COMMONWEALTH OF KENTCUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF LOUISVILLE GAS AND ELECTRIC COMPANY FOR APPROVAL OF AN ALTERNATIVE METHOD OF REGULATION OF ITS RATES AND SERVICES	) CASE NO. 98-426

In the Matter of:

APPLICATION OF KENTUCKY UTILITIES COMPANY FOR APPROVAL OF AN ALTERNATIVE METHOD OF REGULATION OF ITS RATES AND SERVICES	) CASE NO. 98-474

O R D E R

On August 26, 1999, the Community Action Council for Lexington-Fayette, Bourbon, Harrison and Nicholas Counties (CAC) filed a motion requesting clarification of the Commission s August 19, 1999 and August 24, 1999 Orders which respectively granted motions to strike two nonunanimous settlements. The first Order struck the Joint Agreement among Louisville Gas and Electric Company and Kentucky Utilities Company (collectively Applicants) and the Attorney General s Office; the second struck the Letter Agreement among the Applicants and the Division of Energy, Natural Resources and Environmental Protection Cabinet. CAC claims that in granting the motions to strike, the Commission s Orders raise other issues that need to be resolved prior to the commencement of the hearing on August 31, 1999.

CAC argues that the Applicants amended applications are inextricably intertwined with the Joint Agreement, that the amended applications themselves are in

the nature of settlement agreements because they provide that their provisions are not enforceable if the Commission modifies the proposed performance-based rate-making plan or requires additional rate reductions, and that the testimony attached to the amended applications contains numerous references to the Joint Agreement. Due to these references to the Joint Agreement, CAC argues that the testimony supporting the amended applications must be stricken in toto, leaving the amended applications with no evidentiary support and, consequently, no evidentiary value on the issues of performance-based rate-making. In addition, CAC takes issue with the Commission s finding in the August 19, 1999 Order that the Joint Agreement is cumulative to the amended applications.

Further, CAC urges the Commission to reconsider the ruling set forth in these two Orders that a party or non-party may file in the case record a statement of position on the pending issues. Such statements, CAC opines, have no evidentiary value and should only be placed in a public comment file which is not reviewable by the Commission or its staff to ensure that the statements are not considered as relevant evidence. In addition, CAC renews its previous motion requesting the Commission to strike from the record the references in the rebuttal testimony of Applicants witness Ronald Willhite that the United Way supports the amended applications. CAC argues that such references are not relevant evidence and cannot be considered by the Commission.

Based on the motion and being sufficiently advised, the Commission finds that the relief sought by CAC is not in the nature of clarifying the August 19, 1999 and August 24, 1999 Orders. Rather, CAC now seeks to strike all the testimony supporting

the Applicants amended applications and have the Commission determine that there is no evidentiary support for the performance-based rate-making proposals set forth in those amended applications.

The August 19, 1999 Order struck from the record both the Joint Agreement and all references thereto. Thus, the focus of this case is on the Applicants amended applications (and the consolidated rate complaints), not the terms or provisions of any nonunanimous settlement. This we believe comports with the decision in Kentucky-American Water Company v. Commonwealth, ex rel, Cowan, Ky., 847 S.W.2d 737 (1993). Since the Applicants did amend their respective applications to reflect the terms of the Joint Agreement, the Commission found it appropriate to strike the Joint Agreement for two reasons: that it was a nonunanimous settlement and its contents were cumulative to those of the amended applications. Even though the Joint Agreement may have preceded and been the basis for the amended applications, the Joint Agreement was cumulative since it added nothing of evidentiary value to the record that was not already there through the amended applications.

Whether the Applicants testimony in support of the amended application has any evidentiary value in light of the August 19, 1999 Order is not appropriate for determination at this point in the proceedings. Only after that testimony is subject to cross-examination at the public hearing and the parties have had an adequate opportunity to brief the issue, will that issue be ripe for a decision.

Further, the Commission finds that while its findings of fact must be supported by substantial record evidence, it would be a travesty for the Commission to exclude from the record comments and statements of positions from parties or members of the public.

The General Assembly has declared in KRS 278.310 that the Commission shall not be bound by the technical rules of legal evidence, thus leaving to the Commission the task of determining the weight to be given to each item submitted for the record. The Commission notes that for over 20 years it has allowed utility customers to make statements of position on the record at the commencement of major rate hearings. Typically, those comments have been from residential customers who may lack expertise in the rate-making process but feel strongly that their comments and positions are worthy of consideration by the agency conducting the hearing. The Commission similarly feels strongly that it would be a disservice to the rate-paying public of this Commonwealth if their comments and views on issues were excluded from the record. As the trier of facts, it is for the Commission to determine what, if any, evidentiary weight will be afforded statements submitted for the record. Therefore, the Commission will deny the request to strike from Mr. Willhite s testimony the references to the United Way, subject to CAC or any other party establishing that such testimony is inaccurate.

The Commission also finds that whether any commitment set forth in the amended application is illusory, unenforceable, or otherwise subject to withdrawal is an issue of fact to be determined after the hearing, not before.

IT IS THEREFORE ORDERED that CAC s motion for clarification of the Commission s August 19, 1999 and August 26, 1999 Orders and to strike portions of the rebuttal testimony of Mr. Willhite are denied.

Done at Frankfort, Kentucky, this 30th day of August, 1999.

By the Commission

ATTEST:

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Executive Director