

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

ALTERNATIVE RATE FILING OF
COOLBROOK UTILITIES, LLC

)

) Case No. 2010-00314

ATTORNEY GENERAL'S
WRITTEN COMMENTS FOR
THE REPORT OF COMMISSION STAFF

On 4 August 2010, Coolbrook Utilities, LLC, filed an application for an increase in rates through the alternative rate filing procedure. Coolbrook's proposal is to increase rates from \$22.22 per customer per month to \$35.00 per month, a 57.5% increase. On 25 February 2011, the Staff Report on the application was placed into the record for this proceeding.

Filed into the record per the authorization in a 25 February 2011 order of procedure, Coolbrook's written comments on the Staff Report identify six (6) disagreements with Staff's recommendations, ask for the recovery of additional capital expenditures, and request a surcharge for items that Coolbrook cannot identify. Subsequently, through the authorization of a 31 March 2011 order of procedure,

Coolbrook provides additional written comments. Coolbrook is deemed in agreement with all remaining findings and recommendations of the Staff Report.¹

Through the Commission's March 31st Order of procedure allowing the Attorney General to file his comments and any evidence regarding the findings and recommendations in the Staff Report, the Attorney General states the following:

1. The Staff Proposal for the Owner/Manager Fee is Appropriate.

Per its Application, Coolbrook shows a test year Owner/Manager Fee of \$2,800. Coolbrook's Application seeks to adjust that amount by an increase of \$6,800 to \$9,600. Coolbrook's justification is contained through Reference Note B of the Application which states that Farmdale Development has been allowed an owner/manager fee of \$6,000 and Coolbrook is larger than Farmdale. "Therefore, [per the Applicant] a \$9,600 owner/manager fee is appropriate in this case."

The Staff Report correctly rejects Coolbrook's proposal. The Staff Report (at page 3) notes:

Coolbrook has not demonstrated that, given its operations, the proposed fee is reasonable. In this proceeding, Coolbrook asserts that its owners spend five hours per week, or 250 hours annually, managing the operations of Coolbrook, but fails to present any documentary evidence to show the amount of time that they devote to utility operations.

¹ Order, 25 February 2011, Numbered Order 3.

After being confronted by the failure to produce evidence, Coolbrook replied by filing Affidavits of Lawrence W. Smither and Martin Cogan. Coolbrook's submission simply (and only) shows that these two individuals have extensive experience. That fact, however, wholly fails to address the central evidentiary issue, namely the failure to present any documentary evidence to show the amount of time that they devote to Coolbrook. As the Staff Report further notes:

Given the limited demands placed upon its owners as a result of its significant use of contractors and the absence of any special or unusual duties performed by Coolbrook's owners, Commission Staff finds insufficient evidence to support the proposed fee of \$9,600.

Given that Coolbrook's only evidence to support its request is the claim that it has more customers than another utility and that Misters Smither and Cogan have extensive experience, the evidence does not show that circumstances of this particular utility justify an amount in excess of \$3,600. Staff's recommendation is appropriate.

2. The Staff Proposal for the Agency Collection Fee is Appropriate.

While Coolbrook identifies its disagreement with the Staff's findings and recommendation for the Agency Collection Fee, its initial written comments contain nothing other than the fact of the disagreement. Coolbrook fails to point to any evidence supporting a claim that the Staff's findings were erroneous or that the recommendation is inappropriate. The Staff recommendation is appropriate.

3. The Staff Proposal for Insurance Expense is Appropriate.

The Staff Report, consistent with generally accepted rate-making principles and practices, recommends the denial of Coolbrook's proposal to increase Insurance Expense based upon estimates of an increase in general liability premiums. Yet again, while Coolbrook identifies its disagreement with the Staff's findings and recommendation for the expense, its initial written comments contain nothing other than the fact of the disagreement. Coolbrook fails to point to any evidence supporting a claim that the Staff's findings were erroneous or that the recommendation is inappropriate. The Staff recommendation is appropriate.

4. Amortization Expense is Properly Handled in the Staff Report.

Coolbrook identifies the fact of its disagreement with the Staff's recommendation for Amortization Expense. The basis for the disagreement, presumably, is that Coolbrook seeks recovery of legal fees. To the extent that Coolbrook can identify reasonable, prudently incurred legal fees associated with the rate proceeding, the rate case expense (and thereafter the amortization expense) should be adjusted.

However, to be clear, at the time of the issuance of the Staff Report, the recommendation to disallow \$15,000 in anticipated legal fees was appropriate because there was no evidence that Coolbrook had incurred the expense or that it would incur the disallowed expense. In fact, the Application does not support the proposal with an

actual bill or bid but rather with an estimate “for legal fees if this case is heavily litigated.”² Further, the Staff Report was issued well-before the Notice of Entry of Appearance of its Counsel. Therefore, it is noteworthy to point out that while claiming the intent to “avoid the legal and other expenses associated with a formal hearing,”³ Coolbrook actually built the expense associated with a “heavily litigated” formal hearing (perhaps to serve as a poison pill if not windfall) into its rate application.

The decision by the applicant to include recovery through rates of an expense amount that Coolbrook had not incurred and for which Coolbrook was claiming the intent to avoid conclusively demonstrates Coolbrook’s overreaching. Staff appropriately eliminated the amount in the Report.

5. The Staff Approach for Depreciation Expense is Appropriate.

In a well-reasoned approach consistent with the statutorily-imposed mandate that Coolbrook, as the applicant, has the burden of proof, Commission Staff notes (at page 7 of its Report):

In its 2009 Annual Report [calendar Year 2009 is the test period], Coolbrook reported a beginning balance for utility plant of \$60,000, and ending balance of \$61,000, and accumulated depreciation of \$1,250.00 and \$7,325.00 respectively. Neither its annual report nor the application filed in this proceeding provided any detail as to how these amounts [beginning balance and ending balance for utility plant and accumulated depreciation per the 2009 Annual

² Application, Coolbrook Proforma – Attachment A, Reference Note I (Amortization Expense).

³ Coolbrook, 7 March 2011 written comments to Staff Report.

Report] were determined. Therefore, Staff is of the opinion that Coolbrook is not entitled to depreciation on either its beginning or ending utility plant shown in its 2009 Annual Report.

In its Report, Staff notes the demonstration of \$28,436.98 of capital repairs on its utility plant by Coolbrook during 2010. Ultimately, Staff used this amount to calculate an annual depreciation expense of \$3,346. Coolbrook seeks to increase this amount for major non-routine expenditures since June of 2010.⁴

Although the test period is 2009, Commission practice permits increasing the depreciation expense for post-test year plant additions.⁵ However, the inclusion of post-test period plant for determining depreciation is not necessarily automatic.⁶

Therefore, given that the normal Commission practice is to permit consideration of post-test year plant additions, the Attorney General does not object to *consideration* of the major non-routine expenditures since June of 2010. To the extent that these expenditures qualify as reasonable, useful capital repairs, a further adjustment to the pro forma annual depreciation expense appears appropriate. The Attorney General, nonetheless, respectfully requests that the Commission utilize this opportunity to

⁴ See Coolbrook's March 7th Additional Comments to the Commission Staff Report, page 2.

⁵ *In the Matter of: The Application of Woodland Estates Sewage System for an Adjustment of Rates Pursuant to the Alternative Rate Filing Procedure for Small Utilities*, Case No. 2007-00397, Order, 10 September 2007 (Staff Report, Attachment A, Note L); rates recommended by Staff accepted by Order of 27 December 2007; see also *In the Matter of: Alternative Rate Filing of Purchase Public Service Corporation*, Case No. 2010-00231, Order, 3 August 2010 (Staff Report, Attachment A, Note C); findings of Staff Report adopted by Order of 9 September 2010; also *In the Matter of: An Adjustment of the Rates of the South Shore Water Company*, Case No. 2007-00199, Order, 1 November 2007 (Staff Report, Attachment A, Note E).

⁶ Staff chose to exclude from pro forma operations depreciation expense for projects not completed at the time of the filing of the application. See *In the Matter of: Application of Big Bear Wastewater, Inc. for an Adjustment of Rates*, Case No. 2009-00171, Order, 22 January 2010 (Staff Report, Appendix A, Note O); thereafter, Order, 26 February 2010 (Commission accepts settlement and does not accept or reject any specific rate-making methodology or adjustment).

provide additional guidance regarding the treatment of post-test year plant additions for depreciation expense. To the extent that there are limits associated with (or exceptions to) the normal rate-making practice or general rule for an adjustment to pro forma depreciation expense consequent to post-test year plant additions, the Attorney General seeks their identification (and application in this instance, if appropriate).

6. The Staff Proposal for Other Interest Expense is Appropriate.

In its March 7th written comments to the Staff Report, Coolbrook identifies the fact of disagreement concerning the Staff's recommendation for Other Interest Expense. Despite being given the chance to elaborate through additional comments, Coolbrook does nothing more than forward a bare, unexplained objection. As the Staff Report (at page 8) explains:

The Commission generally does not allow debt for these types of expenses because the recovery would constitute retroactive rate-making.

Coolbrook, despite twice being given a chance to offer argument and evidence on this issue, offers nothing. As is readily-apparent, Coolbrook, which has the burden of proof, submits a variety of proposals for which it offers no evidentiary support or meaningful argument. Coolbrook's approach, it seems, is to put items "into play" and impose upon the Commission Staff and the other parties a duty to prove that the change is inappropriate. Coolbrook's approach is incorrect. KRS 278.190(3).

The burden of proof for the necessity of any change in the approved rates rests entirely with Kentucky-American. It is not necessary ... that this Commission or anyone else prove that the proposed change is inappropriate.

In the Matter of: Notice of Adjustment of the Rates of Kentucky-American Water Company, Case No. 8836, Order, 20 December 1983, page 9.

Coolbrook should not be allowed to assign as error any aspect of the Staff Report in the absence of a specific statement of the grounds of the objection. Having twice failed to place into the record the specific grounds for objection to the Staff Report, Coolbrook's objection is defaulted.⁷ Due process and KRS Chapter 278 permit notice and the opportunity to be heard. They do not create a process through which an Applicant need not present its argument when required to state its objection.

7. The Staff's Approach for Post Test-Year Major Non-Routine Expenditures Appears Appropriate.

The test period is 2009. As discussed in Section 5 (previously), the Staff's approach to Depreciation Expense is appropriate. In its 1 April 2011 additional comments, Coolbrook seeks the recovery of "major non-routine expenditures incurred by Coolbrook since June of 2010." The Attorney General incorporates his prior comments by reference to his discussion in Section 5.

⁷ And the same is true of the other objections for which Coolbrook provides mere notice of a disagreement with Commission Staff in order to put the issue "into play."

8. There Are No Reasons to Authorize a Surcharge.

In its March 7th comments, Coolbrook indicates a desire to “discuss the merits of a surcharge.” It did not identify or present a surcharge proposal in its application. Rather, it waited until after Commission Staff issued its report to put the issue “into play.” There are no reasons to authorize a surcharge.

Aside from the fact that Coolbrook has not presented an actual proposal for review, “Coolbrook does not currently have a list of these anticipated capital expenditures.”⁸ It offers nothing to support a surcharge.

Conclusion and Notice Regarding Hearing.

For the foregoing reasons, the Attorney General urges the adoption of the approach of Commission Staff. The Attorney General provides notice that he does not plan to sponsor the testimony of any witness, and (while reserving the right to fully-participate in any evidentiary hearing) he does not request an evidentiary hearing. The Attorney General is willing to submit this matter to the Commission for a decision on the existing record without a hearing.

Further, if Coolbrook seeks a hearing, then it should be limited to the evidence produced to date unless it can demonstrate that the additional evidence could not with reasonable diligence have been offered before the evidentiary hearing. Moreover, it


⁸ Coolbrook’s 7 March 2011 written comments to the Staff Report.

should be prohibited from advancing any arguments not specifically identified through the two opportunities already afforded by the Commission in this proceeding.

To do otherwise will reward Coolbrook, which at all times has the burden of proof, for its failure to produce evidence in a timely, reasonable manner. It will also reward Coolbrook for its failure to clearly articulate its objections when given the opportunity (to the detriment of the other participants). Just as the Commission may and should prohibit the use of a never-ending test period, it may and should prohibit a near never-ending review of the Report of Commission Staff consequent to Coolbrook's decision to decline to clearly identify all of its arguments (other than the cursory notice of disagreement) and support these arguments through a well-developed presentation of evidence.

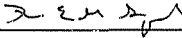
Respectfully submitted,

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Notice Regarding Filing and Certificate of Service

Counsel certifies that an original and ten copies of this pleading were served and filed by hand delivery to Jeff Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601. A copy was served on the Applicant by United States Mail, first-class, postage-prepaid, to Lawrence Smither, 1706 Bardstown Road, Louisville, 40205, and Robert C. Moore, Hazelrigg & Cox, LLP, P. O. Box 676, Frankfort, Kentucky 40602-0676. The filing and service took place on 7 April 2011.



Assistant Attorney General