

RECEIVED

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

OCT 11 2007

PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:)	
)	
THE APPLICATION OF KENTUCKY-AMERICAN)	
WATER COMPANY FOR A CERTIFICATE OF)	CASE NO. 2007-00134
CONVENIENCE AND NECESSITY AUTHORIZING)	
THE CONSTRUCTION OF KENTUCKY RIVER)	
STATION II, ASSOCIATED FACILITIES AND)	
TRANSMISSION MAIN)	

**KENTUCKY-AMERICAN WATER COMPANY'S
MOTION TO COMPEL ADEQUATE DISCOVERY RESPONSES
FROM LOUISVILLE WATER COMANY**

Louisville Water Company's ("LWC") October 1, 2007 discovery responses to Kentucky-American Water Company's ("KAW") August 13, 2007 discovery requests are inadequate, pose inappropriate objections and flout both the Commission's stated rules of procedure for discovery responses in this case and the Commission's regulations pertaining to discovery responses. The Commission should order LWC to correct all those deficiencies immediately. In the alternative, and because LWC's failure to respond appropriately necessarily results in further disruption of this case by an intervenor, the Commission should strike LWC's rebuttal testimony.

I. PROCEDURAL HISTORY

On March 14, 2006,¹ KAW announced publicly its intention to construct facilities on the Kentucky River ("KRS II") to solve the Central Kentucky water supply problem. A little over a year later, on March 30, 2007, KAW filed its Application in this case. By that time, KAW had

¹ On that date, KAW and many others attended an informal conference at the Commission for the purpose of discussing plans to solve the regional water supply problem as part of Case No. 2001-00117. The conference was attended and covered by the press.

designed the proposed facilities, applied for and obtained numerous permits necessary for the construction and operation of the facilities, completed detailed cost studies for the facilities, obtained rights to real estate that would be necessary for the facilities, and conducted numerous meetings and informational sessions with citizens and affected landowners who are concerned about the project. In short, KAW had performed an enormous amount of work, as it should have, before it filed the Application in this case, all in accordance with the rigorous requirements of 807 KAR 5:001, Section 9. As expected, numerous entities² intervened in time to allow them to participate in the case without disrupting the procedural schedule the Commission entered on April 20, 2007.

LWC waited until July 30, 2007 to move for intervention so that it could “help the Commission understand the Louisville Water Company documents it is receiving pursuant to the Open Records Act.”³ After the Commission granted LWC’s Motion to Intervene, KAW and other parties sought discovery from LWC relating to LWC’s “proposal” (“LWC Proposal”) to solve the Central Kentucky water supply problem. Instead of responding to KAW’s August 13, 2007 discovery requests in accordance with the existing deadline in the case, LWC asked the Commission to allow it 60 days from the date it received the discovery requests to respond. Every party in this case except CAWS opposed LWC’s request.

By Order dated September 5, 2007, the Commission allowed LWC until October 1, 2007 to respond to KAW’s discovery requests. Accordingly, LWC had a total of 49 days to respond. In that Order, the Commission noted that LWC moved to intervene over three months after KAW filed its Application and over two months after the Commission entered its April 20, 2007

² Those intervenors are: the Attorney General; the Lexington-Fayette Urban County Government (“LFUCG”); Citizens for Alternative Water Solution (“CAWS”); the Kentucky River Authority (“KRA”); and the Kentucky Industrial Utility Customers (“KIUC”).

³ LWC’s July 30, 2007 Motion for Full Intervention, p. 3, ¶ 10.

Order setting forth the procedure and schedule for this case. The Commission also stated that LWC's President, Greg Heitzman, provided "few specifics" to support his claim that LWC could solve the Central Kentucky water supply problem cheaper than KAW's plan.⁴ Likewise, the Commission stated that Mr. Heitzman offered "no supporting documentary evidence" for that claim other than a copy of a presentation made to the LFUCG Council.⁵ In ruling, the Commission stated that LWC would "not be permitted further extensions of time. If it cannot provide the required documents and testimony within the time permitted, we will draw the appropriate conclusions from its failure to do so."⁶

A review of LWC's October 1, 2007 responses proves that the "appropriate conclusions" should now be drawn. They are full of inappropriate objections and refusals to respond and show a blatant disregard for the Commission's April 20, 2007 Order in this case and the Commission's regulations pertaining to discovery responses. Accordingly, LWC must either correct its deficiencies *immediately* (which is the only way to avoid prejudice to KAW) or it should be penalized by the striking of LWC's rebuttal testimony.

II. ARGUMENT

LWC'S RESPONSES SHOW A CALLOUS DISREGARD FOR THIS COMMISSION'S ORDER AND GOVERNING REGULATIONS

Although LWC was allowed a full seven weeks to respond to KAW's discovery requests, LWC did not assert any objections to those requests until the last possible day. In all, LWC made 34 objections in responding to KAW's discovery requests. The basis for seven⁷ of those objections is that the information sought is "confidential," proprietary" or is "protected by the Homeland Security Act" although LWC offers no further explanation for the objection. These

⁴ September 5, 2007 Order, p. 2.

⁵ Id.

⁶ Id., p. 7.

⁷ Those seven objections were made in response to Request Nos. 3, 21, 22, 44, 53, 115 and 116.

objections disregard Commission regulations and procedure governing the handling of confidential information.

807 KAR 5:001, Section 7 sets forth a detailed procedure to be followed by one who is asked to provide information for which confidentiality is alleged. That procedure requires LWC to file a petition seeking confidential protection of the allegedly confidential information. The petition must: (1) set forth specific grounds under the Kentucky Open Records Act upon which the claim of confidentiality is based; and (2) attach a copy of the subject material which identifies the portions alleged to be confidential by highlighting or underscoring. Also, LWC must provide copies of the same material to the parties in the case with the subject portions redacted. The governing regulation also states:

No party to any proceeding before the Commission shall fail to respond to discovery by the Commission or its staff or any other party to the proceeding on the grounds of confidentiality. If any party responding to discovery requests seeks to have a portion or all of the response held confidential by the Commission, it shall follow the procedures for petitioning for confidentiality contained in this administrative regulation. Any party's response to discovery requests shall be served upon all parties, with only those portions for which confidential treatment is sought obscured.⁸

LWC did not even attempt to begin the process required by the governing regulation. LWC must provide this information immediately because it is necessary for KAW and the Commission to assess the LWC Proposal.

LWC's responses also run afoul of the Commission's scheduling order in this case. In its discovery request, KAW specifically asked that the responses be made "in accordance with the provisions of the Commission's April 20, 2007 Order, as supplemented" The Commission's April 20, 2007 Order, at page 1, states:

⁸ 807 KAR 5:001, Section 7(5)(a).

Responses to requests for information shall be appropriately indexed and shall include the name of the witness responsible for responding to the questions related to the information provided, with copies to all parties of record and 8 copies to the Commission.

Despite the Commission's clear directive and KAW's reminder of that directive, LWC did not identify a responsible witness for *any* of its responses. LWC should be compelled to do so. Additionally, LWC served the attachments to its responses as multiple .pdf files on a CD. LWC did not serve paper copies of the 3208 pages of attachments to its responses. LWC should be ordered to reimburse KAW for two copy sets of those attachments at a total price of \$991.29, which is the amount KAW had to pay for two copy sets for its counsel of record.

**NUMEROUS RESPONSES CONTAIN GLARING
DEFICIENCIES AND MUST BE CORRECTED IMMEDIATELY**

For the exact reasons noted by the Commission when it described Mr. Heitzman's direct testimony – "few specifics" and "no supporting documentary evidence" – KAW served extensive, yet fair, discovery requests on LWC. LWC's discovery responses are lacking in many regards. The most glaring deficiencies, which must be corrected immediately, are as follows:

Response to Request No. 14: This request asked for minutes of the LWC Board of Directors and LWC Executive Leadership Team meetings from 1999 to the present. In response, LWC failed to provide minutes of the August 15, 2006 meeting of its Board of Directors. Those minutes should be provided immediately.

Response to Request No. 15: This request asked for all documents relating to LWC communications with elected officials outside of Jefferson County for the last 5 years. LWC makes an unsupported "unduly burdensome" objection, but then states that it "regularly communicates" with members of the state legislature. However, of the documents provided, only two are communications between LWC and state legislators. LWC should be compelled to provide what was sought: all documents relating to LWC communications with elected officials

outside of Jefferson County. Of course, “all documents” includes electronic correspondence as defined in KAW’s August 13, 2007 discovery requests and also includes LWC *internal* documents relating to those communications. These documents are necessary to properly assess and contextualize the many different water supply proposals LWC has made.

Response to Request No. 17: This request asked LWC to reconcile the differences in two demand studies that were prepared for LWC. Instead of making that reconciliation, LWC responds by identifying the different individuals who prepared the studies, stating that LWC did not prepare the studies, and, finally, that the differences are “likely attributable to differences in the data sets and methodologies used” by LWC’s own consultants. In other words, LWC takes the position that it does not know, and refuses to find out, how its own consultants calculated numbers that have become critical in this case. That position is unacceptable and the Commission should order LWC to make the requested reconciliation immediately.

Response to Request No. 19: This request asked for the rationale, basis and research used for predicting declining industrial sales in the LWC 20-year Forecast. LWC responded by referring to page 2 of its 20-year forecast. The contents of page 2 of the 20-year forecast only broadly describe when data were collected and there is some additional discussion of seasonal trends. There is nothing in the way of the rationale and basis for predicting declining industrial sales. Here again, demand projections for LWC are a critical aspect of its proposal because they bear directly on LWC’s capacity (and cost) of the proposal it has made in this case.

Response to Request No. 24: This request asked for LWC’s maximum monthly demand by customer class. LWC refused to provide a response by stating that it does not track maximum monthly demand by customer class. However, in response to Request No. 134, LWC did provide the annual water use by customer class as a percentage of overall use. To the extent

LWC can provide that sort of annual number, it should be able to provide monthly numbers and it should be compelled to do so.

Response to Request No. 27: This request asked whether LWC has made presentations to existing industries who do not receive water from LWC in an effort to secure those industries for future connection. In response, LWC objected on the basis that the term “industries” is vague and ambiguous. LWC states that it serves customers, not “industries.” LWC’s response lacks good faith. Indeed, the last sentence of the request asks “how are those industries factored into your industrial demand.” Clearly, the request sought information about entities that LWC has approached regarding becoming an industrial customer and/or expanding water consumption for existing industrial customers. LWC’s objection and refusal to answer is unacceptable, particularly in response to a request that seeks information that is critical to assessing whether LWC can live up to its claim that it can meet the Central Kentucky water supply need.

Response to Request No. 34: This request asked for the total project cost of the LWC riverbank filtration project and asked how the cost would be applied to current and future ratepayers. LWC failed to provide any information regarding how the cost would be applied to ratepayers. In order to properly assess the LWC Proposal, the Commission must know how LWC intends to recoup the costs of all LWC projects from its customers.

Response to Request No. 42(b): This request asked for the percentage of “unaccounted for water” that LWC uses for future demand forecast. LWC objected on the basis that the phrase “unaccounted for water” is vague and ambiguous. That objection is misplaced. Not only is that phrase a term of art in the water supply industry, it is a term used in Commission regulations.⁹

⁹ 807 KAR 5:066, Section 6(3).

LWC failed to provide that information and it should be compelled to do so because it bears on the issue of LWC's ability to meet the Central Kentucky water supply need.

Response to Request No. 43: This request asked for identification of projects and the total project cost for each project to alleviate LWC's *projected* production shortfall. It also asked how those costs will be applied to current and future ratepayers. LWC's response states that it does not have a *current* production shortfall and then refers to a recently manufactured (August 2007) Water Treatment Plant Capacity Study which addresses expansion projects. However, here again, LWC failed to provide any information regarding how current and future ratepayers will pay for those projects. Of course, the Commission must have this information to properly assess the LWC Proposal.

Response to Request No. 46: This request asked for the status and schedule for all projects recommended in one of LWC's own documents (the 2002 – 2021 Facilities Plan). It also asked for the project costs for each project. LWC provided nothing other than a statement that those projects do not relate to KAW's evaluation of the LWC Proposal. Nothing could be further from the truth. To properly assess LWC's Proposal, the Commission and KAW must know LWC's historical, current and anticipated projects and LWC's ability to complete those projects timely. That information is critical to determining whether LWC can actually deliver on the claims it has made in this case.

Response to Request No. 53: This request asked for LWC's cost of service study in electronic format with formulae intact so that the Commission and KAW can determine the rate effect on LWC's customers. Relying on the inappropriate "confidentiality" objection discussed above, LWC refused to provide that study in the manner requested. Without that information,

the Commission cannot properly evaluate a critical aspect of LWC's Proposal – the rate effect on LWC's customers.

Response to Request No. 61: This request asked for all project *schedules* for the tasks that must be performed as part of the LWC Proposal. In response, LWC refers to other responses it has made in this proceeding. However, those other responses contain absolutely *nothing* in the way of a schedule for the various components of the LWC Proposal. The Commission *must* know what LWC's schedule is for the completion of the multitude of projects (legal, engineering, permitting, land acquisition, financial, construction, etc.) that must be completed as part of the LWC Proposal. That information must be provided immediately.

Response to Request No. 63: This request asked for the cost estimate of the LWC Proposal broken down into its individual components such as engineering, legal, administration, permitting, land acquisition, and financing. In response, LWC made its oft-used referral to other responses that are completely unresponsive to this request. If the Commission is going to give any consideration to the LWC Proposal, it cannot do so without knowing a breakdown of the costs of the proposal. Therefore, this information must be provided immediately.

Response to Request No. 68: This request asked for information relating to a critical component of the LWC Proposal – the claimed ability to locate the pipeline in the I-64 right-of-way/controlled access. It asked for the basis for LWC's claim that the pipeline could be located there, copies of all documents detailing the use of that location, and information concerning communications about use of that location. LWC's response merely states that the LWC Proposal "includes or considers a route either within or parallel to the I-64 right-of-way." LWC's response provides nothing in the way of a basis for the claim that the right-of-way can be used. LWC should be compelled to provide that basis or state there is none. Additionally, LWC

provided no information concerning communications it has had regarding use of the right-of-way, including LWC *internal* communications (including e-mails). It should be compelled to do so or state that it has had no communications. LWC refers KAW to its responses to Commission Staff Request Nos. 3, and 5 – 8, but those responses do not contain dates or an identification of the individuals with whom LWC has communicated.

Response to Request No. 79: This request asked for any and all hydraulic analyses in paper and electronic format (with formulae intact) for the LWC Proposal. LWC's response states that it has not conducted a "detailed" hydraulic analysis. The request did not ask for only a "detailed" analysis. It asked for "any and all" analyses – detailed or not. LWC should be compelled to provide any and all such analyses in paper and electronic format (with formulae intact). Clearly, whether the LWC Proposal is feasible from a hydraulic perspective is a critical issue.

Response to Request No 80: This request asked for the hydraulic grade line LWC used for its proposal. LWC's response states that it has not conducted a "detailed" hydraulic design for its proposal, and, therefore, the requested information is not available. Here again, LWC's use of the word "detailed" is problematic. If LWC has conducted a hydraulic analysis – "detailed" or not – it must provide the information sought in this request. Indeed, if being "detailed" were a threshold requirement for the production of information in response to a discovery request, LWC would not be obligated to produce anything at all relating to its multiple proposals.

Response to Request No. 85: This request asked for all documents relating to the LWC Board's approval and/or the LWC Executive Leadership Team's approval of the LWC Proposal. LWC makes one of its unsupported "unduly burdensome" objections, and then only refers to

board meeting minutes and the R.W. Beck report for its response. Without question, there must be other documents (as defined by KAW to include electronic correspondence) that relate to the approval of the LWC Proposal. KAW is entitled to exactly what is sought: *all* documents relating to the LWC Board's approval or the Executive Leadership Team's approval of the LWC Proposal, including any and all LWC *internal* e-mails on the topic.

Response to Request No. 89: This request asked for the proposed metering configuration at the termination of the pipeline at Fayette County. LWC's response states that it has not performed a "detailed, final" design, so it does not provide the metering configuration. To the extent LWC has considered any metering configuration, it should provide it and not be allowed to hide behind the fact that its design is not "detailed." Obviously, the metering configuration is an important engineering aspect of the LWC Proposal and must be identified for the Commission to properly assess the LWC Proposal.

Response to Request No. 117: This request asked for all documents relating to any negotiations between KAW and LWC since January 1, 1994 regarding KAW's purchase of water or water-related services from LWC. LWC objects on the basis that KAW already has this information. However, the request did not ask for only documents that were transmitted between KAW and LWC. The request included all LWC *internal* documents, including e-mails, that "relate to any negotiations between KAW and LWC since January 1, 1994." LWC's refusal to provide its internal documents in response to this request is inappropriate. LWC should be compelled to provide this information immediately. LWC internal documents relating to the sale of water to KAW could not be more relevant to the consideration of the LWC Proposal. Those documents must be provided immediately.

Response to Request No. 121: This question asked for the *specific* termination point of service for the LWC Proposal. LWC's response is a reference to page 11 of its July 10, 2007 presentation to the LFUCG, but that page does not provide anything specific. LWC should be compelled to provide this important aspect of its proposal.

III. CONCLUSION

When LWC moved to intervene in this case, it promised that its intervention would *not* disrupt this proceeding.¹⁰ Despite that promise, LWC next moved to extend the procedural schedule extensively after it received other parties' discovery requests which sought justification for the claims LWC made when it moved to intervene. Now, after having been granted a significant amount of time to provide discovery responses, the responses themselves are inadequate and ignore Commission rules and orders. When the Commission allowed LWC that additional time, it specifically stated that LWC would not be given any more time extensions. Without asking for one outright, LWC has, by evading, objecting and simply not answering questions, granted to itself more time. Therefore, the Commission should order LWC to cure those deficiencies *immediately* without further disruption in this case. If the deficiencies cannot be cured immediately, the Commission should penalize LWC by striking LWC's rebuttal testimony. Such a penalty is deserved given the manner in which LWC has abused the generous treatment the Commission afforded to it.


¹⁰ LWC's Motion for Full Intervention, p. 4, ¶ 20.

Respectfully submitted,

A. W. TURNER, JR., GENERAL COUNSEL
KENTUCKY-AMERICAN WATER COMPANY
2300 Richmond Road
Lexington, Kentucky 40502

and

STOLL KEENON OGDEN PLLC
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507-1801
Telephone: (859) 231-3000

BY: 

Lindsey W. Ingram, Jr.
Lindsey W. Ingram III

Attorneys for Kentucky-American Water Company

CERTIFICATE OF SERVICE

This is to certify that on the 11th day of October, 2007, the original and eight (8) copies of the foregoing were filed with the Public Service Commission and a copy of each served upon the following via U.S. Mail:

David E. Spenard, Esq.
Dennis G. Howard II, Esq.
Assistant Attorneys General
1024 Capital Center Drive, Suite 200
Frankfort, Kentucky 40601-8204

David Barberie, Esq.
Leslye M. Bowman, Esq.
Lexington-Fayette Urban County Gov't.
Department of Law
200 East Main Street
Lexington, Kentucky 40507

Tom FitzGerald, Esq.
Kentucky Resources Council, Inc.
P.O. Box 1070
Frankfort, Kentucky 40602

David F. Boehm, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202

Damon R. Talley, Esq.
112 N. Lincoln Blvd.
P.O. Box 150
Hodgenville, Kentucky 42748-0150

Stephen Reeder
Robert Ware
Kentucky River Authority
70 Wilkinson Boulevard
Frankfort, Kentucky 40601

John E. Selent, Esq.
Edward T. Depp, Esq.
Dinsmore & Shohl LLP
1400 PNC Plaza
500 West Jefferson St.
Louisville, Kentucky 40202

Barbara K. Dickens, Esq.
Louisville Water Company
550 South Third Street
Louisville, Kentucky 40202

STOLL KEENON OGDEN PLLC

By 