

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AUXIER WATER COMPANY)	
)	
COMPLAINANT)	
)	
V.)	CASE NO. 96-362
)	
CITY OF PRESTONSBURG AND)	
PRESTONSBURG CITY'S UTILITIES)	
COMMISSION)	
)	
DEFENDANTS)	

O R D E R

Auxier Water Company ("Auxier") has moved to incorporate by reference the testimony of Marilyn Eaton-Thomas that was filed in a prior Commission proceeding or, in the alternative, for the issuance of a subpoena to compel Ms. Thomas' appearance at the hearing in this matter. The Defendants have submitted a response in opposition to the motion. Having considered the motion and response thereto, the Commission denies the motion to incorporate by reference and grants the motion for issuance of subpoena compelling Ms. Thomas's appearance.

Auxier seeks to incorporate by reference the testimony of Marilyn Eaton-Thomas that was filed in Case No. 97-161.¹ In support of its motion, Auxier states that Administrative Regulation 807 KAR 5:001, Section 5(5), authorizes this action. It further

¹ Case No. 96-161, Sandy Valley Water District v. City of Prestonsburg and Prestonsburg City's Utilities Commission.

states that Ms. Thomas's testimony is relevant to the issues posed in Auxier's Complaint, that the Defendants have had the opportunity at the prior proceeding to cross-examine Ms. Thomas, and that Ms. Thomas would be unduly burdened by having to again appear before the Commission.

Our review of Administrative Regulation 807 KAR 5:001, Section 5(5), fails to support Auxier's contentions. While the regulation permits the incorporation of "documentary evidence," the evidence at issue is clearly testimonial. Moreover, while the Defendants had an opportunity to cross-examine Ms. Thomas in Case No. 96-161, the issues involved in that case are not identical to those in this proceeding. To permit the incorporation of her testimony, therefore, would deprive the Defendants of their right to due process.

The Commission also notes that Auxier has made no showing that Ms. Thomas is unable to testify. To the contrary, it requests a subpoena to compel her appearance if the Commission fails to rule favorably on its motion for incorporation by reference. Absent a showing that Ms. Thomas is unavailable, the Commission finds no basis to grant Auxier's motion.

Recognizing that Ms. Thomas's testimony is pertinent to this proceeding, the Commission finds that a subpoena compelling her appearance should be issued. In view of the limited time remaining before the scheduled hearing, the Commission will not require Auxier to file Ms. Thomas's written direct testimony. To ensure that the Defendants' rights are not prejudiced by the absence of written direct testimony or their inability to submit rebuttal testimony on subjects which Ms. Thomas may address in her

testimony, however, the Commission will entertain any motion by Defendants for further examination of Ms. Thomas after the conclusion of the scheduled hearing or for the opportunity to submit additional rebuttal testimony. Upon a showing that Defendants were prejudiced by the late introduction of Ms. Thomas's testimony, such motion will be granted.

IT IS THEREFORE ORDERED that:

1. Auxier's motion to incorporate by reference the testimony of Marilyn Eaton-Thomas is denied.
2. Auxier's motion to issue a subpoena to compel the appearance of Ms. Thomas is granted.

Done at Frankfort, Kentucky, this 9th day of February, 1998.

PUBLIC SERVICE COMMISSION


For the Commission

ATTEST:


Executive Director