

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 )  
IMPROVEMENTS PROJECT PURSUANT TO KRS )  
278.020 AND 278.300 )

ORDER

Forest Hills Residents' Association, Inc. ("Forest Hills") and William Bates (collectively "Intervenors") have moved to strike portions of Jessamine-South Elkhorn Water District's ("Water District") brief for referring to materials not part of the record. The Water District has submitted a response in opposition. We grant the motion in part and deny in part.

In their motion, the Intervenors identify several portions of the Water District's brief which, they contend, rely upon filings of Kentucky-American Water Company ("KAWC") and the Office of the Attorney General in unrelated proceedings.<sup>1</sup> They argue that the Water District's introduction of such materials through its brief after the close of testimony is contrary to 807 KAR 5:001, Section 1. They further argue that allowing the Water District to submit such material through its brief deprives them of

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<sup>1</sup> Case No. 2012-00096, *Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing Construction of the Northern Division Connection* (Ky. PSC filed Mar. 30, 2012); Case No. 2007-00134, *Application of Kentucky-American Water Company for a Certificate of Convenience and Necessity Authorizing the Construction of Kentucky River Station II, Associated Facilities and Transmission Main* (Ky. PSC filed Mar. 30, 2007); Case No. 2005-00039, *Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing the Construction of a Two (2) Million Gallon Elevated Storage Tank and 1200 Feet of 24-Inch Water Main* (Ky. PSC filed Jan. 21, 2005).

their right to due process, since they have no opportunity to cross-examine or rebut such materials. They also assert that none of the materials at issue are relevant.

The Water District does not contest that the materials at issue were materials submitted in other Commission proceedings by persons or entities who are not parties to this proceeding. It further does not contest the proposition that these materials were not previously part of the record of this proceeding. Instead it advances several legal arguments for the admissibility of the materials and against Intervenors' right to submit a motion to strike.

First, the Water District argues that 807 KAR 5:001, Section 11(4), does not preclude the introduction of the materials through the Water District's brief. It notes that it has offered no documentary evidence with its brief, but has only referred to documents that have been filed in other Commission proceedings. It further notes that documents at issue were not prepared after the conclusion of a proceeding to be offered as additional evidence of some claim, but that they are pre-existing documents. It further notes that 807 KAR 5:001, Section 11(5), permits the incorporation by reference of existing records and that such incorporation does not necessarily occur before the close of testimony.

807 KAR 5:001, Section 11(4), provides:

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.

To the extent that a party in its brief refers to or quotes from a document that is located outside the record after the close of testimony, it is seeking to introduce a

portion of that document into the closed record. The document need not be physically attached to or a part of a paper<sup>2</sup> that the party files. We find nothing within the literal language of the regulation to suggest that the prohibition applies only to documents created after the close of the record. Accordingly, we construe the Water District's efforts to quote or refer to documents not part of the record as contrary to Section 11(4).

We find no merit to the argument that Section 11(5) supports the Water District's actions. That section does permit the incorporation by reference of documents on file with the Commission upon motion. No motion to incorporate by reference the materials at issue, however, has been made. Moreover, while Section 11(5) does not specify a time limit on when such motion can be made, the Commission is of the opinion that to the incorporation of materials after the close of testimony without the agreement of all parties or in the absence of unusual circumstances would be inconsistent with Section 11(4).

As to the Intervenors' argument of denial of due process, the Water District asserts that, because the Intervenors have employed the same counsel as KAWC employed in Case No. 2012-00096,<sup>3</sup> they cannot assert surprise to the documents submitted by and arguments advanced by that very same counsel. They were, the Water District asserts, fully aware of the evidence and chose not to discuss that evidence in their brief. To prevent the Water District from presenting evidence of the

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<sup>2</sup> 807 KAR 5:001, Section 1(8) defines "paper" as, "regardless of the medium on which it is recorded, an application, petition, or other initiating document, motion, complaint, answer, response, reply, notice, request for information, or other document that this administrative regulation or the commission directs or permits a party to file in a case."

<sup>3</sup> In its Response, JSEWD asserts the "common counsel" argument to address objections to references from Case No. 2012-00096. It makes no assertion of common counsel for the other two proceedings, Cases No. 2005-00039 and No. 2007-00134.

conflicting positions that Intervenor's counsel has taken in the two proceedings, the Water District argues, effectively deprives the Water District's right to due process.

The Commission finds little merit to Water District's assertion of common counsel. The Water District has provided no supporting authority for the proposition that, when a person retains an attorney or law firm, he or she adopts the positions of every other client that the attorney or his law firm has ever represented. Retention of the same law firm is not enough to bind KAWC's evidence and arguments in Case No. 2012-00096 to the Intervenor's in this case.<sup>4</sup> The Water District has failed to show any relationship between the Intervenor's and KAWC. The Intervenor's were not a party to Case No. 2012-00096. The Water District has failed to identify any common interest that Intervenor's had in the subject matter of that proceeding.

Assuming that the Water District demonstrated the existence of a relationship between Intervenor's and KAWC, the introduction of new evidence into record at this stage of the proceeding through the Water District's brief still raises serious due process concerns. The record in Case No. 2012-00096 closed in November 2012. We issued our final Order on February 28, 2013. The Water District, therefore, had ample opportunity to present this evidence at the hearing on this issue in direct or rebuttal testimony or to cross-examine the Intervenor's witnesses on the Intervenor's "conflicting positions." In failing to introduce this evidence until after the close of the testimony, the Water District has deprived the Intervenor's of notice that KAWC's positions on storage facilities were an issue and of any opportunity to address this evidence or to confront

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<sup>4</sup> The Water District has presented no evidence that Intervenor's retained its counsel to represent their interests in Case No. 2012-00096 or that KAWC retained Intervenor's counsel to represent its interest in this proceeding.

the Water District's claim of conflicting positions. Such notice and opportunity are the essence of due process.<sup>5</sup>

The Commission agrees that findings of fact set forth in a Commission Order may for purposes of argument be referenced and discussed in a brief in another Commission proceeding. A party may properly use such findings to argue that a prior Commission decision supports its requested relief or to distinguish the earlier Commission decision from the circumstances of current proceeding. In its brief, however, the Water District refers not to the Commission's findings in a Commission Order, but to an unrelated entity's discovery responses, testimony, and post-hearing brief. It does not discuss the holding in our decision in the other proceeding, but instead elaborates on the standards that the unrelated entity employs in the operation of its water distribution facilities. In doing so, the Water District injects the issues of an unrelated proceeding into the current proceeding.

Having considered Intervenors' Motion to Strike and the Water District's Response and having carefully reviewed the Water District's Post-Hearing Brief, the Commission finds that the Water District has sought to introduce evidence after the close of testimony through its Post-Hearing Brief and that those portions of the Water District's Post-Hearing Brief that discuss materials for other Commission proceedings that have not been introduced or incorporated by reference into the record of this proceeding or are not specifically set forth in a Commission Order should be struck and disregarded. We further find that those portions of the Water District's Post-Hearing Brief that discuss or reference findings in Commission Orders should not be stricken.

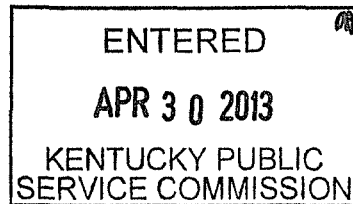
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<sup>5</sup> We do not hold that a party may not refer to Commission orders from other proceedings to support a legal claim in a post-hearing brief.

IT IS THEREFORE ORDERED that:

1. Intervenor's Motion to Strike is granted in part and denied in part.
2. The following portions of the Water District's Post-Hearing Brief are struck:
  - a. Footnotes 36, 38, 64, and 65; and
  - b. Footnotes 40, 41, 42, 44, 48, 49, 50, 51, 52, 67, 74, 75, 76 and the accompanying text to those footnotes;
3. Those portions of Intervenor's Motion that seek to strike Footnotes 37 and 66 are denied.

By the Commission



ATTEST:

  
Executive Director

Case No. 2012-00470

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