

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF KENTUCKY-AMERICAN)	
WATER COMPANY FOR A CERTIFICATE OF)	
PUBLIC CONVENIENCE AND NECESSITY)	CASE NO. 2007-00134
AUTHORIZING THE CONSTRUCTION OF)	
KENTUCKY RIVER STATION II, ASSOCIATED)	
FACILITIES AND TRANSMISSION MAIN)	

O R D E R

Louisville Water Company (“LWC”) has moved for rehearing of the Commission’s Order of October 29, 2007 in which we directed LWC to respond to certain discovery requests of Kentucky-American Water Company (“Kentucky-American”). We grant the motion in part and deny it in part.

On August 13, 2007, Kentucky-American served discovery requests upon LWC in accordance with the then existing procedural schedule in this proceeding. On October 1, 2007, LWC responded to these requests. Asserting that these responses were “inadequate, pose inappropriate objections, and flout both the Commission’s stated rules of procedure for discovery responses in this case and the Commission’s regulations pertaining to discovery responses,”¹ Kentucky-American, on October 11, 2007, moved for an Order requiring LWC’s immediate correction of these alleged deficiencies. On October 16, 2007, LWC submitted its response to this motion.

On October 24, 2007, the Commission issued its first Order on Kentucky-American’s motion. The Commission identified 20 responses to discovery requests that Kentucky-American asserted were deficient and briefly summarized Kentucky-

¹ Kentucky-American’s Motion to Compel Adequate Discovery Responses from Louisville Water Company at 1.

American's and LWC's positions on these responses in a table appended to the Order.² We limited our discussion to certain LWC responses, but specifically ruled on Kentucky-American's motion as it related to each of the 20 identified discovery requests.³ We further ordered that "[a]ny portion of Kentucky-American's Motion to Compel Adequate Discovery Responses that is not expressly addressed in this Order is denied."

On October 25, 2007, Kentucky-American, by electronic mail to Commission Staff, sought clarification of this Order.⁴ Noting the absence of a date for LWC's submission of certain information, counsel for Kentucky-American inquired whether this absence was intentional. Its counsel further noted that the Commission had not addressed in the Order of October 24, 2007 Kentucky-American's motion as it related to 7 discovery requests to which LWC objected on confidentiality grounds. As the Commission had not discussed these requests in the Order or listed them in the table appended to the Order, Kentucky-American's counsel inquired whether these omissions were also intentional.

On October 25, 2007, we acknowledged our oversight in failing to specify a date for LWC's response to Kentucky-American's Initial Discovery Request Nos. 46 and 117 and amended our earlier Order to require delivery of the requested documents by October 29, 2007. We imposed this deadline to be consistent with the other provisions of our Order of October 24, 2007, to avoid additional delay in this proceeding, and to

² Order of October 24, 2007 at Table I.

³ The Commission also expressly addressed Kentucky-American's motion for the reimbursement of costs associated with the reproduction of documents that LWC submitted in electronic medium in lieu of paper medium. See Order at 6.

⁴ E-Mail from A.W. Turner, Jr., General Counsel, Kentucky-American Water Company, to David Samford, General Counsel, Kentucky Public Service Commission (Oct. 25, 2007, 07:55 EDT). Mr. Turner also sent the message to all counsel of record.

minimize the prejudice that would accrue to other parties from LWC's failure to respond adequately to initial discovery requests.⁵

On October 29, 2009, the Commission issued an additional Order in which we acknowledged "our failure to address that portion of the motion that addresses . . . [LWC's] objections to certain discovery requests on the grounds that the requested information sought was 'confidential,' 'proprietary' or 'protected by the Homeland Security Act.'"⁶ While sustaining the majority of LWC's objections to the production of documents, we granted Kentucky-American's motion with respect to Initial Request Nos. 3 and 44.

LWC now moves for rehearing for the Order of October 29, 2007 on the grounds that our action "constitute[s] unconstitutional arbitrary action." It contends the Commission improperly failed to provide notice that we were "reconsidering" our initial decision and implies that this lack of notice deprived LWC of its right to due process by providing additional argument to the Commission on Kentucky-American's motion.

We find no merit in this argument. The Commission had acknowledged in its Order of October 29, 2007 that we had overlooked the portion of Kentucky-American's motion that related to LWC's objections on confidentiality grounds. As

⁵ The parties and Commission Staff's ability to conduct discovery had already been affected as a result of LWC's incomplete responses to initial discovery requests. The existing procedural schedule required all supplemental discovery requests to be served upon LWC no later than October 29, 2007. As a practical matter, therefore, the parties and Commission Staff could not engage in discovery on any materials that LWC produced in response to the Order of October 24, 2007.

⁶ Order of October 29, 2007 at 1.

we had not addressed these issues in our Order of October 24, 2007, we were not reconsidering an earlier decision.⁷ We clearly retain the authority to correct an error or omission in an earlier Order.⁸

We find no denial of LWC's right to due process in the manner by which we addressed our oversight. The Commission promptly reexamined Kentucky-American's motion and issued an Order addressing the overlooked issues.⁹ We based our decision solely upon Kentucky-American's motion and LWC's response. No party submitted new arguments. We fail to discern why LWC should be afforded an additional opportunity to present argument on a motion to which it had already responded and had had the last word. Due process did not require LWC to have a second bite at the apple to address arguments that it concedes it overlooked.¹⁰

⁷ While we accept full responsibility for our failure to carefully review Kentucky-American's motion and to address these issues in the initial Order, we note that the discovery requests at issue were identified in a footnote and, unlike the other discovery requests in dispute, not separately discussed at any length in Kentucky-American's motion. See Kentucky-American Water Company's Motion to Compel Adequate Discovery Responses at 3, fn. 7. In its motion for rehearing, LWC implies that the requests at issue were not readily discernible. See LWC's Motion for Rehearing at 1 (stating that the additional requests were "[b]uried in a footnote to the Motion"). We make no comment on the appropriateness of the manner in which Kentucky-American presented its request for relief within its Motion to Compel.

⁸ See Mike Little Gas Co. v. Public Service Commission, 574 S.W.2d 926 (Ky.App. 1978).

⁹ We generally agree with LWC that the manner in which Kentucky-American sought to make us aware of our oversight is not the best practice. Rather than an electronic mail message to Commission Staff and the parties, the more appropriate method to advise the Commission of an error is a motion for clarification.

¹⁰ LWC's Motion for Rehearing at 2 (stating that the Commission had addressed "the same twenty issues that LWC believed were the subject of KAWC's Motion").

LWC also contends that the Order of October 29, 2007 is unsupported by substantial evidence. It states that the Commission has failed to offer any justification why the documents sought in Initial Request Nos. 3 and 44 were relevant to Kentucky-American's ability to present its case.

We find no merit in this contention as it relates to Initial Request No. 3. While the Commission's Rules of Procedure are generally silent upon discovery, the Kentucky Civil Rules make clear that scope of discovery is quite broad. If the requested material appears reasonably calculated to lead to discovery of admissible evidence, then the request is relevant.¹¹ Where a party objects to the request, the burden is upon the objecting party to demonstrate that the request is improper.¹² LWC, not Kentucky-American, bears the burden of proof.

With regard to its objection to Initial Request No. 3, LWC failed to meet this burden. In Initial Request No. 3, Kentucky-American sought a copy of "LWC's operating policies and procedures for water treatment, storage, distribution, and transmission" and a copy of any operations manual. LWC responded:

LWC objects that this request is unduly burdensome and seeks confidential and sensitive information protected by the Homeland Security Act.

LWC did not provide a description or summary of the material, did not explain the basis for its contention that the material was confidential, nor state how the Homeland Security Act applied to the requested materials. Despite having the opportunity to supplement its initial objection in its Response to Kentucky-American's Motion to

¹¹ Ky. Civil Rule 34.01; 26.02(1).

¹² Kurt A. Phillips, David V. Kramer, and David Burleigh, 6 Ky. Prac. R. Civ. Proc. Ann. Rule 33.01 (6th ed. 2007).

Compel and in its Motion for Rehearing, LWC continues to provide no support for its objection.¹³

LWC also failed to comply with the Commission's rules of procedure by its assertion of confidential treatment of the materials in question. Administrative Regulation 807 KAR 5:001, Section 7(5)(a), states:

No party to any proceeding before the commission shall fail to respond to discovery by the commission or its staff or any other party to the proceeding on grounds of confidentiality [emphasis added]. If any party responding to discovery requests seeks to have a portion or all of the response held confidential by the commission, it shall follow the procedures for petitioning for confidentiality contained in this administrative regulation. Any party's response to discovery requests shall be served upon all parties, with only those portions for which confidential treatment is sought obscured.

Our rules required LWC to file all of the requested materials with the Commission, together with a petition for confidential treatment of those materials, and to provide all parties with a redacted version.¹⁴ Assuming LWC's petition for confidential treatment was granted, the materials would not be subject to public disclosure and the parties would be permitted access to them only after entering into a protective agreement with LWC. LWC made no attempt to comply with this procedure even when Kentucky-American noted its existence in its Motion to Compel.¹⁵

¹³ In its Motion for Rehearing, LWC alludes to the possibility of a terrorist act, but provides no further information or argument. LWC's Motion for Rehearing at 6 (suggesting the Commission "would not want to put Kentucky's citizenry at risk by requiring disclosure of the highly sensitive information KAWC has requested").

¹⁴ 807 KAR 5:001, Section 7(2).

¹⁵ Kentucky-American's Motion to Compel at 4.

Upon reexamining LWC's response to Initial Request No. 44 and Kentucky-American's Motion to Compel, the Commission finds that Kentucky-American's motion as it relates to that request should have been denied. In its Motion to Compel, Kentucky-American failed to indicate that the information that LWC provided in response to the request was unresponsive. As Kentucky-American did not deem LWC's response as unresponsive or seek greater elaboration on this initial response, no need existed to address Kentucky-American's Motion as it related to LWC's assertion of confidentiality. To the extent that we granted Kentucky-American's motion and ordered an additional response,¹⁶ we vacate that portion of the Order of October 29, 2007.

In its Motion for Rehearing, LWC asserts that the Order of October 29, 2007 is "arbitrary and unconstitutional" because the Commission failed to apply a consistent standard in reviewing discovery requests. It notes that, in reviewing LWC's objections to Initial Request No. 3, the Commission required LWC to demonstrate that the request was improper. In denying Kentucky-American's motion with regard to Initial Request Nos. 21 and 22, the Commission required Kentucky-American to demonstrate a need for the requested information.

Having reviewed the Order of October 29, 2007, we agree with LWC's assertion that inconsistent standards were applied and that we erred in holding that Kentucky-American was required to demonstrate a need for the information requested in Initial

¹⁶ In our Order of October 29, 2007, we failed to expressly order the production of documents requested in Initial Request No. 44 or to expressly overrule LWC's objection. See Order of October 29, 2007 at 4. With regard to Initial Request No. 44, however, we stated: "[W]e find no basis to sustain LWC's objection and direct LWC to produce the requested information." *Id.* at 3.

Request Nos. 21¹⁷ and 22.¹⁸ In these requests, Kentucky-American requested usage information about LWC's top 50 industrial customers. LWC provided available information on the usage of these customers, but did not identify the specific customers, did not explain why the customers' identities were privileged or confidential, and did not apply for confidential protection of the information. Despite LWC's failures, we sustained LWC's objection.

Based upon a rigid and exact interpretation of the law, LWC should have been required to identify the customers in question. We chose not to compel production of the names because Kentucky-American did not deem the response to the request as unresponsive¹⁹ and because the Attorney General has recognized such information as warranting confidential treatment under the Open Records Act. In past Commission proceedings, such customer usage information has been provided without customer identities. Requiring the production of requested information when the requesting party was satisfied with the information produced and requiring the submission of an application for confidential protection for such information is an inefficient use of the administrative process and contrary to common sense. By this Order, we are modifying

¹⁷ Provide a list of the top 50 industrial customers by overall annual demand, their historical average daily demands for 2001 through 2006 and their projected average daily demands in 2020, 2025, and 2030.

¹⁸ What are the maximum monthly demands for each of these top 50 industrial customers for the last 5 years? Identify the month and year that the maximum monthly demand occurred.

¹⁹ In its Motion to Compel, Kentucky-American did not identify the response as non-responsive, but merely asserted that LWC should be required to comply with the Commission's rules of procedures that pertain to the confidential protection of information.

the findings of our Order of October 29, 2007 with regard to Initial Request Nos. 21 and 22 to reflect this reasoning.

Our ruling on Initial Request Nos. 21 and 22 does not render our ruling on Initial Request No. 3 “arbitrary” nor does it afford LWC any right to disregard Commission regulations or the basic rules of discovery. It does not serve as a basis to modify our decisions with respect to Initial Request No. 3.²⁰

The Commission finds that LWC’s motion for rehearing with respect to Initial Request No. 3 should be denied. We further find that, in an effort to expedite discovery in this matter and to avoid unnecessary delay and administrative procedures, LWC may, in lieu of filing the requested materials with the Commission and the parties of record, permit Kentucky-American representatives under the auspices of a protective agreement to inspect the requested materials and to copy any relevant materials. Should Kentucky-American desire to use any of the copied materials in the Commission proceeding, LWC may seek confidential protection of those materials.²¹

IT IS THEREFORE ORDERED that:

1. LWC’s Motion for Rehearing is denied in part and granted in part.

²⁰ LWC also makes similar contentions with regard to our decision on Initial Request Nos. 115 and 116. The Commission, however, did not base its decision on LWC’s objections of confidentiality. In its response to these requests, LWC clearly asserted that the requested materials were “not reasonably calculated to lead to the discovery of admissible evidence as it does not relate to KAWC’s evaluation, if any, of the Louisville Pipeline prior to the filing of its application. These responses were sufficient to shift the burden upon Kentucky-American to explain the need for the requested materials. In its Motion to Compel, Kentucky-American offered no explanation.

²¹ The Commission expects both parties to act reasonably in establishing the terms of an inspection of the materials in question and to notify the Commission immediately if agreement cannot be reached upon such terms.

2. LWC is not required to supplement its original response to Initial Request No. 44.

3. As it pertains to LWC's Response to Initial Request No. 3, LWC's Motion for Rehearing is denied.

4. No later than November 19, 2007, LWC shall provide to Kentucky-American a copy of LWC's "operating policies and procedures for water treatment, storage, distribution, and transmission" and a copy of any operations manuals.

5. In lieu of compliance with Ordering Paragraph 4 of this Order, LWC may permit Kentucky-American representatives under the auspices of a protective agreement to inspect the requested materials and to copy any relevant materials. Such inspection shall begin no later than November 16, 2007.

6. If LWC elects to permit Kentucky-American representatives to inspect the requested materials and to copy any relevant materials:

a. LWC shall, no later than November 16, 2007, notify the Commission in writing of its election, of the terms of any protective agreement under which it will allow inspection, and of Kentucky-American's response to such terms.

b. Kentucky-American shall advise the Commission in writing of any objections that it has to the terms of any proposed protective agreement.

7. The Commission's Order of October 29, 2007 with regard to our findings for denial of Kentucky-American's Motion to Compel with respect to Initial Request Nos. 21, 22, and 44 are modified to reflect the findings set forth in this Order.

8. All other provisions of the Commission's Order of October 29, 2007 shall remain in full force and effect.

Done at Frankfort, Kentucky, this 15th day of November, 2007.

By the Commission

Commissioner Clark Abstains.

ATTEST:


Executive Director