

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION INTO THE FUEL)
PROCUREMENT PRACTICES OF KENTUCKY) CASE NO. 9631
UTILITIES COMPANY)

O R D E R

On August 26, 1988, Kentucky Utilities Company ("KU") filed a motion requesting, in the alternative, that the Commission: (1) enter a final Order, consistent with the RCG/Hagler Bailly, Inc. Report ("Report"), finding that KU's fuel procurement practices have been reasonable and prudent, and approving all prior fuel clause adjustments; (2) if a final Order is not now entered, further proceedings be limited to cross-examination of the Report, discovery, and rebuttal testimony by RCG/Hagler Bailly, Inc. ("Consultant"), and KU; or (3) if further proceedings are not so limited, KU be given detailed notice of the claims against it and the further proceeding be structured to afford KU a full and fair opportunity to rebut said claims. On August 31, 1988, KU filed a request to present oral argument on its motion.

The grounds for KU's first motion are that since an independent consultant, retained by the Commission, has reviewed KU's fuel procurement practices and found them to be reasonable, there can be no claim of imprudence and no basis for further proceedings. KU supports its alternative motions on due process grounds. Specifically, KU seeks to compel the intervenors and Commission

Staff to identify in detail all challenges to the Report and to prefile evidence in support of those challenges. Further, KU requests full discovery rights, including the right to depose witnesses, the opportunity to file rebuttal testimony, a prohibition of participation by Staff in any hearing unless Staff is subject to discovery regarding its supervision and review of the Report, and a requirement that Staff be bound by the procedural schedule including submission to cross-examination.

The Attorney General's Office, Utility and Rate Intervention Division ("AG"), filed a response in opposition to KU's motion on September 2, 1988. The AG notes that the Commission's July 10, 1986 Order, which established this investigation as a docket separate from the Fuel Adjustment Clause reviews, announced the Commission's intent to retain the services of an independent consultant. The Commission's Order further stated that "subsequent to the submission of the consultant's report, it will schedule a hearing to allow all parties the opportunity to present testimony and cross-examine the consultant and all other witnesses." July 10, 1986 Order, page 4.

The AG argues that the Commission's 1986 decision to subsequently hold a trial-type hearing indicates that the Report would be but one piece of evidence to be considered in this investigation and that the Commission expressed no intent to delegate its adjudicatory power to a consultant.

By Order entered September 16, 1988, the Commission granted KU's request for oral argument on its pending motion. Oral argument was held at the Commission's offices in Frankfort,

Kentucky, on October 10, 1988. The participants included KU, the AG, Kentucky Industrial Utility Customers ("KIUC"), Lexington-Fayette Urban County Government, and Mr. Don Wiggins.

At the oral argument, KU stated that its motion addressed two issues: the legal effect to be given the Consultant's Report; and the appropriate role of Staff. As to the first issue, KU notes that the Commission, acting pursuant to its statutory authority, initiated this investigation and retained an independent consultant to review KU's fuel procurement practices. The Consultant has issued its Report, concluding that KU's actions were reasonable and not imprudent. KU argues that the Commission has completed its investigation, there are now no charges of imprudency pending against KU, and, consequently, there is no probable cause for the Commission to proceed to a hearing or trial of KU.

KU's second issue arises from the Staff's role of supervising the Consultant and reviewing and commenting on the draft Report. KU argues that the Staff should be restricted to a neutral role in any further proceedings, not permitted to conduct cross-examination in any hearing, and not permitted to advise the Commission. To allow Staff to otherwise participate would not be fair, KU claims, because the Report represents the product of Staff input and due process requires any Staff challenges to the Report be supported by Staff testimony.

KIUC's oral argument questioned the credibility of the Report based on the magnitude of the coal procurement documents needed to be reviewed and the contractual limitation on the number of hours

that the Consultant could devote to the Report. KIUC argues that it would be improper for the Commission to conclude that KU was prudent if relevant documents and other evidence are unavailable or never existed. Consequently, KIUC opposes any attempts to limit the scope of this proceeding. KIUC further states that if the Report is in actuality a Staff report, then additional discovery is necessary to determine the influence, if any, exerted by Staff over the Consultant.

The AG's position at oral argument is that the Report should not be dispositive of the issues set for investigation. The AG notes that the Report is the Consultant's, not the Commission's. The intervenors are entitled to conduct discovery and cross-examination of the Consultant, and to present additional evidence to the Commission in a trial-type hearing. The AG further states that if the Commission's ultimate decision on the fuel procurement issues is based on evidence that is not in the record, but is brought to the Commission's attention by Staff, then all parties should have the opportunity to confront that evidence and cross-examine Staff.

Based on the evidence of record, and being advised, the Commission is of the opinion and hereby finds that KU's motion to have a final Order now entered dismissing this investigation or, alternatively, to have the scope of this investigation limited to a review of the Report, should be denied. The Commission agrees with the AG's position that the Report is but one piece of evidence to be considered. It is the Commission, not the Consultant, that performs the adjudicative function to pass on the

reasonableness of KU's fuel procurement practices. Elementary principles of due process afford the intervenors the right to confront the Report and to have the opportunity to present evidence in a hearing.

The Commission further finds that KU's third motion, relating to the role of Staff, has limited merit. In deciding to retain the services of a consultant, the Commission did so for the express purpose of having KU's fuel procurement practices reviewed by an independent entity having experience and expertise in the subject matter. The Consultant's review of the facts and preparation of its Report was intended to be performed independently of the Commission, Staff, and all parties to this case. Despite the Commission's intent, KU argues that the Staff's supervision and review of the Consultant's work has transformed the Report into the Staff's Report.

The Commission flatly rejects the claim that the Staff can be deemed to have adopted a Report as a consequence of its supervision of an independent consultant. Staff is an integral part of the Commission. The Staff exists to perform the functions and duties assigned to it by the Commission. While the Commission has in certain limited instances directed Staff to prepare and file testimony or a report, no such direction was given in this case. Absent such prior authorization by the Commission, Staff currently lacks any authority to voluntarily, or involuntarily, present a formal Staff position in a case.

The Staff's traditional role is to ensure that the evidentiary record is fully developed so that the Commission will be able to make an informed decision. This role encompasses participation in discovery, cross-examination of witnesses, and providing technical advice to the Commission. The record in this case contains no valid reason to justify compelling Staff to abandon its traditional role and adopt an adversarial position.

The Commission further finds that the procedures followed in this investigation afford KU full and complete protection of its due process rights. The Commission's July 10, 1986 Order initiating this investigation put KU on notice as to the specific issues that would be subject to review in this case. The procedural schedule previously adopted by Commission's Order entered September 22, 1988 requires intervenors to file prepared testimony, if any, by December 21, 1988, and provides for a hearing to commence the week of February 27, 1989. That schedule also allows the parties the opportunity to conduct discovery, including depositions, and authorizes the filing of rebuttal testimony by KU.

These procedural steps are more than adequate to provide KU, and the other parties, their due process rights consistent with the Kentucky Court of Appeals decision in Utility Regulatory Commission v. Kentucky Water Service Co., Ky.App., 642 S.W.2d 591 (1982). In that case, the Court of Appeals quoted favorably from a United States Supreme Court opinion that,

A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause

forbids any agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.

Kentucky Water Service, page 593. KU's argument, however, goes beyond merely wanting to be afforded notice of the issues and evidence against it and an opportunity to rebut. KU seeks disclosure of the Staff's files and the right to cross-examine Staff on its opinions, irrespective of whether Staff files testimony in the case. KU claims that Staff:

[M]ust not be allowed to challenge the report in any respect by its "traditional role" of analyzing the evidence off the record and advising the Commission on how that evidence ought to be resolved. If staff is going to assume that role, it should do so on the witness stand.¹

Due Process does not entitle a party to an administrative agency proceeding the right to discovery and examination of the agency's Staff, absent the introduction of Staff testimony. KU previously presented this same request almost 6 years ago in its last general rate case, Case No. 8624, In Re: General Adjustment of Electric Rates of Kentucky Utilities Company. KU's request was rejected by the Commission's finding that:

Staff is an arm of this Commission: it is not an adversary party to a proceeding before us. Commission staff could no more be subject to cross-examination than could the law clerks of a judge or the staff attorneys of an appellate court. To allow such a procedure at this Commission would inhibit the free flow of ideas between staff members and Commissioners which is crucial to the functioning of our agency.

* * *

¹ Case No. 9631, Transcript of Evidence, October 10, 1988, page 70.

Just as the courts have rejected attempts to obtain the papers of the members of an administrative body and cross examine such members, so also has this protection been extended to the staff serving such commission or board members. The reasoning behind this salutary rule was well stated in T.S.C. Motor Freight Line, Inc. v. United States, 186 F.Supp. 777, 790 (S.D. Texas 1960), aff'd sub nom. Herrin Transportation Co. v. U.S., 366 U.S. 419 (1961):

Congress is aware of the tremendous volume of business which is the ultimate responsibility of the Commission, and hence the Commissioners. . . . Congress did not mean to leave this small group of Commissioners bereft of staff assistance in the assimilation of the great flood of formal cases requiring decision. The decision is still that of the Commissioners. Each bears full legal and personal accountability for that which bears his name or concurrence. The system requires a full public report of reasons and conclusions. With these safeguards Congress deemed the question of the identity and actions of staff assistants to be matters beyond question by the parties. (Emphasis supplied.)²

The Commission is aware of its obligation to base its decision solely on the evidence of record. Should KU or an intervenor believe that the Commission has strayed from this requirement, two remedies have been made available by the General Assembly. One is to apply for a rehearing pursuant to KRS 278.400; the other is to seek judicial review pursuant to KRS 278.410(1). These provisions, as well as the Due Process Clause, are intended to insure that litigants are afforded their opportunity to confront and refute the evidence against them. As the District of Columbia Circuit Court held in U.S. Lines v.

² Case No. 8624, Order dated January 13, 1983, pages 1-4.

Federal Maritime Commission, 584 F.2d 519, 534-5 (D.C. Cir. 1978),

[I]f the substance or identity of the data upon which the agency has relied is permitted to remain hidden until judicial review, the courts may well find themselves called upon to resolve novel disputes as to the truth of what the agency thought it knew, disputes which should have been resolved either in the initial hearings before the agency or on reconsideration.

* * *

This is not to say that an agency may never rely on data in its files, or on public information, in reaching its decision. Rather, we hold only that the agency must either disclose the contents of what it relied upon or, in the case of publicly available information, specify what is involved in sufficient detail to allow for meaningful adversarial comment and judicial review. While such disclosure would ideally appear appropriate at the earliest stage of the agency proceeding, at the very least it is clear that it must come in the final decision so that reconsideration may be sought and judicial review meaningfully afforded.

The mere fact that the Staff supervised the Consultant and provided comments on the draft Report does not disqualify the Staff from participating in the hearing and advising the Commission in the adjudicative phase of this case. The United States Supreme Court has rejected claims similar to KU's on finding no due process violation. In Withrow v. Larkin, 421 U.S. 35, 52, 43 L.Ed.2d 712 (1975), the Court said that:

It is not surprising, therefore, to find that "[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process" 2 K. Davis, Administrative Law Treatise § 13.02, p 175 (1958). Similarly, our cases, although they reflect the substance of the problem, offer no support for the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating. The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle.

While it is clear that an agency may combine its investigative and adjudicatory functions and still pass constitutional muster, it should be noted that the Commission had no contact with the Consultant during the preparation of the Report. Furthermore, it is the Commission, not the Staff, that will make the final decision regarding the prudence of KU's fuel procurement practices. The Staff's role in that decision is limited to providing advice and recommendations to the Commission upon request.

The Commission is, however, aware that Staff's supervision of the Consultant may have given the appearance that the Consultant's Report is either a product of Staff or reflective of Staff's views and opinions. Therefore, the Commission finds that KU has presented reasonable cause to subject the Staff to limited inquiry regarding its role in working with the Consultant. This inquiry should extend only to the Staff member previously designated by the Commission as the Project Manager, since only that individual had supervisory authority over the Consultant. The Project Manager will be directed to file testimony on the issues of Staff control of the Consultant and Staff comments on the draft report. A copy of the Project Manager's notes and correspondences relating to these issues will also be filed.

IT IS THEREFORE ORDERED that:

1. KU's motion requesting the entry of a final Order finding KU's fuel procurement practices to be reasonable, or, in the alternative, a limitation on the scope of the further proceedings in this case, be and it hereby is denied.

DISSENT OF CHAIRMAN RICHARD D. HEMAN, JR.
Case No. 9631 - Kentucky Utilities Company
Order entered October 28, 1988

I respectfully dissent from the majority Opinion and Order to the extent that the Order indicates that the "traditional" role of the Staff is a proper role and that these procedures "afford Kentucky Utilities Company full and complete protection of its due process rights". My dissenting opinions in Case No. 10069 (Kentucky-American Water Company) and Case No. 10064 (Louisville Gas and Electric Company) relate to the views expressed here and are attached as Appendix A and Appendix B.

The "traditional" role of the Staff is generally to analyze the evidence and advise the Commission. Mr. Richard Raff, Staff Counsel, states at page 63 of the transcript of the oral argument:

"The staff will have, after all the record of evidence is compiled, the staff will have analyses that will assist the Commission in reaching a decision."

The prevailing role of the Staff is described in "The Regulation of Public Utilities", Second Edition, by Charles F. Phillips, Jr., Public Utilities Reports, Inc., 1988 at page 188:

"Before the case is called, the utility, the Commission staff, and intervenors (interested parties) will file their testimony..."

There is a discussion of this procedure in "The Balancing Act", a film endorsed by the National Association of Regulatory Utility Commissioners and the Consumer Federation of America.

The above references concern rate proceedings. See the weekly newsletters ("blue sheets") of the National Association of Regulatory Utility Commissioners relative to commission and staff actions at the various state commissions. Also see the procedures and practices of the state utility regulatory commissions of the United States.

The "traditional" role means that the Staff position or direction is not disclosed except as it may be perceived from an issues list, requests for information, and cross-examination of witnesses by Staff at a hearing. In the rehearing held September 21, 1988 in Case No. 10064 (Louisville Gas and Electric Company, Mr. Lane Kollen, witness for the Kentucky Industrial Utility Customers, was questioned by Mr. Kendrick Riggs, counsel for Louisville Gas and Electric Company. Mr. Riggs asked Mr. Kollen why he did not file testimony on the accounting treatment of sulphur dioxide removal systems and the abandonment of gas storage fields in the initial part of the proceeding. Mr. Kollen responded (Volume II, page 83):

"I just didn't choose to put in testimony. I knew that the Staff was asking questions on it. I was not certain at the time what direction they were heading. I knew they would have some dispute with you as to the treatment of the retirements, but I chose not to get involved in that argument at that time."

And, again, at page 84:

"As I indicated before, I knew that they were looking into this issue, and as to which direction they were going to come down on it, in terms of the reflecting it in the Order or not reflecting it in the Order, I had no way of knowing."

Mr. Raff objected indicating that there is no acceptance or non-acceptance of any adjustment by Staff -- that this was a Commission Order. In any event, it would be an understatement to say that there is considerable interest in where the Staff is coming from, where it stands, where it is heading, and where it will stand at the end.

In addition to the parties, the Commission needs the positions of the Staff much earlier in the process. We don't get this from the "traditional" role. Prefiled testimony would afford an initial point of evaluation and a broader view of the issues. Discovery procedures applicable to Staff would provide additional information. Cross-examination of Staff tests the positions set forth in testimony and discovery. Finally, the Commission should have a post-hearing brief filed by participating Staff simultaneously with the other parties. This is an opportunity for Staff to assess on the public record all of the evidence and to make its final arguments.

"Neutrality" of the Staff as discussed at page 62 can be explained as the obligation to meet the dual responsibility of the Commission and to balance the various interests in determining what is in the overall public interest. It cannot be explained as being non-adversarial on the issues.

Mr. Richard Newell, counsel for Kentucky Utilities Company, expresses a concern (page 19): "Staff is good and getting better

all the time. They have expertise." So he wants to know where the Staff stands and to have an opportunity to cross-examine and present rebuttal testimony. I agree - the Staff does indeed have expertise. We must get on with the job -- ventilate our process and move forward.

Richard D. Heman, Jr.
Richard D. Heman, Jr.
Chairman
Public Service Commission

DISSENTING OPINION OF RICHARD D. HEMAN, JR.

Case No. 10069 - Kentucky-American Water Company

At the hearing held May 5, 1988, to consider the reasonableness of the proposed settlement between Kentucky-American and Staff, the Attorney General and the Lexington-Fayette Urban County Government filed a Motion to Reject "Proposed Settlement". Among other things, the Motion stated that the Order (Settlement) is unlawful in that it does not permit Intervenors to confront and examine Staff. The Commission overruled the Motion. My concern goes to the refusal to allow Intervenors to question Staff, and I believe the Commission should reconsider its ruling.

I believe the Commission may approve contested settlements provided a party not signing the settlement agreement is afforded an opportunity to present evidence and cross examine witnesses at the settlement hearing. This includes examination of Staff. Staff did not prefile testimony. However, I believe the settlement procedure used here is valid provided we allow direct examination and cross examination of Staff (and discovery, if necessary).

The Motion also referred to the burden of proof. The utility clearly has the burden of proof with respect to the reasonableness of its proposed rates (KRS 278.190). I do not believe the burden has shifted.

At the hearing there was discussion as to the "burden of going forward" on the party (or parties) who have not agreed to the settlement (Transcript at page 21 and following). The burden of going forward is not a shifting of the statutory burden of proof. However, I think the Attorney General makes a good point at page 22 - "Well, I don't think we should have to have the burden of going forward either, because we have not had the opportunity to cross examine the staff, we have not had the opportunity to do any discovery".

In my judgment the "burden of going forward" is not fairly assigned without the opportunity to question the Staff.

I do not agree with the position set forth in the Motion that Staff can only participate in a settlement conference on an informal basis, and that the Staff cannot take a formal position with respect to the reasonableness of the settlement. Staff is a necessary participant. The procedures followed by many Commissions of which I am aware do not require that Staff be formally designated a party in order to fully and formally participate in a settlement proceeding or to file testimony, submit briefs and the like. The regulations of our Commission do not preclude active, formal participation by Staff in the negotiations. But if these regulations need to be clarified, let us do so.

The settlement process is a viable alternative to litigation in balancing the interests of the parties and arriving at a

result which is in the public interest. As stated, the Staff must participate. Staff represents the public interest, that is, the statutory obligation of the Commission to establish rates which (1) allow the regulated utility to remain viable in order to provide safe and adequate service, and (2) allow consumers to receive service at rates which are fair, just and reasonable.

The Staff perspective, although coinciding on some issues, differs from that of the other participants. The Staff represents no particular constituency. It has no ax to grind. In negotiations the Staff cannot be merely an observer, an advisor, a mediator, a conciliator, an arbitrator, or a referee. Rather, it must independently and vigorously negotiate for the public interest.

In this instance ground rules were not established at the beginning of the settlement conference. Staff was not informed by the Commission that it should be prepared for direct examination, cross examination and possible discovery at the settlement hearing should an agreement be reached which did not include all participants. This was an error. However, a subsequent proceeding could be scheduled for this purpose.

Questions have been raised concerning due process - and fairness. The Commission and Staff are implementing Staff testimony in cases. We must press forward. This is the practice of virtually every Commission in the land. It will facilitate settlements. It will provide accountability. It will

enable the Commission to more fully assess Staff positions. It will result in a better and more complete public record on which a decision can be based.

I doubt whether any regulator would deny the extremely important role of the Staff and its significant and necessary input into Commission decisions. In a recent Commission case [Case No. 9310, Sanitation District No. 1 of Campbell and Kenton Counties, November 13, 1985 Transcript, Pages 34 and 35] the question was asked from the bench whether, by the same reasoning being applied by Applicant's counsel to the Commission Staff, due process rights would be violated if a clerk to a Judge had expressed strong opinions about a case after analyzing it and communicated those to a Judge in a conference room and yet was not subject to cross examination on the witness stand. William Robinson, counsel for Applicant, responded, in part:

"I would not begin to speak as President of the Kentucky Bar Association without the authority of our Board on this or any other issue. But if I might just speak as counsel for the Sanitation District in this hearing, I can only say in comment with very quick reflection obviously, that in our dealings with the staff, and for me this is a new experience, we did not understand ourselves to be dealing with a clerk to a Judge, but we understood ourselves to be dealing with someone who purports to be in an adversary situation, who purports to, and I say that professionally not anything other than professional adversary, it is the nature of the system as I have seen it so far, and it is in any context professionally for someone like myself. We can prepare our side of the case, but to point out the obvious, Commissioner, we cannot rebut an argument that we cannot hear. We cannot rebut proof that we do not see. We can only come before you and argue the proof that we do see, that we did develop at some considerable expense and that we did present conscientiously and in good faith..." (Emphasis supplied.)

It is the nature of the system I have observed.

I believe the Commission should reconsider its ruling with respect to the Motion of the Attorney General and Lexington-Fayette Urban County Government. We should either (1) schedule a hearing for the purpose of direct examination and cross examination of Staff on the proposed settlement or (2) reject the settlement agreement and proceed to a hearing on the merits of the case.


Richard D. Heman, Jr.
Chairman
Kentucky Public Service Commission

DISSENTING OPINION OF RICHARD D. HEMAN, JR.
Case No. 10064 - Louisville Gas and Electric Company
Order Entered September 6, 1988

In Case No. 10069 (Notice of Adjustment of the Rates of Kentucky-American Water Company) the Staff and the Company signed a settlement agreement. In my dissent to the Commission's Order entered June 3, 1988, I contended that the Attorney General and Lexington-Fayette Urban County Government, Intervenors, should have an opportunity to cross-examine the Staff. Since that dissent relates to the views expressed here, a copy is attached (Appendix A).

The accounting treatment of the sulphur dioxide removal systems and the abandonment of the gas storage fields was a Staff issue. Staff prepared data requests and undertook extensive cross-examination. This was an important initiative on a complex issue which resulted in an adjustment of approximately \$2.2 million.

The absence of Staff testimony (and cross-examination) in the public record is a continuing concern. It is especially troublesome when we have an issue initiated by Staff. The focus usually seems to be on "notice", that is, was proper notice given of an issue to be examined by Staff. If notice of an issue and information requests concerning that issue constitutes due process, it is, in my opinion, an inferior kind of due process. We stand virtually alone among the state regulatory commissions in this regard. This is not good enough. We must do better.

Staff testimony is now submitted in cases involving small utilities (Staff Report) and medium-sized utilities (prepared questions and answers). We have made considerable progress. As we aim toward the large cases the question of Staff resources arises. However, if Staff cannot provide testimony on all of the issues in a major case at this time, it can do so on some of the issues.

As to Staff resources - on many issues Staff cross-examination consumes a great deal of time and requires much preparation as it did in this case. This is a demonstration of what I think everyone must have observed for a long time - that is, it is arduous and extremely difficult to establish a position or develop a case only by cross-examination. This should be kept in mind when we consider time and resources.

Further (on resources) - the absence of Staff testimony or a Staff Report slows a major policy objective of the Commission: the establishment of case settlement procedures. In many instances settlements could save time and resources. We have cancelled settlement conferences or declined to schedule settlement conferences because of the need to have Staff testimony either by prepared questions and answers or a written report. The participants in settlement conferences should establish initial positions in written form.

The long debate in this case over the Staff request that the Company provide a regression analysis relative to its proposed temperature adjustment and the Commission's ruling that it be

provided presents another dilemma. This is discussed at pages 8-9 of the brief of Anthony Martin, Counsel for Residential Intervenors:

"However, evidence to be used in deciding this case should have someone willing to stand up and take responsibility for it to be given any weight. This is the very minimal test." (Emphasis is Mr. Martin's)

Paul Reilender, Assistant Attorney General, agrees with Mr. Martin at page 26 of his brief:

"In addition to the due process claims raised by the intervenors regarding its introduction, there is the real and practical problem that no witness is sponsoring this regression analysis." (Emphasis is Mr. Reilender's)

The public record should include the positions considered by the Commission in reaching a decision. This is a significant issue. The Staff has done a great deal of work on the matter and should testify and be subject to cross-examination.

I would sustain the Motion of Louisville Gas and Electric Company.


Richard D. Heman, Jr.
Chairman
Public Service Commission