

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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COMMISSION

In the Matter of:

PETITION OF MOUNTAIN WATER DISTRICT)
FOR MODIFICATION OF ORDER OF)
CASE 2014-00342)

CASE NO.
2016-00062

**ATTORNEY GENERAL'S MOTION TO INTERVENE
AND OBJECTION TO MOUNTAIN WATER DISTRICT'S
REQUEST FOR MODIFICATION OF CASE NO. 2014-00342 ORDER**

Comes now the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and pursuant to KRS 367.150(8), which grants him the right and obligation to appear before regulatory bodies of the Commonwealth of Kentucky to represent consumers' interests, hereby moves the Public Service Commission ("Commission") to grant him status as an intervenor party in this action pursuant to 807 KAR 5:001 Section 4(11).

Furthermore, the Attorney General objects to Mountain Water District's ("Mountain Water" or "District") Petition for Modification of the Order from Case No. 2014-00342¹ ("Petition") on multiple grounds discussed herein. In the Petition, Mountain Water has requested elimination of the requirement to obtain services of an outside independent consultant that has no past history with the District for the purpose of issuing a request for proposals ("RFP").² The District's Petition fails to provide a sufficient basis for the Commission to reverse any portion of its prior October 9, 2015 or November 17, 2015 Orders.³ Therefore, the Commission's Orders should be upheld and enforced accordingly.

¹ *In the Matter of: Petition of Mountain Water District for Modification of Order of Case No. 2014-00342, Case No. 2016-0006*, (Ky. PSC January 29, 2016) (hereinafter "Petition").

² *Id.* at 1 and 6.

³ *In the Matter of: Application of Mountain Water District for an Adjustment of Water and Sewer Rates, Case No. 2014-00342*, Order (Ky. PSC October 9, 2015, Order (Ky. PSC November 17, 2015)

I. MOUNTAIN WATER’S PETITION FOR MODIFICATION IS BARRED BY THE DOCTRINE OF RES JUDICATA AND SHOULD BE DISMISSED

The Attorney General contends that the principles of res judicata bars Mountain Water’s Petition since the issues were already litigated and ruled upon in Case No. 2014-00342.⁴ The doctrine of res judicata bars the adjudication of issues that have already been litigated, or should have been litigated in a prior case between the same or similar parties.⁵ Res judicata is formed by two subparts: claim preclusion and issue preclusion.⁶ Issue preclusion, which is also known as collateral estoppel, bars the parties from re-litigating any issue that was litigated and decided in an earlier action.⁷ Kentucky courts have held that by disallowing previously litigated issues from being the subject matter of a later action “is not only salutary, but necessary to the speedy and efficient administration of justice.”⁸

For issue preclusion to operate as a bar to litigation, the following elements must be present: issues in the two proceedings are the same, the issues were litigated, the adjudicator reached a final decision on the issues based upon the merits of the case, and the issues in the prior action was necessary to the court’s judgment.⁹ Res Judicata applies to quasi-judicial acts of an administrative agency, such as the Commission, unless there has been a “significant change of conditions or circumstances” that occur between two successive administrative hearings.¹⁰ As discussed below, the Attorney General affirms that all of the elements of res judicata are present, and Mountain Water has not demonstrated the required significant change necessary to proceed with the Petition.

⁴ *Id.*

⁵ 47 Am. Jur 2d Judgments §464.

⁶ *Yeoman v. Commonwealth*, 983 S.W.2d 459, 464 (Ky. 1998).

⁷ *Id.* at 465.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Bank of Shelbyville v. Peoples Bank of Bagdad, Ky.*, 551 S.W.2d 234, 236 (1977); *Williamson v. Public Service Commission*, 174 S.W. 2d 526, 529 (Ky. 1943); *Happy Coal Co. v. Hartbarger*, 251 Ky. 779, 65 S.W.2d 977, 978 (1933).

In the prior Case No. 2014-00342, Mountain Water filed an application to increase its water and sewer rates with the Commission.¹¹ The Attorney General, Commission Staff, and Mountain Water fully litigated the prior case by propounding multiple rounds of discovery, conducting a hearing, as well as submitting post-hearing briefs to the Commission to render a final decision.¹² In the Commission’s October 9, 2015 Order, in addition to reducing the revenue request, it also ordered Mountain Water to obtain the services of an outside independent consultant, that has no prior work experience with the District, to assist with preparing, issuing, and analyzing an RFP within 180 days of the Order.¹³ The RFP process was to entail soliciting bids from firms interested in providing managerial and operational services to Mountain Water.¹⁴ Within 240 days, Mountain Water was to submit a written report to the Commission discussing the results of the RFP and provide a detailed analysis of the same.¹⁵

On October 28, 2015, Mountain Water filed an Application for Rehearing and requested the elimination of the requirements to obtain the services of an outside independent consultant and the issuance of an RFP.¹⁶ The District argued that if it terminated the current management contract with Utility Management Group (“UMG”) and resumed operations of the water district in-house then “the need for an RFP will be unnecessary and generate an expense with no benefit.”¹⁷ The Commission denied the District’s request for modification and/or elimination of the requirements to obtain an independent consultant and to issue an RFP in its November 17, 2015 Order.¹⁸ The Commission held that even if the District cancelled its contract with UMG

¹¹ *In the Matter of: Application of Mountain Water District for an Adjustment of Water and Sewer Rates, Case No. 2014-00342* (Ky. PSC November 20, 2014).

¹² *Id.*

¹³ Case No. 2014-00342, Order at 33-38 (October 9, 2015).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *In the Matter of: Application of Mountain Water District for a Rehearing, Case No. 2014-00342*, (Ky. PSC October 28, 2015).

¹⁷ *Id.*

¹⁸ Case No. 2014-00342, Order (November 17, 2015).

and decided to operate independently, an RFP would still be beneficial to the water district and its ratepayers.¹⁹ Mountain Water did not appeal this decision, and the Order is now final.²⁰

Instead of appealing the Commission's decision, Mountain Water is attempting a third bite at the apple by filing a Petition for Modification merely two and a half months after the final order entered in the prior case. The Petition is demanding the exact relief that the District previously requested in its Application for Rehearing – the elimination of the requirements to obtain an independent consultant and to issue an RFP.²¹ The only minor difference between the District's Application for Rehearing in the prior case and the pending Petition is that Mountain Water has now terminated the contract with UMG.²²

However, this is not a significant change in circumstances that would allow the Petition to proceed, since the District already posed the argument in the prior case that the specific requirements involving an independent consultant and RFP should be eliminated from the Order if it terminated its contract and independently operated the water district.²³ The Commission ruled that even in this scenario, an independent consultant to assist with the issuance of an RFP was still required.²⁴

Thus, the District's Petition should be barred due to the doctrine of res judicata since all of the elements have been fulfilled. The prior and present case contain identical issues, these issues have already been litigated and decided on the merits, the decision on the issues were necessary to the court's judgment, and no significant change of conditions or circumstances have

¹⁹ *Id.*

²⁰ *Petition at 2. See: In the Matter of: Application of Mountain Water District for an Adjustment of Water and Sewer Rates, Case No. 2014-00342, Order (Ky. PSC October 9, 2015), Order (Ky. PSC November 17, 2015).*

²¹ *Petition at 1, 5, and 6; See Generally: In the Matter of: Application of Mountain Water District for a Rehearing, Case No. 2014-00342, (Ky. PSC October 28, 2015).*

²² *Petition at 3-5.*

²³ *In the Matter of: Application of Mountain Water District for a Rehearing, Case No. 2014-00342, (Ky. PSC October 28, 2015).*

²⁴ *Case No. 2014-00342, Order (November 17, 2015).*

occurred since the last case. Hence, the Attorney General requests the dismissal of Mountain Water's Petition for Modification based upon the doctrine of res judicata.

II. MOUNTAIN WATER'S PETITION FOR MODIFICATION SHOULD BE DISMISSED BECAUSE THERE HAS BEEN NO EVIDENCE SUBMITTED JUSTIFYING THE ELIMINATION OF THE INDEPENDENT CONSULTANT AND RFP REQUIREMENTS FROM THE COMMISSION'S 2014-00342 ORDER

In the alternative, if the Commission does not find that Mountain Water's Petition is barred by res judicata, the Attorney General contends that the District has provided no evidence or justification to eliminate the requirement for an independent consultant to assist with issuing an RFP. In Mountain Water's Petition, it is alleged that the District's Board has "sufficient information" to make a decision whether to independently run the water district or continue to utilize contractors, without the assistance of an independent contractor or an RFP.²⁵ This assertion stands in stark contrast to the facts of the case.

In the prior case, Mountain Water admitted that it did, "not know exactly how much it would cost to operate the district..."²⁶ Consequently, the Commission instructed Mountain Water to provide a comparison of the costs to run the district independently versus the costs of the UMG yearly contract.²⁷ Only then did the District discover that if it had run the water district independently then it could have produced a large annual savings.²⁸ Based upon the Petition, Mountain Water is now asserting that it estimates a savings of approximately \$462,000 annually if it runs the operations independently.²⁹ It cannot be ignored that Mountain Water could have saved close to one-half of a million dollars per year for the ratepayers if it had run independently. Yet the District continuously signed a multi-million dollar contract with UMG

²⁵ *Petition* at 5-6.

²⁶ *In the Matter of: Application of Mountain Water District for an Adjustment of Water and Sewer Rates, Case No. 2014-00342*, Order (Ky. PSC October 9, 2015), Order (Ky. PSC November 17, 2015); Mountain Water District's Response to AG 2-3(b) in Case No. 2014-00342.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Petition* at 5.

for well over a decade without engaging in independent competitive bidding or calculating the true costs to run the water district.³⁰

Based upon Mountain Water's own admissions, if it had acted prudently then its ratepayers could have saved, at the very least, an estimated \$5,000,000 over the course of the decade long contract with UMG. Moreover, if Mountain Water would have engaged in arms-length, competitive bidding throughout the contract with UMG, it is feasible that the District could have achieved even more significant cost savings. It is abundantly clear that Mountain Water has not had sufficient information in the past, nor the present, to act rationally and make cost-effective decisions on behalf of its ratepayers, which makes the issuance of the RFP even more crucial.

The Attorney General concurs with the Commission when it held in the prior case that “[t]he RFP was necessary to assess the potential costs of operating the district, particularly in consideration of the passage of a decade since the contract was last bid.”³¹ The Commission further stated that the RFP would provide useful information for the District in assessing the most reasonable and cost-effective means for operating the district, as well as assessing the efficacy of conducting its operations independently.³² The RFP process is the preferred benchmarking method for a determination of the least cost option for services, and as such, operates as a check and balance for the regulators and as a benefit to the ratepayers.

As the Commission importantly stated in its prior order “[a] utility board fully informed as to the range of methods and costs of operating its district will best serve its ratepayers in the most transparent and cost-effective manner.” The Attorney General agrees with the Commission in that an RFP is necessary for Mountain Water to determine the most reasonable and cost-

³⁰ *In the Matter of: Application of Mountain Water District for an Adjustment of Water and Sewer Rates, Case No. 2014-00342*, Order (Ky. PSC October 9, 2015), Order (Ky. PSC November 17, 2015).

³¹ Case No. 2014-00342, Order (October 9, 2015); Case No. 2014-00342, Order (November 17, 2015).

³² Case No. 2014-00342, Order (November 17, 2015).

effective means to provide utility services to its ratepayers, As such, an independent consultant assisting with the issuance of an RFP will be exceptionally valuable to both the District as well as the ratepayers. Based on the foregoing reasons, the Attorney General objects to the elimination of the independent consultant to issue an RFP as set forth by the Commission in its prior October 9, 2015 or November 17, 2015 Orders.

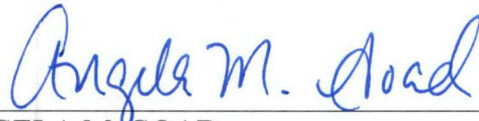
Alternatively, should the Commission permit Mountain Water to eliminate the RFP, as the District proposes, it should nonetheless require the retention of an outside independent consultant to assist the Board with any transition to in-house governance. In this way, the Commission may ensure that an independent, outside consultant that has no past history with Mountain Water District is evaluating and conducting the transition process accordingly.

III. CONCLUSION

WHEREFORE, the Attorney General respectfully requests status as an intervenor party in the present action. The Attorney General further requests that the Commission DENY Mountain Water District's Petition for Modification of the Case No. 2014-00324 Orders.

Respectfully submitted,

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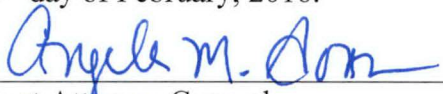
Certificate of Service and Filing

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 US Mail, first class postage-prepaid:

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This 9th day of February, 2016.



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