raised

¹⁰ Final Order at 83.

¹¹ *Id.* at 81. We note that the Attorney General's and LFUCG's arguments included those made in their respective post-hearing brief, as well as the evidence and testimony that they proffered, whether individually or jointly.

assertion regarding the sufficiency of evidence regarding rate shock is not properly before the Commission.

For the reasons discussed above, the Commission finds that the Attorney General failed to establish a material error or omission in the Final Order, or that the Final Order was unreasonable or unlawful. Therefore, the Attorney General's request for rehearing on this issue is denied.

Labor Expenses

The Attorney General asserts that the Final Order failed to consider one of the Attorney General's arguments regarding Kentucky-American's alleged failure to include overtime expense for new FTEs. The Attorney General further asserts that the Final Order improperly shifted the burden of proof to the Attorney General by finding that the Attorney General's proposed adjustment should be denied and failed to find that Kentucky-American met its burden of proof.

Kentucky-American did not address this issue specifically but asserts that the Commission appropriately considered and weighed all evidence in determining rates that are fair, just, and reasonable.

LFUCG states that it is in general agreement with the Attorney General on all matters raised in the petition for rehearing and did not address this issue specifically.

Regarding the Attorney General's assertion regarding overtime expense, the Commission finds that rehearing should be granted to the limited extent that the Final Order is clarified that the Commission considered the totality of the Attorney General's arguments regarding labor expenses and, after weighing and evaluating the evidence, we were not persuaded. The Final Order is further clarified that we find that Kentucky-American met its burden to demonstrate the reasonableness of the labor expenses.

Because the Attorney General's assertion that the Commission shifted the burden of proof to the Attorney General on this issue is the same assertion raised above, we incorporate the same reasoning here as discussed above. The Commission finds that the Attorney General failed to establish that there was a material error or omission in the Final Order, and failed to establish that the Final Order was unlawful or unreasonable. Therefore, the Attorney General's request for rehearing on this issue of a shift of the burden of proof is denied.

Base Period Update

The Attorney General asserts that the Final Order improperly based a decision that Kentucky-American established good cause to deviate from the regulatory deadline for filing base period updates in part on Attorney General's "inconsistent position" regarding increases and decreases to the forecasted test year. The Attorney General asserts that his position was consistent, arguing that the relevant regulation prohibits increases to the forecasted test year, as opposed to decreases, which were related to subjects raised in intervenor direct testimony. The Attorney General argues that decreases are typically addressed in rebuttal testimony as concessions to intervenor testimony. The Attorney General contends that the Final Order should be amended so that reasoning regarding good cause removes reference to the Attorney General's inconsistent position.

Kentucky-American did not address this issue specifically but asserts that the Commission appropriately considered and weighed all evidence in determining rates that are fair, just, and reasonable.

LFUCG states that it is in general agreement with the Attorney General on all matters raised in the petition for rehearing and did not address this issue specifically.

While we disagree with the Attorney General's argument that his position on the base period update was consistent, the Commission finds that rehearing should be granted to the limited extent that the Final Order is clarified to strike the second and third full sentence in the first paragraph on page 19, and replace it with language regarding Kentucky-American's ability to avoid demobilizing contractors.

Chemical Complex Expense

The Attorney General asserts that the Final Order improperly shifted the burden of proof to LFUCG and granted cost-recovery to Kentucky-American's chemical complex expense because LFUCG did not prove the expenses should be disallowed.

Kentucky-American did not address this issue specifically but asserts that the Commission appropriately considered and weighed all evidence in determining rates that are fair, just, and reasonable.

LFUCG also contends that the Final Order unlawfully shifted the burden of proof from Kentucky-American to LFUCG regarding the chemical complex expense and that the Commission should evaluate whether Kentucky-American met its burden of proof.

First, we note that this issue arises from the Attorney General's request for rehearing of LFUCG's request that the Commission deny recovery for the chemical complex projects that was first raised as an issue in LFUCG's post-hearing brief. LFUCG did not file for rehearing on this or any issue. Next, we note that the "chemical complex" consists of two discrete projects included in Kentucky-American's comprehensive construction projects list, but not otherwise addressed in Kentucky-American's application. Finally, we note that, as the Attorney General cited in his petition for rehearing, the Commission has held that an intervening party does not have a burden of proof to meet "[e]xcept in those instances that [it] advances proposals in areas or on

issues” not addressed in the utility’s application.¹² Here, LFUCG requested that the Commission deny recovery of the expenses for the chemical complex because Kentucky-American had not obtained a Certificate of Public Convenience and Necessity (CPCN) for those two projects. Because LFUCG advanced a proposal not addressed in Kentucky-American’s application, LFUCG would have had the burden of proof under Commission precedent.

However, the Commission did not make its determination on this issue based on LFUCG not satisfying the burden of proof. Instead, the determination was based upon LFUCG’s not filing evidence on the issue and not raising the issue until its post-hearing brief. The purpose of a post-hearing brief is for a party to present and elaborate on its own positions and comment on and rebut any opposing arguments.¹³ Without evidence in the record, there was no basis to enter the finding that LFUCG belatedly requested.

The Commission finds that the Attorney General failed to establish that there is a material error or omission in the Final Order, and failed to establish that the Final Order was unlawful or unreasonable. Therefore, the Attorney General’s request for rehearing on this issue of a shift of the burden of proof is denied.

IT IS THEREFORE ORDERED that:

1. The Attorney General’s petition for rehearing is granted in part and denied in part.
2. The Attorney General’s petition for rehearing on the issue of the representation of a party’s witness testimony as a party’s position is denied.

¹² See Case No. 2004-00103, *Adjustment of Rates of Kentucky-American Company* (Ky. PSC Oct. 27, 2004) at 2.

¹³ *Id.*

3. The Attorney General's petition for rehearing on the issue of the representation of jointly-sponsored witness testimony as both parties' position is denied.

4. The Attorney General's petition for rehearing on the issue of the ESPP is granted to the limited extent that the following is inserted into page 47 of the Final Order before the "Deferred Maintenance Expense" section.

Employee Stock Purchase Program

Kentucky-American offers an employee stock purchase program (ESPP) that is a voluntary, optional employee benefit available to all full- and part-time employees. Effective in May 2019, Kentucky-American employees who make this election pay 85 percent of the cost to purchase American Water common stock through payroll deduction at post-tax dollars.

In his post-hearing brief, the Attorney General asserts that \$17,459 that was included in rate base for the ESPP should be disallowed. The Attorney General argued that the ESPP is part of a generous compensation package that allows employees to purchase stock at a discount and that customers should not pay for this employee benefit.

LFUCG did not address this issue in its post-hearing brief.

While the Commission historically denies recovery for portions of incentive compensation benefits that are tied to financial performance measures such as earnings per share, the ESPP is not tied to financial performance measures. This distinction is important because incentive plans in which stock awards or other financial compensation to employees that are tied to financial performance measures are designed to primarily benefit shareholders rather than ratepayers, and therefore the Commission disallows recovery of such plans. The ESPP is more akin to employee benefits such as health, dental, vision, life, and disability insurance; retirement plans; and paid time off, in which the employers' costs are included in the cost of service. Employee benefits are designed to hire and retain a qualified workforce. Because retaining a qualified workforce ultimately benefits ratepayers, the Commission evaluates employee benefits to ensure that they are not excessive, but instead are market competitive as measured against other utilities and state, regional, and national industries. Here, Kentucky-American provided evidentiary

support, including a wage and benefit study, regarding the reasonableness of the ESPP. The Commission finds that, based on the substantial evidence of record, that Kentucky-American satisfied its burden and that the ESPP is reasonable.

With this amendment to the Final Order, this issue is closed.

5. The Attorney General's petition for rehearing on disallowance of the portion of membership dues to certain organizations attributable to lobbying expense is denied.

6. The Attorney General's petition for rehearing on the issue of cash working capital is granted to the limited extent that the following is inserted into the cash working capital section of the Final Order as indicated. The following two sentences are inserted as the first sentence in the second full paragraph on page eight of the Final Order:

Based upon the evidence of record, the Commission finds that Kentucky-American met its burden of proof and that Kentucky-American's proposed treatment of cash working capital is reasonable. We are not persuaded by the Attorney General's arguments regarding service company charges, cash dividend expense, and non-cash items.

The following sentence is inserted before the second to last sentence of the first paragraph on page nine of the Final Order:

The Commission is not persuaded by the Attorney General's argument that the expense lag day should be infinity, which removes non-cash items from cash working capital and is contrary to our long-held position that cash working capital requirements should be recognized for the lag in receipt of operating income.

With this amendment to the Final Order, this issue is closed.

7. The Attorney General's petition for rehearing on the disallowance of the APP is denied.

8. The Attorney General's petition for rehearing on the QIP is denied.

9. The Attorney General's petition for rehearing on the labor expenses is denied.

10. The Attorney General's petition for rehearing on the base period update is granted to the limited extent that the Final Order should be amended to strike the second full sentence and third full sentence in the first paragraph on page 19, and insert the following in its place:

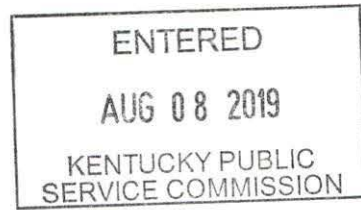
Second, by rescheduling the projects, Kentucky-American was able to avoid demobilizing contractors, which ultimately benefits ratepayers by advancing with necessary maintenance while contractors are available.

With this amendment to the Final Order, this issue is closed.

11. The Attorney General's petition for rehearing on the chemical complex expense is denied.

12. This case is closed and removed from the Commission's docket.

By the Commission



ATTEST:


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