

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF FARMDALE )  
DEVELOPMENT CORPORATION )  
FOR AN ADJUSTMENT OF RATES )  
PURSUANT TO THE ALTERNATIVE )  
RATE FILING PROCEDURE FOR )  
SMALL UTILITIES )

CASE NO. 2006-00028

O R D E R

On February 13, 2006, the Attorney General (“AG”) moved to be “present or otherwise participate” in any field review or audit that Commission Staff conducts as part of the Commission’s review of Farmdale Development Corporation’s (“Farmdale”) application for rate adjustment. In support of his motion, the AG stated that, as Commission Staff’s review “is for the purpose of examining evidence and establishing the evidentiary record that will serve as the basis upon which the Commission will make its determination,” he should be afforded “the opportunity for full and meaningful participation in this direct interaction with the Applicant by Commission Staff.”

After considering the AG’s motion, the Commission ordered that the AG address by memorandum certain issues concerning his and other intervening parties’ participation in Staff field reviews or audits. On April 7, 2006, the AG filed his

Memorandum in response to the Commission's Order. On April 18, 2006, Farmdale filed its response to the AG's Memorandum in opposition to the AG's request.<sup>1</sup>

In his memorandum to the Commission's Order, the AG argues that "as an intervenor, [he] has a right to be heard on the means of proof by the applicant or any other party to the proceeding."<sup>2</sup> He further argues that "due process includes the right to know what evidence is being considered."<sup>3</sup> The due process rule of fairness, he argues, mandates "that a party has the right to be apprised of the evidence and arguments considered by the Commission. For this reason, *ex parte* contacts are not favorites of the law."<sup>4</sup>

It is apparently the AG's position that the exclusion of the AG and other intervening parties at a Staff field review or audit raises due process concerns and constitutes an ostensible *ex parte* contact. The AG frequently intervenes in proceedings involving a sewer utility's request for rate adjustment made pursuant to the alternative rate adjustment procedure.<sup>5</sup> Despite his frequent intervention and his considerable

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<sup>1</sup> Response of Farmdale Development Corporation to the Attorney General's Written Memorandum in Response to the Public Service Commission's Order of March 20, 2006 (April 18, 2006) ("Farmdale's Response").

<sup>2</sup> Attorney General's Written Memorandum in Response to the Public Service Commission's Order of March 20, 2006 (April 7, 2006) ("AG's Memorandum") at 5 (citing Mayfield Gas Company v. Public Service Commission, 259 S.W.2d 8 (Ky. 1953)).

<sup>3</sup> AG's Memorandum at 5 (citing Kentucky American Water Company v. Commonwealth ex rel. Cowan, 847 S.W.2d 737, 741 (Ky. 1993)).

<sup>4</sup> *Id.* at 5-6 (relying on Louisville Gas and Electric Company v. Commonwealth of Kentucky ex rel. Cowan, 862 S.W.2d 897 (Ky. App. 1993)).

<sup>5</sup> *Id.* at 3.

reliance on the Commission Staff report as a basis for commenting, rarely does the AG request to be present at a Staff field review or audit.<sup>6</sup>

KRS Chapter 278 confers upon the Commission the exclusive jurisdiction over the regulation of rates and services of utilities within the Commonwealth.<sup>7</sup> In furtherance of its authority, the Commission has the right to adopt reasonable regulations to implement the provisions of KRS Chapter 278.<sup>8</sup>

The Commission's commissioners, officers, and employees have the statutory right to enter onto the premises of any utility subject to its jurisdiction for the purpose of examining any books or records, or for making any examination or test, or for exercising any power provided for the Commission in KRS Chapter 278.<sup>9</sup> Further, the Commission has the authority to call witnesses, take depositions, issue subpoenas, and hold hearings with all necessary process in hearings brought before or initiated by the Commission.<sup>10</sup> Neither the Kentucky Constitution nor the Kentucky Revised Statutes expressly address Commission Staff reviews and therefore neither allows intervenors to

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<sup>6</sup> To the extent that the AG argues that the exclusion of intervenors at a Staff field review or audit presents due process problems and potential *ex parte* issues, the Commission must weigh the fact that, although the AG regularly intervenes in these cases, rarely does he request to participate in field reviews or audits.

<sup>7</sup> KRS 278.040(2).

<sup>8</sup> KRS 278.040(3).

<sup>9</sup> KRS 278.230.

<sup>10</sup> KRS 278.320.

trespass or otherwise enter onto the property of a utility without the consent of the utility.<sup>11</sup> The Commission, however, does have authority to enter a utility's premises.<sup>12</sup>

The Commission's regulations provide that Commission Staff may conduct field reviews pursuant to the alternative rate adjustment procedure for small utilities.<sup>13</sup> If a field review is conducted and no hearing is held on the matter, then the Commission is to consider written reports that Commission Staff prepares and submits.<sup>14</sup> The Commission also considers the utility's prior two annual reports and its application. Importantly, intervenors may submit information requests to be answered by the utility, which shall be considered by the Commission.<sup>15</sup>

Contrary to the AG's position, due process does not require that intervening parties be allowed to participate in field reviews or audits. Due process requires, at a minimum, that persons forced to settle their claims of right and duty through the judicial process be given a meaningful opportunity to be heard.<sup>16</sup> The Commission's regulations provide ample opportunity and process for an intervening party to be heard

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<sup>11</sup> Farmdale objects to the AG's entry upon its private property. Farmdale's Response at 4.

<sup>12</sup> AG's Memorandum at 8.

<sup>13</sup> 807 KAR 5:076, Section 2(d).

<sup>14</sup> *Id.*

<sup>15</sup> 807 KAR 5:076, Section 2.

<sup>16</sup> Boddie v. Connecticut, 401 U.S. 371 (1971).

and “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.”<sup>17</sup>

The Commission’s regulations provide sufficient opportunity for an intervening party to enjoy due process absent participating in a Staff field review or audit. These regulations and the provisions of KRS Chapter 278 further provide the Commission with the discretion to allow an intervening party to, among other things, participate in a Staff field review or audit. Moreover, Administrative Regulation 807 KAR 5:076 provides adequate due process to all parties to a proceeding such that the absence of intervenors at a Staff field review or audit would not constitute an unlawful or prejudicial *ex parte* contact.

The Commission finds that the AG’s motion should be denied. As Commission Staff will prepare and submit a written report of its findings and be subject to discovery and cross-examination at any hearing in this proceeding, the AG’s participation in the Commission Staff review is not necessary to ensure the AG a meaningful opportunity to be heard or to defend the public’s interests in this matter.

IT IS THEREFORE ORDERED that the AG’s motion to participate in the field review or audit is denied.

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<sup>17</sup> See Utility Regulatory Commission v. Kentucky Water Service, 642 S.W.2d 591, 593 (Ky. App. 1982).

Done at Frankfort, Kentucky, this 14<sup>th</sup> day of June, 2006.

By the Commission

ATTEST:

A handwritten signature in black ink, consisting of several overlapping loops and flourishes, positioned above a horizontal line.

Executive Director