

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

In the Matter of:

Application of Water Service Corporation)
of Kentucky for a General Adjustment)
in Existing Rates) Case No. 2013-00237

**WSCK RESPONSE TO INTERVENORS’
MOTION TO STRIKE**

Water Service Corporation of Kentucky (“WSCK”), by counsel, provides the following response to the Intervenor’s Attorney General of the Commonwealth of Kentucky, Hickman County Fiscal Court, and City of Clinton’s (collectively “Intervenor’s”) Motion to Strike. Because the documents attached as Exhibits 2-7 to WSCK’s brief were either a part of the record, merely used to discuss the holdings or findings of the Public Service Commission, or the nature of which it is appropriate to take judicial notice, the Intervenor’s motion should be denied.

I. Discussion of the Exhibits

A. Exhibit 2

Exhibit 2 is a section of the testimony from Andrea Crane from a previous case in which she testified before this Commission. WSCK requested this information from the AG in WSCK’s information request.¹ In response, the AG objected to producing documents,

¹ WSCK’s Request for Information to the Attorney General, Item 1(b) (“Provide a copy of each written testimony that Ms. Crane has submitted in matters related to water utilities since January 1, 2004, in all utility commissions, in which the topic of her testimony related in part or in whole to revenue requirements.”)

suggesting that WSCK had access to documents.² Such an objection is not proper.³ The AG then referred WSCK to its previous response that stated, in part, “Ms. Crane’s other testimonies are also available from various Commission websites.”⁴ Exhibit 2 is testimony of Crane that is available on this Commission’s website.⁵ In fact, it is the only previous case in which Crane has testified in Kentucky.⁶ Through its response, the AG incorporated Crane’s testimony in Case No. 2004-00103 into this case.

B. Exhibits 3 and 4

In its final order in Case No. 2012-00520, the Commission authorized Kentucky-American to recover \$9,324,323 from its customers for allocated expenses from American Water Works Service Company (“AWWSC”).⁷ The Commission explained that AWWSC provides certain services to Kentucky-American, including “the use of centralized call centers, water quality testing lab, information technology support, accounts payable and accounts receivable, tax support and insurance, as well as corporate governance.”⁸ With the exception of some water quality testing services, these are the same services that Water Service Corporation (“WSC”) provides WSCK. Because the AG was seeking to exclude only a portion of the expenses

² AG’s Responses to Data Requests of Water Service Corp. at 1(b).

³ See Gomez v. Tyson Foods, Inc., No. 8:08-CV-21, 2012 WL 3111897, at *4 (D. Neb. July 31, 2012) (overruling an objection that a party should already have access to documents requested by that party); cf. Davidson v. Goord, 215 F.R.D. 73, 77 (W.D.N.Y. 2003); Burton Mech. Contractors, Inc. v. Foreman, 148 F.R.D. 230, 236 (N.D. Ind. 1992); Italia di Navigazione, S.p.A. v. M.V. Hermes I, 564 F. Supp. 492, 495 (S.D.N.Y. 1983).

⁴ AG’s Responses to Data Requests of Water Service Corp. at 1(a).

⁵ See http://psc.ky.gov/pscecf/2004-00103/AGKY_efs/08272004/AGKY_DT_acc_082704.pdf (last visited May 16, 2014).

⁶ It is particularly surprising that the AG could not produce the previous testimony of its witness considering that she had only previously testified once in this state. VR: 04092014; 17:13:09-17:13:11.

⁷ Kentucky-American Water Co., Case No. 2012-00520, at 38 (Ky. PSC Oct. 25, 2013).

⁸ Kentucky-American Water Co., Case No. 2012-00520, at 36 (Ky. PSC Oct. 25, 2013).

allocated from WSC to WSCK, WSCK wanted to provide as close a comparison as possible to what was approved in the Kentucky-American rate case.

In order to provide the most complete discussion of the holding and findings of the Commission's decision in Case No. 2012-00520, WSCK provided Exhibits 3 and 4 to explain how the Commission's ruling should be interpreted to the facts in the present case. These exhibits provide a detailed description of the services summarized by the Commission in its order and a detailed breakdown of the components of the \$9,324,323 in service support fees that the Commission found to be reasonable and accepted for ratemaking purposes. Thus, Exhibits 3 and 4 serve the purpose of elaborating on the Commission's decision in a prior case.

C. Exhibits 5 and 6

In its final order in Case No. 2012-00520, the Commission authorized Kentucky-American to recover costs for its Business Transformation ("BT") Program. As a part of its analysis, the Commission considered how the BT Program's costs compared with other customer-service information systems in Kentucky.⁹ Relying on testimony from Kentucky-American witness Gary VerDouw, the Commission explained that "Louisville Water Company recently installed a customer care information system at a cost of \$92 per customer. Louisville Gas and Electric Company and Kentucky Utilities Company jointly installed a customer-care and billing information system project whose cost is roughly \$68 per customer."¹⁰

VerDouw testified that he reviewed the annual report of the Louisville Water Company ("LWC") and the record of Case Nos. 2009-00548 and 2009-00549. In an attempt to provide further support for the Commission's findings in Case No. 2012-00520, WSCK reviewed the underlying support for VerDouw's testimony and noticed what appeared to be discrepancies

⁹ Kentucky-American Water Co., Case No. 2012-00520, at 10-11 (Ky. PSC Oct. 25, 2013).

¹⁰ Id. (citing VR 06052013; 15:13:17 - 15:15:37).

between VerDouw's calculations of \$92 and \$68 per customer for the customer care information systems of these two systems and what appeared to be calculations of approximately \$94 and \$92,¹¹ respectively.

Exhibit 5 is pages from the LWC's 2013 annual report showing the relevant information that LWC has spent \$29 million on its customer care information system and that it had 304,932 customers at the end of 2012 and 306,927 customers at the end of 2013. It is a public record that is maintained on the internet.¹² It correlates to the Commission's acceptance of VerDouw's testimony in the final order of Case No. 2012-00520, and it provides updated information with respect to total costs and increased customer base.

Exhibit 6 is a page of testimony from Chris Herman from Louisville Gas and Electric ("LG&E") and Kentucky Utilities ("KU") 2009 rate case, which indicated that these utilities spent \$83 million on their customer care information system. In Case No. 2012-00520, the Commission accepted VerDouw's calculation that LG&E and KU spent approximately \$68 per customer on this system. That calculation was based on a total cost of \$83 million. Exhibit 3 was merely providing further verification of the \$83 million total costs implicitly used in the Commission's decision and specifically used in VerDouw's testimony. The Intervenors seek to punish WSCK for being overly thorough in attempting to provide further support for the Commission's decision in Exhibit 6.

On further review of the underlying support of VerDouw's testimony, WSCK has recognized reasons for the apparent discrepancies in calculations for the LG&E and KU per customer cost between VerDouw and WSCK. In its brief, WSCK inadvertently did not include

¹¹ Brief of Water Service Corporation at 20 nn. 92-93.

¹² See http://www.louisvilleky.gov/NR/rdonlyres/69CC2760-4685-4A7E-845F-6304CC45DAF3/0/2013AnnualReport_Full.pdf (last visited May 19, 2014).

in its calculation LG&E's gas customers, many of whom are duplicative of LG&E's electric customers.¹³ Although arguments could be made in support of WSCK's original position, WSCK is willing to concede that the appropriate comparative analysis should be to the calculation of \$68 per customer for the customer care information systems, as determined by the Commission in Case No. 2012-00520. WSCK is likewise willing to concede that the Commission can use \$92 per customer for LWC's customer care information system as a comparison.¹⁴

These concessions do not affect the overall analysis as to the reasonableness of the costs of Project Phoenix as discussed in the brief:

The Commission previously accepted the testimony of a witness for Kentucky-American who suggested the per customer costs of Louisville Water Company's and LG&E and KU's customer care systems were approximately \$92 and \$68 respectively. Kentucky-American Water Company, Case No. 2012-00520 at 10-11 (Ky. PSC Oct. 25, 2013). Even if these figures are accurate, Project Phoenix's costs of approximately \$30 per customer for the Customer Care and Billing system are far below these two examples.¹⁵

D. Exhibit 7

In its final order in Case No. 2012-00520, the Commission referred to LFUCG's position that there was no study on the BT Program and AG witness testimony that there was no cost-benefit analysis of the BT Program. The Commission implicitly rejected the argument that the lack of a cost-benefit analysis prevents a utility from recovering costs for a technology

¹³ WSCK emphasizes that LG&E's customer count has no relation to any of the exhibits on which the Intervenor's base their motion to strike.

¹⁴ The Commission can reject WSCK's calculations of approximately \$94 and \$92 per customer based on this concession and based on the facts contained in the text above. It should not strike any exhibit or portion of the brief because those exhibits and sections of the brief were an attempt to discuss the findings and holding of a prior Commission decision.

¹⁵ Case No. 2012-00520, at 20 n.94.

renovation project by its holding that there was “sufficient evidence to support inclusion of the BT Program costs.” In order to discuss the holding of the Commission’s decision and ensure that Kentucky-American had not submitted a cost-benefit analysis that was not referenced in the Commission’s decision, WCK confirmed that Kentucky-American had not submitted a cost-benefit analysis. WCK’s reference to Exhibit 7 of its brief was merely used to discuss the holding and findings of the Commission’s decision in Case No. 2012-00520.

II. WCK use of the exhibits is lawful and not a violation of 807 KAR 5:001, Section 11(4).

The Intervenors argue that WCK has attempted to add new evidence in violation of 807 KAR 5:001, Section 11(4), which states: “Except as expressly permitted in particular instances, the commission shall not receive in evidence or consider as a part of the record a book, paper, or other document for consideration in connection with the proceeding after the close of the testimony.” The Commission has clearly indicated that a party may refer to Commission orders from other proceedings to support the parties’ legal claims.¹⁶ It has distinguished between a party discussing the holding or findings of the Commission in a prior decision and introducing documents from the record of a previous case that were unrelated to the Commission’s ruling.

The distinction between the Commission’s facts underlying the motion to strike in the Jessamine-South Elkhorn Water District case and the present case are critically important to this case and future cases. Jessamine-South Elkhorn Water District (“JSEWD”) attempted to use the evidence submitted in a previous case involving unrelated entities to prove what certain industry

¹⁶ See Jessamine-S. Elkhorn Water Dist., Case No. 2012-00470, at 5 n.5 (Ky. PSC Apr. 30, 2013).

standards were or should be declared to be.¹⁷ The Commission criticized JSEWD because it did “not discuss the holding in our [Commission] decision in the other proceeding, but instead elaborates on the standards that the unrelated entity employs in the operation of its water distribution facilities.”¹⁸ Moreover, the Commission later explained how JSEWD’s reliance on evidence from the previous case was misplaced because the primary issue in the JSEWD case—compliance with Section 4(4) of 807 KAR 5:066—was not at issue in the previous case.¹⁹ This further demonstrates that the underlying documents could not assist in providing insight on the Commission’s decision in that previous case.

In the present case, WSCK was referring to underlying documents to elaborate on a previous Commission decision. Exhibits 3 and 4 to WSCK’s brief elaborate on the Commission’s approval of \$9,324,323 in allocated expenses from its service company for the same type of services that WSC provides WSCK. In its order, the Commission specifically discussed the services that AWWSC provided Kentucky-American in return for the \$9,324,323 in allocated costs.²⁰ Exhibits 3 and 4 provide context to the Commission’s decision. Exhibits 5 and 6 to WSCK’s brief provide details to support the findings of the Commission in Case No. 2012-00520.²¹ Exhibit 7 supplies details on the Commission’s acknowledgement in its order that a party was challenging the recovery of an expense in rates based on the fact that the utility did

¹⁷ See Post-Hearing Brief of Jessamine-South Elkhorn Water District, Case No. 2012-00470, at 18-25 (filed Apr. 3, 2013).

¹⁸ Order, Case No. 2012-00470 at 5.

¹⁹ Jessamine-S. Elkhorn Water Dist., Case No. 2012-00470, at 5 n 5 (Ky. PSC Jan. 3, 2014).

²⁰ Kentucky-American Water Co., Case No. 2012-00520, at 36 (Ky. PSC Oct. 25, 2013).

²¹ As suggested above and in WSCK’s brief, regardless of whether LWC actually spent more than \$28 million on its customer care system or the costs of KU and LG&E’s customer care system should not be borne duplicatively by customers that receive both electric and gas service from LG&E need not be decided in this case. The findings and conclusions of reasonableness by the Commission that Kentucky-American’s customer care system of its BT Program, which cost approximately the same as WSCK’s Project Phoenix’s customer care system on a per customer basis, remain relevant.

not have a cost-benefit analysis and the Commission's footnote that the AG's witness made a similar reference in his testimony. In addition, the Commission made findings on the reasonableness of the allocated expenses of Kentucky-American's service company and expenses of its information technology upgrades, which are precisely two of the issues involved in the WSCK's rate case.

Parties must have the opportunity to explain their position in written briefs and fully explain previous decisions of this Commission and the courts. In Case No. 2012-00520, Kentucky-American filed over 7,500 pages of information in support of its application for a rate increase, and the Commission held an evidentiary hearing that lasted two days. The Commission ultimately consolidated all the information that was filed—both by the utility and intervenors—into a decision that was 80 pages in length. It would have been virtually impossible for the Commission to discuss every minute detail regarding the position of every party on every topic that was raised in the case and still comply with the mandates of KRS 278.190, which requires the Commission to render decisions in rate cases “as speedily as possible” and within ten months after an application is filed. Accordingly, it must be permissible to explain specific holdings and findings of the Commission's decisions by referencing the record.

In the present case, WSCK was referencing specific topics of previous Commission orders. If the Commission were to disallow parties from providing information in their briefs discussing precisely what the Commission had previously held and citing to portions of the record that support the parties' position as to what the Commission previously held, the Commission will be at a distinct disadvantage when drafting its orders. It will no longer have the benefit of guidance from well-researched briefs.

Such a restriction would likewise prevent the Commission from referring to underlying documents in a previous case to explain its previous findings and holdings in that case—a practice which it has commonly done.²² It would also call into question the propriety of the Commission to cite documents and testimony from previous cases as a mechanism for providing more thorough analysis in its orders.²³ The limitation of a party's or the Commission's ability to explain its positions would be a severe detriment to everyone involved in utility regulation.

III. The Intervenors' due process rights have not been violated.

In addition to not discussing the Commission's holding, prior to filing its post-hearing brief, JSEWD never argued that it needed a storage tank to improve the redundancy in certain areas within its service territory.²⁴ JSEWD's attempt to present a new argument stands in stark contrast to the position of WSCK. In the present case, WSCK had put the Intervenors on notice regarding each of the issues related to topics addressed in its brief and in Case No. 2012-00520. With respect to Exhibit 2, WSCK requested this information in discovery, and the AG directed WSCK to search for the testimony on the internet, which is precisely where the exhibit was located. With respect to Exhibits 3 and 4, WSCK provided testimony in its application²⁵ and rebuttal testimony²⁶ that the components of the indirect allocations from WSC were reasonable. With respect to Exhibits 5 and 6, WSCK provided testimony on the reasonableness of Project

²² See, e.g., Kentucky-American Water Co., Case No. 2008-00440, at 4-5 nn.12-13 (Ky. PSC Aug 26, 2009)(explaining the Commission's decision in Case No. 2007-00134 and citing to underlying documents in the record of that case).

²³ See, e.g., Water Service Corp. of Kentucky, Case No. 2011-00414, at 3 n.4 (Ky. PSC Sept. 17, 2012); Fleming Cnty. Water Ass'n, Case No. 2010-00049 at 4 nn.10-12 (Ky. PSC Jun. 21, 2011).

²⁴ See Forest Hills Residents' Association and William Bates's Motion to Strike, Case No. 2012-00470 (filed Apr. 5, 2013).

²⁵ Testimony of Gary Shambaugh at Exhibit B (and related testimony).

²⁶ Rebuttal Testimony of Steven M. Lubertozzi at 3:3.

Phoenix costs both generally²⁷ and specifically in comparison to LWC and KU and LG&E.²⁸ With respect to Exhibit 7, WSCK provided testimony on why the many benefits of Project Phoenix are unquantifiable, thereby making a cost-benefit analysis impossible.²⁹ Each of the Intervenor had notice of these issues and could have presented testimony or arguments on them.

Unlike in the Jessamine-South Elkhorn Water District case, the Intervenor in this case had notice of every one of the topics discussed by WSCK in its brief in relation to the final order in Case No. 2012-00520 and related to Exhibits 3-7. The Attorney General also made Crane's 2004 testimony a part of this record when it was specifically requested by WSCK and the AG responded on where all the parties and the Commission could obtain it.³⁰ Thus, the parties had full knowledge of the issues related to the Exhibits attached to WSCK's brief and the corresponding discussion of Case No. 2012-00520.

The Intervenor's procedural due process rights have not been violated by WSCK's citation and discussion of the Commission's previous holdings and findings or the attachment of exhibits verifying its position thereof. "The fundamental requirement of procedural due process is simply that all affected parties be given 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" Hilltop Basic Res., Inc. v. Cnty. of Boone, 180 S.W.3d 464, 469 (Ky. 2005) (quoting Mathews v. Eldridge, 424 U.S. 319, 333, (1976)). As discussed above, the Intervenor had an opportunity to ask WSCK witnesses questions about indirect allocated

²⁷ See, e.g., Testimony of Patrick Baryenbruch at 6-7.

²⁸ See, e.g., WSCK Response to Item 21 of the Commission Staff's Second Information Request.

²⁹ Rebuttal Testimony of Patrick Baryenbruch at 13:18-17:3.

³⁰ In addition, there was no secret that Crane had previously testified before this Commission as she mentioned it in her oral testimony at the April 9, 2014, hearing.

expenses and Project Phoenix or critique WSCK's requested recovery. The AG took the opportunity to do so.³¹

Any suggestion that the Intervenors failed to have the opportunity to cross-examine any witnesses regarding the Exhibits is meritless for several reasons. First, with respect to Exhibit 2, the AG made it a part of the record with his response to WSCK's information request. Second, with respect to the Exhibits 3-7, and examination of any other witness would not change the Commission's decision or analysis in Case No. 2012-00520. The Commission's decision in that case was limited to the evidence in the record of that case. Any newly discovered evidence bearing on Kentucky-American's service company or the cost-benefit analysis could not change the Commission's decision in Case No. 2012-00520 and the precedent that it sets. Third, to the extent that the AG is making these arguments, the AG was a party to Case No. 2012-00520 and had full opportunity to examine the witnesses and testimony in that case. In fact, Exhibits 3 and 4 of WSCK's brief are Kentucky-American's responses to the AG's information requests. Accordingly, the Intervenors' due process has not been violated.

Conversely, WSCK's procedural due process would be violated if it were not permitted to present legal arguments and discuss prior Commission decisions and the underlying information on which the Commission rendered its decision.³²

³¹ See, e.g., Items, 11, 34, 38, 39, 41, 43, and 50 of the Attorney General's Initial Request for Information.

³² See, e.g., Estevez v. State, 705 So. 2d 972 (Fla. App. 1998); cf. Beery v. C.I.R., 130 F. App'x 966, 972 (10th Cir. 2005).

IV. Exhibit 5 is a governmental document on which the Commission should take judicial notice.

“A court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet.”³³ LWC’s annual report is a governmental document that is available online.³⁴ Thus, it is entirely appropriate for the Commission to consider LWC’s 2013 annual report in rendering its decision. In fact, the Commission regularly cites to annual reports in its orders, impliedly recognizing that it is taking judicial notice of those annual reports.³⁵

V. Conclusion

Because the documents attached as Exhibits 2-7 to WSKC’s brief were either a part of the record, used to discuss the holdings or findings of the Commission, or the nature of which it is proper to take judicial notice, the Intervenor’s motion should be denied.

If the Commission determines that any of the exhibits attached to WSKC’s brief are “new” evidence submitted in contravention to 807 KAR 5:001, Section 11(4), the appropriate remedy would be to strike that specific exhibit. It is not appropriate to strike the entire brief or entire sections of the brief under such circumstances,³⁶ as suggested by the Intervenor. Any material stricken can be isolated to individual footnotes.³⁷ All text discussing the Commission’s

³³ Polley v. Allen, 132 S.W.3d 223, 226 (Ky. Ct. App. 2004).

³⁴ LWC is a governmental agency. See Kentucky-American Water Co. Case No. 2007-00134 at 23-24 (Ky. PSC Apr. 25, 2008 (noting LWC’s general exemption from Commission jurisdiction because it is owned by Louisville Metro government); 12-ORD-10 (Jan. 9, 2012) (opining that LWC is a public agency).

³⁵ See, e.g., Water Serv. Corp. of Kentucky, Case No. 2010-00476 at 2 n.2 (Ky. PSC Nov. 23, 2011); see also Broadway v. Alabama Dry Dock & Shipbuilding Co., 20 So.2d 41, 51 (Ala. 1944) (recognizing that the Alabama Supreme Court takes judicial notice of the director of the Department of Industrial Relations’ annual report to the governor).

³⁶ Jessamine-S. Elkhorn Water Dist., Case No. 2012-00470, at 5-6 (Ky. PSC Apr. 30, 2013).

³⁷ Exhibit 2 – footnote 20.

holdings and findings should not be stricken. For the above reasons, WSCK requests that the Intervenor's Motion to Strike be denied.

Respectfully submitted,



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Exhibit 3 and 4 – footnotes 56 and 57.
Exhibit 5 and 6 – footnotes 92 and a portion of 93.
Exhibit 7 – footnote 117.