

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

WATER SERVICE CORPORATION OF)
KENTUCKY'S NOTICE OF INTENT TO FILE) CASE NO. 2013-00237
AN APPLICATION FOR RATE ADJUSTMENT)

INTERVENORS' JOINT MOTION TO STRIKE WATER SERVICE CORPORATION OF
KENTUCKY'S POST-HEARING BRIEF OR, IN THE ALTERNATIVE, MOTION TO
STRIKE EXHIBITS 2 THROUGH 7 AND ALL PORTIONS OF THE BRIEF RELYING
ON INFORMATION FROM EXHIBITS 2 THROUGH 7

Comes now the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention ("AG"), Hickman County Fiscal Court ("HCFC") and City of Clinton (together as "Intervenors") and hereby move the Commission to grant Intervenors' Joint Motion To Strike Water Service Corporation Of Kentucky's Post-Hearing Brief Or, In The Alternative, Motion to Strike Exhibits 2 Through 7 And All Portions Of The Brief Relying On Information From Exhibits 2 Through 7. Exhibits 2 through 7 contain information that with reasonable diligence could have been presented by Water Service Corporation of Kentucky ("WSCK" or "the Company") in its application, testimony, rebuttal testimony, responses to Requests for Information, or the Hearing. Much of the Company's Post-Hearing Brief relies on information improperly included in exhibits 2 through 7. Because the Company had every opportunity to present the information in Exhibits 2 through 7, because testimony in this proceeding is closed, and because the information from Exhibits 2 through 7 are

scattered throughout the brief, WSCK's Post-Hearing Brief must be struck in entirety and removed from the record.

An evidentiary hearing occurred in this proceeding on 9 April 2014 following two rounds of discovery among the parties. Pursuant to the Commission's instructions, the AG and WSCK each filed a post-hearing brief on 9 May 2014. Significant portions of WSCK's Brief rely on materials not previously entered into the record in this proceeding. Accordingly, the entire Brief should be stricken from the Record. In the alternative, portions of the Brief tainted with the improperly referenced materials should be stricken: Section A.1 (Exhibit 2), Section A.5 (Exhibits 3 and 4), Section B.3 (Exhibit 5), and Section B.4 (Exhibits 6 and 7). These particular sections of the Brief are almost entirely founded on the improperly referenced materials and should be stricken.

The Company attempts to enter new information into the record from a variety of sources. WSCK's Brief Exhibit 2 is a portion of testimony from a ten year-old proceeding for an unrelated utility by the Attorney General's witness. Exhibit 3 is a response to Requests for Information ("RFI") that includes a table with unsourced data from a witness for an unrelated utility and the witness was never made available in this proceeding. Exhibit 4 is another RFI from a witness in a separate proceeding on behalf of an unrelated utility and the witness was never made available in this proceeding. Exhibit 5 is a portion of an annual report from a utility not regulated by the KPSC. Exhibit 6 is a portion of testimony from a witness never made available in this proceeding on behalf of an unrelated utility in a separate proceeding and the witness was never made available in this proceeding. Exhibit 7 is another RFI by a witness

never made available in this proceeding on behalf of an unrelated utility in a separate proceeding and the witness was never made available in this proceeding. These documents are inadmissible through a post-hearing brief where the information has not previously been introduced. To allow this information into the record would violate both 807 KAR 5:001 and Intervenors' constitutional right to due process.¹

First, any attempt to add evidence to the record after the close of testimony is prohibited by 807 KAR 5:001 Section 11(4). Specifically, the rule states:

(4) Except as expressly permitted in particular instances, the commission shall not receive in evidence or consider as part of the record a book, paper, or other document for consideration in connection with the proceeding after the close of the testimony.

None of the Exhibits 2 through 7 were introduced in this proceeding during discovery or at hearing. The Commission has previously held:

The intent of Section 11(4) is twofold: (1) to impose some sense of order and closure on the evidentiary phase of Commission proceedings and (2) to ensure that the parties carefully and thoroughly prepare and present their case in a timely manner. It prevents parties from presenting their evidence in a piecemeal fashion or attempting to endlessly drag out the evidentiary phase to gain the last word. At some point the record must close. To permit a party in a contested case to present factual evidence after the closing of the record, and without Commission approval, would encourage parties to needlessly prolong Commission proceedings in an effort to achieve an unfair advantage by late evidentiary submissions that an opposing party has no opportunity to confront, cross-examine or rebut.

¹ Smith v. O'Dea, 939 S.W.2d 353, 357 (Ky. App. 1997) (Section 2 of our Constitution provides that the Commonwealth shall be free of arbitrary state action. With respect to adjudications, whether judicial or administrative, this guarantee is generally understood as a due process provision whereby Kentucky citizens may be assured of fundamentally fair and unbiased procedures) (Citation omitted).

Such action would also reward the party that fails to thoroughly prepare its case by allowing it a second bite at the apple.²

The Company did not seek permission to enter this evidence into the record nor has the Company entered this information into the record at any time prior to filing its post-hearing Brief. The Attorney General has previously established in his Post-Hearing Brief that the Company failed to thoroughly prepare its case,³ hence allowing the company to now have “a second bite at the apple” would be improper.

Second, the Commission has repeatedly found that allowing a party to rely on new evidence after the close of testimony would deny due process to the other parties.

The Commission has stated:

“Short of reopening the case record and taking additional evidence - an action that is contrary to the expressed language of Section 11 (4) - there are no means to cure the procedural due process problems created by accepting the untimely filed factual evidence.”⁴

Further, the Commission has previously found:

“The Commission must ensure that all parties to its proceedings are afforded due process. Despite the relaxed nature of Commission proceedings, each party must still have the opportunity to confront and cross examine adverse witnesses...In this instance, KU had no opportunity to cross-examine Mr. Harman on the content of his letter or to offer rebuttal evidence. Therefore, to allow the letter to remain in the record would deny KU due process of law.”⁵

² Case No. 2012-00470, *In the Matter of: Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity to Construct and Finance a Waterworks Improvements Project Pursuant to KRS 278.020 and 278.300*, at 6 (Ky. PSC Jan. 3, 2014).

³ See Attorney General’s Post- Hearing Brief, pages 14-15.

⁴ Case No. 2012-00470, at 6 (Ky. PSC Jan. 3, 2014).

⁵ Case No. 89-349, *In the Matter of: Kentucky Utilities Company v. Henderson-Union Rural Electric Cooperative 3 Corporation* (Ky. PSC May 21, 1990).

Because none of these materials in Exhibits 2 through 7 have previously been introduced, Intervenor's were not provided an opportunity to confront, cross-examine, or generally contest any of the information WSCK now seeks to enter into the record. The Attorney General's witness was made available at the hearing for cross-examination, during which time WSCK could have introduced evidence relevant to the witness, but chose not to. Thus, WSCK allowing this testimony into the record via WSCK's post-hearing brief would prevent the witness from explaining the prior testimony or allowing the Attorney General to object/argue relevance. This is a blatant and patent violation of Intervenor's due process.

All the materials WSCK attempts to enter into evidence at this time were available well prior to WSCK filing its application or commencing discovery in this proceeding. WSCK had ample opportunity to present these documents into evidence through the Company's application, testimony, two rounds of discovery, rebuttal testimony, or at the hearing. In addition, For WSCK to attempt to enter these documents into evidence as exhibits to its post-hearing brief is improper and should be disallowed by the Commission.

WHEREFORE, the Attorney General requests an Order from the Commission consistent with his positions as set forth herein.

Respectfully submitted,
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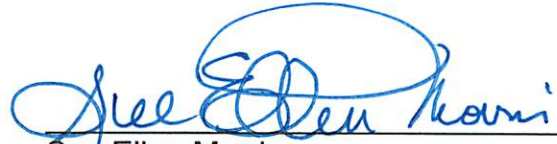
Respectfully submitted,

Leanna Wilkerson w/permission by GTD

LEANNA WILKERSON

City Attorney for the City of Clinton

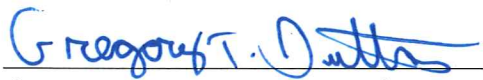
Respectfully submitted,

A handwritten signature in blue ink, reading "Sue Ellen Morris". The signature is written in a cursive style with a large, looping initial "S".

Sue Ellen Morris
Hickman County Attorney

Certificate of Service and Filing

Counsel certifies that the Intervenor's Joint Motion To Strike Water Service Corporation Of Kentucky's Post-Hearing Brief Or, In The Alternative, Motion to Strike Exhibits 2 Through 7 And All Portions Of The Brief Relying On Information From Exhibits 2 Through 7 is a true and accurate copy of the documents to be filed in paper medium to the Commission within two business days; that the electronic filing was transmitted to the Commission on May 15, 2014; and that no party has been excused from preparation by electronic service.



Assistant Attorney General