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NOV 05 2007  
PUBLIC SERVICE  
COMMISSION

November 5, 2007

**VIA HAND-DELIVERY**

Hon. Beth O'Donnell  
Executive Director  
Public Service Commission  
211 Sower Blvd.  
Frankfort, KY 40601

**Re: *Application of Kentucky-American Water Company, a/k/a Kentucky American Water for Certificate of Convenience and Public Necessity Authorizing Construction of Kentucky River Station II ("KRS II"), Associated Facilities, and Transmission Line; Case No. 2007-00134***

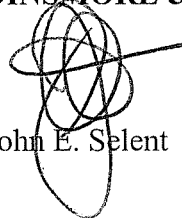
Dear Ms. O'Donnell:

We have enclosed, for filing with the Public Service Commission of the Commonwealth of Kentucky ("Commission"), an original and ten (10) copies, of the Louisville Water Company's Motion for Rehearing.

Thank you, and if you have any questions, please call us.

Very truly yours,

**DINSMORE & SHOHL LLP**



John E. Selent

JES/bmt

Enclosures

cc: All Parties of Record (w/enclosures)  
Barbara K. Dickens, Esq. (w/enclosures)  
Edward T. Depp, Esq. (w/o enclosures)

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NOV 05 2007

PUBLIC SERVICE  
COMMISSION

**COMMONWEALTH OF KENTUCKY  
BEFORE THE 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** )

**LOUISVILLE WATER COMPANY’S MOTION FOR REHEARING**

Louisville Water Company ("LWC"), by counsel, and pursuant to KRS 278.400, and 807 KAR 5:001, moves the Public Service Commission of the Commonwealth of Kentucky (the "Commission") for rehearing of those portions of the Commission's October 29, 2007 order (the "Order") in the above-captioned matter relating to KAWC Initial Data Request Nos. 3 and 44. In support of its motion, LWC states as follows.

**INTRODUCTION**

On Thursday, October 11, 2007, at 1:27 p.m., counsel for Kentucky-American Water Company ("KAWC") served an electronic copy of KAWC's motion to compel responses to a number of its initial data requests on LWC (the "Motion"). Counsel for KAWC requested that LWC file a response to KAWC's twelve page Motion two business days later, on Monday, October 15, 2007. Despite having never attempted to contact LWC prior to filing the Motion, the Motion claimed "deficiencies" with respect to twenty data requests (Initial Request Nos. 14, 15, 17, 19, 24, 27, 34, 42(b), 43, 46, 53, 61, 63, 68, 79, 80, 85, 89, and 117).

Buried in a footnote to the Motion, KAWC also identified seven additional requests (Initial Request Nos. 3, 21, 22, 44, 53, 115, and 116) with respect to which it claimed LWC had improperly asserted an objection to the production of sensitive information related to Homeland Security.

KAWC did not acknowledge LWC's other objections to KAWC Initial Request Nos. 3, 44, 115, and 116. KAWC also made no effort to explain why the information in any of these seven requests was reasonably calculated to lead to the discovery of admissible evidence in this matter. In short, KAWC provided the Commission with no justification for compelling LWC to review and potentially produce the reams of information and documentation that KAWC requested. Instead, KAWC simply complained about an alleged breach of Commission procedure and then proceeded to discuss in detail the twenty requests that LWC believed were the subject of KAWC's motion.

LWC responded with respect to those twenty requests, and the Commission issued its order with respect to the Motion on the afternoon of Wednesday, October 24, 2007. At the time, LWC was working to respond to the additional 108 supplemental data requests it had received in the interim. Those responses were due to be filed just three business days later on Monday, October 29, 2007.

The Commission's October 24, 2007 order ("Initial Order") addressed the same twenty issues that LWC believed were the subject of KAWC's Motion, and it concluded by ordering that "[a]ny portion of [KAWC's Motion] that is not expressly addressed in this Order is denied." (Initial Order at ordering para. 11.) The following morning, KAWC e-mailed the Commission, inquiring whether: (i) there was a typographical error with respect to the due dates for the additional information the Commission had ordered produced with respect to Initial Requests 46 and 117; and (ii) despite the clear language of the Initial Order, whether the seven requests the Commission did not expressly address in the Initial Order were denied. (*See* Initial Order at ordering para. 11.)

As the express language of the Initial Order was clear on its face with respect to both issues, LWC continued working toward the timely completion of the many discovery responses (including those additional ones addressed in the Initial Order) that would be due the coming Monday. LWC

did not respond to KAWC's e-mail because the Initial Order appeared clear on its face, and (in any event) the proper procedure for seeking clarification/correction of a Commission order is through the filing of a formal motion. (*See* KRS 278.400.) One day later, on Friday afternoon, the Commission entered an order, nunc pro tunc, ("Amended Initial Order") whereby it ordered LWC to respond to Initial Request Nos. 46 and 117 by Monday, October 29, 2007.<sup>1</sup> The Amended Initial Order did not address the seven requests that were the subject of counsel for KAWC's email the previous morning. Again, given the Commission's order that "[a]ny portion of [KAWC's Motion] that is not expressly addressed in this Order is denied," coupled with the absence of any motion from KAWC with respect to this ordering paragraph 11, LWC continued to believe that the Commission had denied KAWC's Motion with respect to the seven additional requests.

On Monday, October 29, 2007, LWC was embroiled in the midst of finalizing eight documents for filing with the Commission that day. That afternoon, the Commission issued yet another order (the "Second Order") with respect to KAWC's Motion. The Second Order was not designated nunc pro tunc; instead, it purported to make a new substantive ruling with respect to the very seven requests that the Commission's Initial Order and Amended Initial Order had denied. This Second Order purported to effectively reverse (rather than clarify) the Initial Order and Amended Initial Order without having given LWC notice of the Commission's intent to rule on the issues addressed therein, and furthermore without having the benefit of any substantive arguments from LWC or KAWC, or any findings by the Commission. This motion seeks to correct that error.

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<sup>1</sup> The Initial Order had not specified a due date for responses to these two Initial Requests. LWC believed this was because these two particular requests required the review of significant additional volumes of documentation, a task that was effectively impossible (in light of the over 110 additional discovery requests to which LWC was responding) by the next business day.

## ARGUMENT AND ANALYSIS

The Commission should reverse those portions of its Second Order that relate to KAWC Initial Request Nos. 3 and 44, because those portions of the Second Order constitute unconstitutional arbitrary action.

Section 2 of the Kentucky Constitution provides, "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." *Id.* In the context of administrative agencies, Kentucky law is clear that "a party to be affected by an administrative order is entitled to procedural due process." *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky.*, 379 S.W.2d 450456 (1964) (citation omitted). Likewise, "[u]nless action taken by an administrative agency is supported by substantial evidence it is arbitrary." *Id.* (citation omitted). "There is an inherent right of appeal from orders of administrative agencies where constitutional rights are involved, and section (2) of the Constitution prohibits the exercise of arbitrary power." *Id.* (citation omitted).

Those provisions of the Second Order compelling responses to KAWC Initial Request Nos. 3 and 44 are the paradigm of arbitrary decisionmaking. First, LWC was never advised that the Commission was reconsidering that portion of the Initial Order providing, "Any portion of [KAWC's Motion] that is not expressly addressed in this Order is denied." (Initial Order at ordering para. 11.) The Initial Order was clear on its face, and as its plain language explained, to the extent KAWC's Motion sought to compel responses to Initial Request Nos. 3 and 44, the Motion was "denied." (*Id.*)

The Amended Initial Order corrected three clerical errors in the Commission's Initial Order, but it gave no indication that the Commission was considering taking any further action with respect to KAWC's Motion or the subsequent e-mail from KAWC. Accordingly, LWC continued working to respond to the multitude of discovery requests that were due on the following Monday.

That Monday afternoon, LWC was surprised to receive the Commission's Second Order. Unlike the Amended Initial Order, that Second Order was not designated nunc pro tunc. Also unlike the Amended Initial Order, the Second Order purported to effectively reverse the Commission's Initial Order that "[a]ny portion of [KAWC's Motion] that is not expressly addressed in this Order is denied." (*See generally*, Second Order.) The Commission ordered LWC to respond to KAWC Initial Request Nos. 3 and 44.

Exacerbating matters, the Commission's order compelling LWC to respond to KAWC Initial Request Nos. 3 and 44 justified the compulsion solely on the basis that LWC had allegedly offered no reason to explain why the requests were unduly burdensome or why concerns related to the Homeland Security Act ("HSA") prevented disclosure. (Second Order at 1, 3.) This, however, is not the relevant question; the question is whether the Commission's order compelling responses to those requests was "supported by substantial evidence." *See American Beauty Homes Corp.*, 379 S.W.2d at 456. The Commission offered no justification of its own with respect to why responses to these requests were relevant to KAWC's ability to present its case. The Commission also ignored the fact that KAWC had not advanced a single argument with respect to why its responses were relevant to KAWC's ability to present its case. The Commission also ignored the fact that it had (in the very same Second Order) denied KAWC's Motion with respect to Initial Request Nos. 115 and 116 "based on [KAWC]'s failure to explain the relevance and need for the requested information." (Order at 3-4 (emphasis added).) In light of its ruling on Initial Request Nos. 115 and 116, then, the Commission's ruling on Initial Request Nos. 3 and 44 is arbitrary and unconstitutional.

In addition, the Commission's ruling on Initial Request Nos. 3 and 44 is arbitrary and unconstitutional because it also contradicts the Commission's ruling (again, in the same Second Order) with respect to Initial Request Nos. 21 and 22. When evaluating Initial Request Nos. 21 and

22, the Commission evaluated LWC's confidentiality objection, *sua sponte*, and determined that requests for commercially sensitive information were "considered confidential under the Kentucky Open Records Act." (Second Order at 2.) The Commission also noted the lack of need for the requested information. (*See id.*) Accordingly, the Commission denied KAWC's Motion with respect to Initial Request Nos. 21 and 22.

Then, without any explanation, the Second Order performs an immediate about-face and faults LWC for not explaining why confidentiality and homeland security implications prevented disclosure of the information requested by KAWC in Initial Requests 3 and 44. In comparison to the request for confidential customer information, the Kentucky Open Records Act is at least as clear (if not more so) that information potentially harmful to homeland security is considered confidential under the Kentucky Open Records Act. (*See* KRS 61.878(1)(m)<sup>2</sup>.) Yet, despite KAWC's failure to express any need for this information, despite the Commission's failure to specify any need for this information, and despite the Commission's previous willingness to deny access to information protected by the Kentucky Open Records Act, the Commission somehow granted KAWC's motion with respect to Initial Request Nos. 3 and 44. Again, this constitutes unconstitutionally arbitrary decisionmaking.

Moreover, LWC believes the Commission would not want to put Kentucky's citizenry at risk by requiring disclosure of the highly sensitive information KAWC has requested, such as: (i) "a copy of LWC's operating policies and procedures for water treatment, storage, distribution, and transmission," as well as a copy of any operations manual (Initial Request No. 3); and (ii) "a detailed

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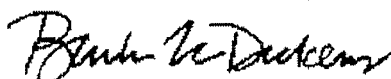
<sup>2</sup> KRS 61.878(1)(m) affords confidential treatment to documents "the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act...." (*Id.*) Confidential treatment of this type of information does not end at the state level. *See also* Freedom of Information Act, 5 U.S.C. § 551, *et seq.*; *see also* Critical Infrastructure Information Act, 6 U.S.C. § 131, *et seq.* The Second Order does not address this potential federal preemption issue, either.

description of LWC's backup power supplies at its treatment plants and pump stations and how it relates to the amount of system storage... [as well as] all plans for changes in [LWC's] backup power supplies" (Initial Request No. 44). This is particularly true in light of KAWC's (and the Commission's) failure to provide any justification for needing the requested information. Therefore – as with its rulings on Initial Request Nos. 115 and 116 – if the Commission is willing to deny KAWC's Motion with respect to Initial Request Nos. 21 and 22 because that information is confidential under the Open Records Act and because KAWC has not expressed a need for the requested information, then it would be unconstitutionally arbitrary for the Commission to take the opposite approach with respect to Initial Request Nos. 3 and 44.<sup>3</sup>

### CONCLUSION

For all the foregoing reasons, the Commission should reverse those portions of its Second Order that relate to KAWC Initial Request Nos. 3 and 44 and order that LWC is not required to respond further to those requests.

Respectfully submitted,



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Barbara K. Dickens  
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<sup>3</sup> Both KAWC and the Second Order also fail to note that, in addition to objecting to KAWC Initial Request No. 44, LWC answered the request by affirming its ability to continue providing water during unexpected power outages and stating that it "has two water treatment plants: the Crescent Hill Filtration Plant and the B. E. Payne Water Treatment Plant. Both plants have redundant power feeds from the power supplier, LG&E. In addition, both plants have backup power supplies that allow LWC to produce water to meet average demand under blackout condition." *Id.* KAWC does not need more information than this to present its case in this matter, especially when that information comes at the risk of security to critical infrastructure.



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-and-



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by was served via first-class United States mail, sufficient postage prepaid, on the following individuals this 5th day of November, 2007:

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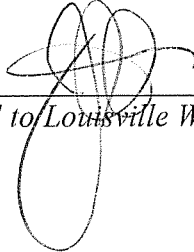
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