

**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION**

**IN THE MATTER OF:** )  
 )  
**NOTICE OF ADJUSTMENT OF THE RATES OF** ) **CASE NO. 2004-00103**  
**KENTUCKY-AMERICAN WATER COMPANY** )  
**EFFECTIVE ON AND AFTER MAY 30, 2004** )

**KENTUCKY-AMERICAN WATER  
COMPANY’S RESPONSE TO THE ATTORNEY  
GENERAL’S MOTION FOR SURREBUTTAL**

Kentucky-American Water Company (“Kentucky American Water”) opposes the October 13, 2004 Motion filed by the Attorney General of the Commonwealth of Kentucky (“Attorney General”) to be permitted to present surrebuttal testimony. The Attorney General’s Motion should be denied because the existing procedural order provides the Attorney General with due process, a fair hearing and ample opportunity for cross-examination of Kentucky American Water’s witnesses. The Attorney General’s Motion fails to establish the “good cause” that is necessary in order for surrebuttal testimony to be permitted.

First, the Commission has already addressed the issue of whether surrebuttal testimony will be allowed in this case. In its May 28, 2004 Order, the Commission established the scheduling deadlines for these proceedings and chose not to allow for surrebuttal testimony. Specifically, the Commission stated, “[a]t any hearing in this matter, neither opening statements, summarization of direct testimony, or surrebuttal testimony shall be permitted.” (May 28, 2004 Order, ¶ 6). Then, when the Commission revised its May 28, 2004 Order to allow for both a public hearing (later set to be held at Lexington’s Dunbar High School) and an evidentiary

hearing<sup>1</sup> (set to be held at the Public Service Commission), it specifically stated, “[a]t the evidentiary hearing on November 8, 2004, neither opening statements nor surrebuttal testimony shall be allowed.” (July 8, 2004 Order, ¶ 3). Clearly, the Commission has already considered the issue of whether surrebuttal testimony is permitted and had decided that it will not. The Attorney General’s Motion fails to acknowledge the fact that the Commission has already spoken on this issue.

Even if the Commission had not already decided this issue, the Attorney General’s Motion fails to establish the “good cause” necessary for surrebuttal testimony. In Case No. 2002-00232, a party moved the Commission for permission to submit data requests related to rebuttal testimony that had been filed by Louisville Gas and Electric Company (“LG&E”) *and* to file surrebuttal testimony to LG&E’s rebuttal testimony. The Commission held:

Based on the motion and the response thereto, and being otherwise sufficiently advised, the Commission finds that MHNA/POWER should be allowed an opportunity to file data requests relating to LG&E’s rebuttal testimony. However, since LG&E bears the burden of proof in this case, good cause has not been shown to justify the filing of surrebuttal testimony.

*(In the Matter of An Investigation of Louisville Gas and Electric Company’s Prepaid Gas and Electric Service, Case No. 2002-00232, November 20, 2002 Order,*<sup>2</sup> pp. 1 – 2). The Commission has considered such an issue as raised by the Attorney General and has concluded that “good cause” must be established for surrebuttal testimony to be permitted.

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<sup>1</sup> The Attorney General’s Motion requests “the opportunity to present surrebuttal during the presentation of his evidence at the *public* hearing for this case.” (Attorney General’s Motion, p. 1, emphasis added). Presumably, the Attorney General meant to seek permission to present surrebuttal testimony at the November 8, 2004 *evidentiary* hearing at the PSC and not at the *public* hearing to be held on November 4, 2004 at Lexington’s Dunbar High School, which was scheduled for the sole purpose of receiving public comment on the proposed rate adjustment.

<sup>2</sup> A copy of this Order is attached.

The Attorney General's Motion does not even acknowledge that "good cause" is required, much less establish it. Instead, the Attorney General's Motion claims surrebuttal testimony should be allowed so that due process and a fair hearing will be achieved. In support of that argument, the Attorney General presents "three factors [that] support the presentation of surrebuttal . . . ." None of the factors presented by the Attorney General establish "good cause" for surrebuttal testimony nor do they establish that due process will not occur absent surrebuttal testimony.

First, the Attorney General claims that because Kentucky American Water filed its updated base year information<sup>3</sup> after the Attorney General's pre-filed direct testimony was due,<sup>4</sup> it will not have "an opportunity to comment on or otherwise present evidence regarding this subsequent evidence." However, the Attorney General provides no explanation as to how surrebuttal testimony is necessary on this issue to ensure due process. Indeed, the existing procedural order allows the Attorney General to propound data requests regarding the updated base year information *and* any matters presented in Kentucky American Water's rebuttal testimony.<sup>5</sup> Clearly, the Attorney General will have ample opportunity to discover information on these issues. Moreover, the Attorney General will have ample opportunity to cross-examine Kentucky American Water's witnesses at the November 8, 2004 evidentiary hearing. Finally, the Commission's existing procedural order reflects the fact that, since Kentucky American Water has the burden of proof in this matter, it is entitled to the "last word." If the Attorney General is entitled to submit pre-filed surrebuttal testimony or to present surrebuttal testimony at

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<sup>3</sup> Pursuant to KRS § 278.192(2)(b), that information was filed on September 15, 2004.

<sup>4</sup> The Attorney General's pre-filed testimony was due on August 27, 2004 under the Commission's scheduling order.

<sup>5</sup> The deadline for any such data requests is October 22, 2004.

the evidentiary hearing for the first time, then the Commission would have to allow Kentucky American Water to submit sur-surrebuttal testimony. Clearly, that is an unnecessary and silly result.

The Attorney General's second argument in support of surrebuttal testimony is that it will allow him to present evidence regarding "adjustments, amendments, and changes in [Kentucky American Water's] positions subsequent to the Attorney General's direct testimony." But the Attorney General does not offer a single "adjustment, amendment or change" in Kentucky American Water's position that calls for surrebuttal. Without providing concrete examples of "adjustments, amendments or changes" in Kentucky American Water's positions, surrebuttal testimony on that basis cannot be allowed. Furthermore, even if there was such an "adjustment, amendment or change," the Attorney General would be entitled to discover information about it and would be entitled to cross-examine Kentucky American's witnesses about it at the November 8, 2004 evidentiary hearing. Those opportunities ensure due process and a fair hearing for all.

Finally, the Attorney General claims that Kentucky American Water's rebuttal testimony "presents additional evidence and issues" that justify a right to present surrebuttal testimony. The Attorney General goes on to say that some of the evidence used in Kentucky American Water's rebuttal testimony was available to Kentucky American Water before it filed its application and that some of the evidence was "in response to the Attorney General's direct testimony." Neither of these provide a basis for surrebuttal testimony. It is true that a 1995 water rationing plan from the Pennsylvania Department of Environmental Protection referred to by Mr. Bush was available to Kentucky American Water before it filed its application, but that fact has absolutely no relevance. The appropriate question is whether that evidence was used to

rebut the Attorney General’s direct testimony, which it was, or whether it was used to raise new issues that have not been raised in this case. Even a cursory reading of Coleman Bush’s rebuttal testimony (at pages 9 – 10) on this issue shows that he was merely rebutting direct testimony from the Attorney General’s witness Scott J. Rubin on the issue of the Emergency Pricing Tariff. Thus, this is not a new issue that was raised for the first time in Kentucky American Water’s rebuttal testimony and which would make surrebuttal testimony appropriate. It was offered for the proper purpose of rebutting the Attorney General’s direct testimony. Clearly then, surrebuttal is inappropriate. And, for the exact same reasons, any evidence in Kentucky American Water’s rebuttal testimony that is “evidence in response to the Attorney General’s pre-filed direct testimony” (as described in the Attorney General’s Motion) does not allow for surrebuttal testimony. Simply stated, Kentucky American Water’s rebuttal testimony accomplished the exact purpose of rebuttal testimony: it rebutted the Attorney General’s direct testimony. It did not present new issues to which the Attorney General has not already had a chance to address in its direct testimony. Therefore, surrebuttal testimony should not be allowed. To the extent the Attorney General wants to attack Kentucky American Water’s rebuttal testimony, it can propound discovery and cross-examine Kentucky American Water’s witnesses at the evidentiary hearing.

In Professor Schwemm’s *Report to the Public Service Commission of Kentucky on Due Process Issues in its Hearing Procedures*, he summarizes three particular procedural rights that have been recognized by the United States Supreme Court in affording due process: (1) the right to know what the issues in the case are; (2) the right to timely notice of the opposing evidence in the case; and (3) the right to a decision based on evidence in the record. Robert G. Schwemm, *Public Service Commission Report on Due Process Issues*, July 8, 1983, at 25. In this case, the

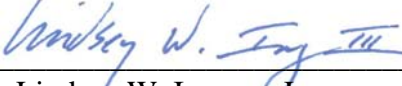
existing procedural schedule and Kentucky American Water's filings ensure that: the Attorney General knows or should know what the issues in this proceeding are; he has had timely notice of the evidence upon which Kentucky American Water relies; and that he will receive a decision based on that evidence. Thus, the Attorney General is receiving due process.

For the reasons set forth above, the Attorney General's Motion to Compel must be denied.

STOLL, KEENON & PARK, LLP

300 West Vine Street, Suite 2100  
Lexington, Kentucky 40507-1801  
(859) 231-3000  
(859) 253-1093 (fax)

By: \_\_\_\_\_

  
Lindsey W. Ingram, Jr.  
Lindsey W. Ingram III

Attorneys for Kentucky-American  
Water Company

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION OF LOUISVILLE GAS AND ) CASE NO.  
ELECTRIC COMPANY'S PREPAID GAS AND ) 2002-00232  
ELECTRIC SERVICE )

O R D E R

On November 13, 2002, Metro Human Needs Alliance and People Organized and Working for Energy Reform ("MHNA/POWER") filed a motion requesting the procedural schedule be amended to provide an opportunity to file data requests related to the rebuttal testimony to be filed by Louisville Gas and Electric Company ("LG&E") and to allow MHNA/POWER an opportunity to file surrebuttal testimony.

LG&E filed on November 14, 2002 a response to the motion. LG&E objects to modifying the procedural schedule to allow MHNA/POWER an opportunity to file surrebuttal testimony on the grounds that LG&E bears the burden of proof in this case and, accordingly, it is entitled to have the last word on the issues pending. On the issue of discovery related to its rebuttal testimony, LG&E states that it will file all workpapers and supporting calculations with its rebuttal testimony and that if any further discovery is authorized, it should be expressly limited to new issues raised in its rebuttal testimony.

Based on the motion and the response thereto, and being otherwise sufficiently advised, the Commission finds that MHNA/POWER should be allowed an opportunity to file data requests relating to LG&E's rebuttal testimony. However, since LG&E bears

the burden of proof in this case, good cause has not been shown to justify the filing of surrebuttal testimony.

IT IS THEREFORE ORDERED that:

1. That portion of the motion filed by MHNA/POWER requesting an opportunity to file surrebuttal testimony is denied.

2. That portion of the motion filed by MHNA/POWER requesting an opportunity to file data requests relating to LG&E's rebuttal testimony is granted. Any data request to LG&E shall be limited to those issues raised in its rebuttal testimony and shall be filed no later than December 3, 2002, and LG&E shall respond to those requests for information no later than December 17, 2002.

Done at Frankfort, Kentucky, this 20<sup>th</sup> day of November, 2002.

By the Commission

ATTEST:

Deputy W<sup>m</sup> H. Fowler  
Executive Director