

APR 05 2013

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF JESSAMINE-SOUTH)	
ELKHORN WATER DISTRICT FOR A)	
CERTIFICATE OF PUBLIC)	
CONVENIENCE AND NECESSITY TO)	CASE NO. 2012-00470
CONSTRUCT AND FINANCE A)	
WATERWORKS IMPROVEMENT)	
PROJECT PURSUANT TO KRS 278.020)	
AND 278.300)	

FOREST HILLS RESIDENTS' ASSOCIATION, INC.'S AND WILLIAM BATES' MOTION TO STRIKE THE PORTION OF THE JESSAMINE-SOUTH ELKHORN WATER DISTRICT'S BRIEF INTRODUCING EVIDENCE NOT PART OF THE RECORD IN THIS PROCEEDING

Pursuant to 807 KAR 5:001, Section 11(4), Forest Hills Residents' Association, Inc. and William Bates (collectively, "Intervenors") respectfully move the Kentucky Public Service Commission ("Commission") to strike the portions of Jessamine-South Elkhorn Water District's ("Water District") Post-Hearing Brief ("Brief") that refer to filings of Kentucky-American Water Company ("KAW") and the Attorney General in unrelated proceedings. In further support of its Motion, the Intervenors state as follows.

An evidentiary hearing occurred in this proceeding on March 13 and 14, 2013, following two rounds of discovery among the parties. Pursuant to the Commission's March 22, 2013 Order, the Intervenors and the Water District each filed a post-hearing brief on April 3, 2013. Significant portions of the Water District's Brief rely upon KAW's direct evidence, discovery responses and pleadings in other proceedings to argue that the Water District's application should be granted. The portions of the Brief related to the following footnotes should be stricken: 36 (pertaining to KAW's Water Storage Analysis); 37 (pertaining to KAW's

application); 38; 40; 41; 42; 44; 45 (except for the reference to the Commission’s order); 48 (except for the reference to the Commission’s order); 49; 50; 51; 52; 64 (pertaining to section 3(e)); 65; 66; 67; 74; 75; and 76. To be clear, none of these documents or evidence was introduced in this case. While it is appropriate to cite to Commission orders from other proceedings to support a legal claim in a post-hearing brief, it is entirely inappropriate to cite to evidence and pleadings from unrelated cases to support an evidentiary claim.

The Water District’s Brief is replete with these inappropriate references. Section 3 of the Brief is titled “Storage Standards – Case No. 2012-00096” and cites to evidence and pleadings KAW provided in a recent certificate of public convenience and necessity case before the Commission.¹ The Brief cites to KAW’s pre-filed direct testimony; numerous data request responses; and KAW’s post-hearing brief in that proceeding.² In a series of paragraphs lettered a. to g., the Brief relies on KAW’s evidence to support its claims in this case.³ For example, the Brief relies on American Water’s (KAW’s parent company) internal policy regarding storage criteria to support its contention that maximum and peak usage is relevant to this case.⁴ The Brief also cites to KAW’s and the Attorney General’s respective post-hearing briefs in a second unrelated case, Case No. 2007-00134, regarding the consideration of other alternatives and environmental issues.⁵ The Brief also cites to a water storage analysis prepared by KAW in Case No. 2005-00039.⁶

It is inappropriate for the Water District to include this “evidence” in its Brief for a manifold number of reasons. First, when the evidentiary hearing concluded, by regulation, no

¹ Brief at 21-25.

² Id.

³ Brief at 21-25.

⁴ Brief at 22.

⁵ Brief at 33, 39-40.

⁶ Brief at 20.

party was permitted to introduce or rely upon new evidence: “Except as expressly permitted in particular instances, *the commission shall not receive in evidence or consider as a part of the record a book, paper, or other document for consideration in connection with the proceeding after the close of the testimony.*”⁷ None of KAW’s or the Attorney General’s documents referenced in the Brief were introduced in this proceeding during discovery or at hearing. Instead, the Water District included a footnote in its Brief requesting that the “relevant documents in Case No. 2012-00096 be incorporated by reference into this proceeding.”⁸ None of KAW’s direct evidence or its post-hearing brief in that case is relevant to this proceeding. No similar request was made to incorporate documents from Case No. 2007-00134 or Case No. 2005-00039, but both are equally irrelevant. All of the documents on which the Water District seeks to rely are hearsay; statements by another utility’s witnesses (or its counsel) about the operation of its utility. While it was the Water District’s prerogative to rely on demand projections it developed for a case seven years ago, relying on another utility’s evidence in another case is beyond the pale.

Second, the Commission has held that allowing a party to rely on new evidence after the close of testimony denies due process to the other parties. In striking a letter filed by a witness twelve days after a hearing, the Commission held:

The Commission must ensure that all parties to its proceedings are afforded due process. Despite the relaxed nature of Commission proceedings, each party must still have the opportunity to confront and cross examine adverse witnesses...In this instance, KU had no opportunity to cross-examine Mr. Harman on the content of his letter or to offer rebuttal evidence. Therefore, to allow the letter to remain in the record would deny KU due process of law.⁹

⁷ 807 KAR 5:001, Section 11(4) (emphasis added).

⁸ Brief at 21, n. 39.

⁹ Case No. 89-349, In the Matter of: Kentucky Utilities Company v. Henderson-Union Rural Electric Cooperative Corporation (Ky. PSC May 21, 1990).

If the Water District is permitted to rely on KAW's discovery responses and legal pleadings (the latter of which has no evidentiary value even in the case in which it is filed) as proof that its application should be granted, the Intervenor will be denied due process. The Intervenor certainly could not cross-examine KAW's witnesses, as KAW is not a party to this proceeding. Similarly, the Intervenor did not have the opportunity to cross-examine the Water District's witnesses regarding the relevance of KAW's filings in Case No. 2012-00096 to the Water District's case. Relatedly, the Commission has also denied efforts to reopen closed evidentiary records to include new testimony.¹⁰

Third, the Water District inappropriately seeks to use KAW's evidence to advance new arguments. This is sandbagging. The Brief states that in Case No. 2012-00096, KAW explained in data responses that its proposed projects, which included storage tanks, were needed to provide redundancy.¹¹ The Water District's Brief claims "[t]his same need applies to, and supports the need for, the proposed JSEWD water tank."¹² The Water District never argued that it needed a storage tank to improve redundancy in its northwest service area and should not be permitted to do so in its Brief. Lack of redundancy was not mentioned when the Intervenor asked the Water District to identify its problems in serving customers.¹³ The Commission has

¹⁰ Case No. 9631, In the Matter of: An Investigation into the Fuel Procurement Practices of Kentucky Utilities Company (Ky. PSC August 17, 1989) (Denying a motion to submit new evidence because "acceptance of new evidence after the close of the record would necessitate affording the parties an opportunity to test the new evidence through discovery and cross-examination"); Case No. 2008-00250, In the Matter of: Proposed Adjustment of the Wholesale Water Service Rates of Frankfort Electric and Water Plant Board (Ky. PSC April 27, 2009) (Refusing to consider evidence that existed at the time of the hearing and that the parties failed to introduce at that hearing).

¹¹ Brief at 24.

¹² Id.

¹³ See Water District's Response to Item No. 22 of the Intervenor's First Request for Information.

stricken the portions of post-hearing briefs that address arguments not raised previously in the proceeding.¹⁴

Fourth, the Water District uses KAW's evidence to revise and "improve" its previous testimony. For example, the Water District was questioned at hearing why it believed maximum usage was relevant to complying with 807 KAR 5:066, Section 4(4). In its Brief, the Water District supplements its response by arguing that American Water considers maximum usage with respect to its storage facilities.¹⁵ American Water's corporate policies are inapposite to whether the Water District is complying with 807 KAR 5:066, Section 4(4). The Water District should not be permitted to revise its answer with this evidence.

Similarly, during the hearing the Water District admitted that it had not contacted KAW to inquire whether it has available water storage.¹⁶ In its Brief, the Water District relies on a KAW data request response to argue that KAW does not have excess storage capacity and that "KAW agrees with JSEWD that there is no need to consider options or alternatives that are not viable."¹⁷ The Water District should not be permitted to argue in its brief that it knows that KAW does not construct storage facilities in a manner that would permit it to provide storage to other utilities when the Water District admitted at hearing that it had not inquired into same. Compiling post-hearing evidence to improve a party's answers simply is not allowed.¹⁸ Furthermore, the Water District inappropriately begins multiple sentences with "KAW agrees with JSEWD..."¹⁹ As the Water District aptly observed in its Motion for Full Disclosure, KAW

¹⁴ Case No. 94-461-A, In the Matter of: An Examination by the Public Service Commission of the Application of the Fuel Adjustment Clause of Kentucky Utilities Company from November 1, 1994 to April 30, 1995 (Ky. PSC March 3, 1997).

¹⁵ Brief at 22.

¹⁶ 3/13/13 Hearing Transcript at 16:01:30-16:01-36.

¹⁷ Brief at 25.

¹⁸ Case No. 89-349, In the Matter of: Kentucky Utilities Company v. Henderson-Union Rural Electric Cooperative Corporation (Ky. PSC May 21, 1990).

¹⁹ Brief at 25, 32.

is not a party to this proceeding and any suggestion that it “agrees” with the Water District in any respect in this case is misleading.

The Water District’s Brief has interjected parties’ filings in three unrelated proceedings – Case No. 2012-00096, 2007-00134, and 2005-00039 – in an attempt to buttress its application. Its efforts contravene the Commission’s regulation, precedent, and due process. For the foregoing reasons, the Intervenors respectfully request the Commission to strike and decline to consider the portions of the Water District’s Brief that rely on documents, evidence, and arguments that were not raised in this proceeding prior to the close of testimony.

Dated the 5th day of April 2013.

Respectfully submitted,

Robert M. Watt, III
Monica H. Braun
Stoll Keenon Ogden PLLC
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507
859-231-3000
robert.watt@skofirm.com
monica.braun@skofirm.com

By: Monica H. Braun
Counsel for Intervenors

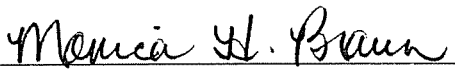
CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading has been served by e-mail and U.S. mail, postage prepaid, to the following persons on this the 5th day of April 2013:

Bruce E. Smith, Esq.
Bruce E. Smith Law Offices, PLLC
201 South Main Street
Nicholasville, Kentucky 40356
bruce@smithlawoffice.net

W. Randall Jones, Esq.
Rubin & Hays
Kentucky Home Trust Building
450 South Third Street
Louisville, Kentucky 40202
wrjones@rubinhays.com

Anthony G. Martin
P.O. Box 1812
Lexington, KY 40588
agmlaw@aol.com


Counsel for Intervenors

114681.140074/4112953.3