

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Adjustment of Rates of Kentucky-) Case No. 2004-00103
American Water Company)

ATTORNEY GENERAL'S MOTION FOR DISCLOSURE
OF *EX PARTE* COMMUNICATIONS AND
COMMUNICATIONS PRIOR TO FORMAL PROCEEDINGS
IN CASE NO. 2003-00478 AND CASE NO. 2004-00103

Comes now the Attorney General and Moves for the Commission to disclose any and all communications of the Commission (the Commissioners, Staff, employees, or any agents) with Kentucky-American Water Company (employees, officers, agents, directors, counsel, of Kentucky-American or any of its corporate parents or affiliates) pertaining to or relating to the merits of this case as well as PSC Case No. 2003-00478¹ other than those to which the Office of the Attorney General was in attendance or otherwise present.

Further, the Attorney General moves for disclosure of any and all communications between the Public Service Commission and Kentucky-American (other than those to which the Office of the Attorney General was in attendance or otherwise present) that took place prior to the formal docketing of the proceedings in this case as well as PSC Case No. 2003-00478 that pertain to or

¹ *In the Matter of: Application of Kentucky-American Water Company for Approval of Accounting Accruals*, PSC Case No. 2003-00478.

relate to issues presented in these cases. In support of this Motion, the Attorney General notes the following:

In PSC Case No. 2000-00120 (Kentucky-American's most recent application for an adjustment in its rates), the Commission issued the following mandate regarding the creation of regulatory assets.

The Commission is concerned with Kentucky-American's present practice of deferring expenses as regulatory assets. **In the future Kentucky-American shall formally apply for Commission approval before accruing an expense as a regulatory asset**, regardless of the ratemaking treatment that the Commission has afforded such expense in previous rate case proceedings (emphasis added). The Commission will consider each expense independently with particular regard to materiality.²

This mandate was effective at the date of its issuance, and it remains in force. Kentucky-American has at all times since 27 November 2000 been under a duty to formally apply for the creation of a regulatory asset.

On 6 September 2001, Kentucky-American, by letter, made a request for Commission approval of the establishment of regulatory assets for six expenses.³ The Commission did not open a formal docket (case or proceeding) in response to or as a consequence of this letter. Commission staff did engage in a conference with Kentucky-American on 25 October 2001.⁴

² *In the Matter of: Application of Kentucky-American Water Company to Increase Its Rates*, Case No. 2000-120, Order, 27 November 2000, pages 23 and 24 (attached A - 1, A - 2).

³ Attached B - 1 to B - 3; KAWC Application, Miller Testimony, Exhibit MAM - 6, pages 4 - 6.

⁴ Attached C - 1; KAWC Application, Miller Testimony, Exhibit MAM - 7, page 1; In its response to AG 1 - 170, Kentucky-American does not identify this meeting as part of its activity to follow-up on the September 6th letter.

On September 24th, Kentucky-American, by letter, made a request for Commission approval of the establishment of two additional regulatory assets.⁵ Again, the Commission did not open a formal docket in response to this letter. The Commission did, however, issue a 15 October 2003 letter in which it advised Kentucky-American that “the Staff finds the request to establish a regulatory asset to accrue such cost should not be allowed.”⁶ Also noteworthy is language in the October 15th letter indicating that the Commission’s consideration of the request and its determination of the merits of the request were not done in a formal Commission process for consideration.

The Office of the Attorney General, which has a statutory obligation to represent the consumers’ interest, was unaware of these private negotiations until October 2003 when it became aware of the informal contacts and private meetings via a third-party.

On 30 October 2003, by a hand-delivered letter to the Commissioners, the Attorney General noted that the attempt to establish regulatory assets by a method other than a petition for formal consideration of the request violates the Commission’s mandate from Case No. 2000-00120.⁷ The letter also notes that (in addition to violating a Commission Order directly on point) “the failure to utilize the proper processes deprives the public of the right to monitor and meaningfully participate in the proceedings [for the consideration of the

⁵ C - 1 and C - 2; KAWC Application, Miller Testimony, Exhibit MAM - 7, pages 1 and 2.

⁶ D - 1 and D - 2; KAWC Application, Miller Testimony, Exhibit MAM - 7, pages 3 and 4.

⁷ E - 1, E - 2.

establishment of the regulatory assets].” Finally, the letter expressly requests the Commission to advise this Office of any additional proceedings on the matter.

In spite of the Commission’s mandate from Case No. 2000-00120 requiring a formal application and in spite of the Commission’s October 15th letter that indicates that the Commission’s consideration of the request to that date had been informal, Kentucky-American, by an 18 November 2003 letter, again made a request for further consideration of the request in its September 24th letter.⁸ The October 15th letter clearly goes well beyond a discussion of mere procedural aspects associated with the pursuit of the matter.

By a 21 November 2003 letter to the Office of the Attorney General, the Commission indicated that it would continue its review of Kentucky-American’s request and that it had asked the Company for additional information.⁹ The request was made by letter from the PSC to Kentucky-American on November 21st.¹⁰ Clearly, the Commission’s informal discussions with the Company related to more than a status inquiry or procedural matters. The discussions concerned the merits of an action requiring, by the Commission’s own Order in Case No. 2000-00120, formal Commission approval.

On 2 December 2003, the Attorney General hand-delivered a letter to the Commission noting his objection to the Commission’s private negotiation of a

⁸ F - 1 to F - 5; KAWC Application, Miller Testimony, Exhibit MAM - 8, pages 1 - 5.

⁹ G - 1.

¹⁰ H - 1, H - 2; KAWC Application, Miller Testimony, Exhibit MAM - 9, pages 1 and 2.

matter that, by a Commission Order, requires formal application.¹¹ Thereafter, Kentucky-American did formally apply for approval of certain regulatory assets, and the Commission opened a formal proceeding, Case No. 2003-00478. Subsequent to Kentucky-American's filing of this application for an increase in rates, the Commission, upon the Attorney General's motion, merged the subject-matter of Case No. 2003-00478 into this case, Case No. 2004-00103.

The following facts are beyond debate. In Case No. 2000-00120, the Commission issued a mandate requiring a formal application process for Kentucky-American's requests for regulatory assets. Prior to the docketing of Case No. 2003-00478 in December 2003, the Commission and Kentucky-American engaged in a series of informal discussions and communications regarding the merits of a matter requiring formal Commission approval.

While the Commission has some ability to engage in one-on-one communications with an applicant or a party regarding "legitimate procedural and status inquires,"¹² the informal discussions concerning the establishment of regulatory assets that took place from, at least, September 2001 through December 2003, pertain to substantive issues. These were communications on the merits between an interested party and the agency in its role as decision-maker. They should not have taken place.

¹¹ I - 1.

¹² *Louisville Gas and Electric Company v. Commonwealth of Kentucky ex rel. Cowan*, Ky.App., 862 S.W.2d 897, 900 (1993).

At the time of Kentucky-American's September 6th letter, the Commission had before it a formal Joint Application for approval of deferred debits by Louisville Gas and Electric Company and Kentucky Utilities Company.¹³ Hence, in September 2001 the Commission was well-aware of how to establish a formal docket for the consideration of Kentucky-American's request. It did not, however, take this action with respect to Kentucky-American's request.

Two days prior to KAWC September 6th letter, the Commission issued a discovery request in PSC Case No. 2001-00092 asking whether the Union Light, Heat and Power Company was aware of the Commission's mandate in Case No. 2000-00120 requiring formal Commission approval before accruing an expense as a regulatory asset.¹⁴ Thus, given that the Commission was pointing out this mandate to another utility in the days immediately preceding the first Kentucky-American letter, it is difficult to conclude that the Commission simply forgot the pertinent requirement of its own Order in Case No. 2000-00120 upon its receipt of KAWC's September 6th letter request.

807 KAR 5:001 Section 4 (b) (4) does provide for informal conferences. This provision, however, is only applicable "when application has been made in a formal proceeding."¹⁵ Indeed, when the Commission holds such informal

¹³ *In the Matter of: Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for an Order Approving Proposed Deferred Debits and Declaring the Amortization of the Deferred Debits to Be Included in Earnings Sharing Mechanism Calculations*, Case No. 2001-00169.

¹⁴ *In the Matter of: Adjustment of Gas Rates of the Union Light, Heat and Power Company*, Case No. 2001-00092, Order, 4 September 2001, page 10; J - 1. The PSC, subsequently, gave the same mandate to ULH&P. Order, 31 January 2002, page 14; K - 1.

¹⁵ 807 KAR 5:001 Section 4 (b)

conferences pursuant to Section 4 (4) – as it did for the LG&E and KU joint application regarding deferred debits – it does so by entry of a formal order.¹⁶ At the time of the Commission’s 25 October 2001 “conference” with Kentucky-American, there was no formal proceeding. Hence, any discussions between Kentucky-American and the PSC were not held pursuant to a valid invocation of the Commission’s regulation.

The documentary evidence more than adequately demonstrates discussions, information exchanges, and contacts that violate the Commission’s 27 November 2000 Order. The Commission actions were contrary to its regulation for informal conferences. The private contacts and negotiations were unofficial, improper, and unlawful. The contacts pertain to the substantive outcome of issues presently pending before the Commission in this proceeding.

The Office of the Attorney General routinely intervenes and participates in matters pertaining to Kentucky-American Water Company. That participation includes, but is not limited to, the following formal proceedings (without complete case citation) at the Commission: Case No. 93-434 and Case No. 2001-00117 (source of supply); Case Nos. 95-554, 97-034, 2000-00120, 2004-00103 (rate applications); Case Nos. 97-320, 2001-00094, 2002-00094, 2002-00018, 2002-00317 (transfer cases); Case Nos. 2002-00201 and 2003-00270 (certificate cases); Case Nos. 2001-00173 and 2001-00230 (water contract cases); Case No. 1998-00148 (Kentucky River Authority fee); Case No. 1996-569 (meter testing); Case No.

¹⁶ Case No. 2001-00169, Order, 14 August 2001; L - 1.

2002-00277 (merger compliance); Case No. 2001-00440 (asset protection surcharge); and Case No. 1998-00189 (borrowing program). Anyone with knowledge of KAWC and its proceedings at the PSC during the last several years is aware of this fact, and any suggestion that the Office of the Attorney General would not have had an interest in Kentucky-American's deferred debits proposal is patently absurd.

WHEREFORE, the Attorney General moves for the Commission to disclose the following information pertaining to its communications with Kentucky-American.

(1) A list describing all contacts between Kentucky-American (its counsel, agents, lobbyists, employees, officers, or those of its corporate parents and affiliates) and the Public Service Commission (Commissioners, Staff, employees, or agents) pertaining to consideration of any regulatory asset proposal (including but not limited to the 6 September 2001, 24 September 2003, and 18 November 2003) letters since 27 November 2000. At a minimum, the description should identify all parties to each discussion or communication. It should also identify and furnish all documentary evidence (e.g. memoranda, letters, presentation materials, etc.) relating to the contacts.

(2) A list describing all contacts between Kentucky-American (its counsel, agents, lobbyists, employees, officers, or those of its corporate parents and affiliates) and the Public Service Commission (Commissioners, Staff, employees, or agents) pertaining to any matter for the pending case. At a minimum, the

description should identify all parties to each discussion or communication. It should also identify and furnish all documentary evidence (e.g. memoranda, letters, presentation material, etc.) relating to the contacts.

Respectfully submitted,

GREGORY D. STUMBO
ATTORNEY GENERAL
/s/ David Edward Spenard
David Edward Spenard
Dennis G. Howard II
Assistant Attorneys General
1024 Capital Center Drive, Suite 200
Frankfort, Kentucky 40601-8204
502-696-5453
(FAX) 502-573-8315

Submission of Filing in Paper Medium

Per Instructions 3, 10, and 13 of the Commission's 27 May 2004 Order, Counsel submits for filing, by hand delivery to Beth O'Donnell, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601, the original and ten copies in paper medium of the document along with the Appendix. 16 July 2004 is the date for the filing in paper medium.

/s/ David Edward Spenard
Assistant Attorney General

Certificate of Service

Per Instructions 4, 8 (d), and 12 of the May 27th Order, Counsel certifies service of a true and correct photocopy of the document (with Appendix) by

mailing the photocopies, first class postage prepaid, to the other parties of record on 16 July 2004.

The following are the other parties of record: David Jeffrey Barberie, Leslye M. Bowman, Lexington-Fayette Urban County Government, Department of Law, 200 East Main Street, Lexington, Kentucky 40507; Coleman D. Bush, Kentucky-American Water Company, 2300 Richmond Road, Lexington, Kentucky 40502; Joe F. Childers, 201 West Short Street, Suite 310, Lexington, Kentucky 40507; Roy L. Ferrell, West Virginia American Water Company, 1600 Pennsylvania Avenue, Charleston, West Virginia 25302; Lindsey W. Ingram III, Stoll, Keenon & Park, LLP, 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507-1801; Lindsey W. Ingram, Jr., Stoll, Keenon & Park, LLP, 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507-1801; Michael A. Miller, West Virginia American Water Company, 1600 Pennsylvania Avenue, Charleston, West Virginia, 25302; Jon Parker, 201 W. Short Street, Suite 310, Lexington, Kentucky 40507; and Roy W. Mundy II, Kentucky-American Water Company 2300 Richmond Road, Lexington, Kentucky 40502.

/s/ David Edward Spenrd
Assistant Attorney General

Certification Regarding Electronic Filing

Counsel certifies that he has (per Instructions 3 and 8 (b) of the May 27th Order) submitted one copy of the document in electronic medium. Pursuant to Instructions 8 (a), he notes that the electronic version of the filing does not contain the Appendix. He certifies that it is, otherwise, a true and accurate copy of the document filed in paper medium. Pursuant to 8 (c) of the May 27th Order, he certifies that he has, by electronic mail, notified the Commission and the other parties that the electronic version of the filing (without Appendix) has been transmitted to the Commission. (See attached) 16 July 2004 is the date of filing in electronic medium.

/s/ David Edward Spenard
Assistant Attorney General