

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)	Case No. 2013-00237
in Existing Rates)	

**WATER SERVICE CORPORATION OF KENTUCKY’S
RESPONSE TO INTERVENORS’ MOTION TO DISMISS**

Water Service Corporation of Kentucky (“WSCK”), by counsel, respectfully submits this Response to the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention (“OAG”), Hickman County Fiscal Court, and City of Clinton’s (collectively “Intervenors”) Motion to Dismiss, filed with the Commission on December 3, 2013.

WSCK has dedicated and will continue to dedicate the resources necessary to demonstrate the reasonableness of its proposed rates and is committed to providing responses to the requests for information by the proposed extended deadline of December 13, 2013. Ultimately, dismissal of the rate case would be premature at this early stage in the rate case and would contradict the statutory scheme set forth in KRS 278.190. As such, the Intervenors’ motion should be denied.

I. Dismissal of the rate case at this stage would be premature.

Two months and one week into a rate case that is statutorily authorized to proceed up to ten months the Intervenors filed a motion to dismiss with prejudice. The Intervenors argue that there would be insufficient time for the Commission to render a decision if deadlines were

extended. This is simply not accurate. As was discussed in the Revised Supplemental Information to WSCK's Second Motion to Amend the Procedural Schedule filed on November 27, 2013, WSCK's proposed amended schedule would allow for a hearing to be held and post-hearing briefs to be filed in April, giving the Commission three months after the record of the case is closed to render a decision before the expiration of the statutory deadline.

Dismissing the rate case at this stage due to potential difficulties with timing would further fail to consider possible events that could eliminate certain deadlines, effectively speeding up the process or allowing for other extended deadlines. The Intervenor and Commission Staff may determine that supplemental requests for information are unnecessary, eliminating six weeks of the proposed procedural schedule and potentially enabling Intervenor testimony to be filed earlier. The Intervenor may determine that they will not file testimony in this case. In fact, no intervenor¹ has filed any testimony in any of WSCK's previous general rate cases.² This would also eliminate at least six weeks of proposed deadlines in the proposed procedural schedule. The parties may enter into a stipulation for the Commission to consider, which often reduces the complexity of the evidentiary hearing and the issues to be considered by the Commission.

The Commission has issued decisions in rate cases after receiving responses to information requests at a much later stage in the process than what is being proposed in WSCK. For example, in Case No. 95-459, Ohio County Water District's application for a general rate adjustment was accepted for filing on March 28, 1996.³ The utility's responses to the Commission Staff's initial data requests were first due on May 14, 1996. On the day after the

¹ The Intervenor did not mention the likelihood of filing testimony in their motion to dismiss.

² See Case No. 2010-00476, Water Serv. Corp. of Kentucky (Ky. PSC Nov. 23, 2011); Case No. 2008-00563 Water Serv. Corp. of Kentucky (Ky. PSC Nov. 9, 2009); 2005-00325 Water Serv. Corp. of Kentucky (Ky. PSC Feb. 28, 2007).

³ The Attorney General was also an intervenor in that case.

responses were due, the utility requested until July 15, 1996, to respond, and the Commission granted the request. The Commission granted a second request for extension for responses to be due on July 25, 1996. Ultimately, the Ohio County Water District filed responses to the Staff's initial information requests four months after filing its rate case, and the Commission had sufficient time to rule on the utility's general rate case.⁴ In the present case, WSCK has already responded to the Staff's initial information request two weeks after filing its rate case and will respond to the Staff's second information request and the OAG's initial information request only two and a half months after filing its rate case. The Ohio County Water District case demonstrates that further delays in the present proceeding would not be "potentially catastrophic," as suggested by the Intervenors.⁵

Moreover, WSCK has agreed that, if the Commission grants its motion to amend the procedural schedule, it will not implement the proposed rates at the end of the five-month suspension period. WSCK's concession will provide assurance to WSCK's customers that their rates will not change without Commission approval (or expiration of the ten-month statutory period absent a Commission decision) and will not be impacted by WSCK's request for an amended procedural schedule.

II. KRS 278.190 requires that the Commission issue an order on the substantive issues of the case after a hearing and does not permit the Commission to dismiss the case at this stage in the proceeding.

As a creature of statute, the Commission has only those powers granted expressly or by necessary implication by the General Assembly.⁶ KRS 278.190 dictates how the Commission must handle requests by utilities for adjustments in rates. During the thirty-day notice period

⁴ See Case No. 95-459, Ohio Cnty. Water Dist. (Ky. PSC Jan. 27, 1997). Commissioner Breathitt was the Chairman of the Commission during the Ohio County Water District rate case.

⁵ See Intervenors' Motion to Dismiss at 6.

⁶ Pub. Serv. Comm'n v. Commonwealth, 320 S.W.3d 660, 665 (Ky. 2010) (citing Boone Cnty. Water and Sewer Dist. v. Pub. Serv. Comm'n, 949 S.W.2d 588, 591 (Ky. 1997)).

that must be given by the utility prior to implementing new rates, the Commission may suspend the operation of rates for a period of five or six months.⁷ The Commission may set a hearing upon reasonable notice concerning the new rates.⁸ The statute, then, specifically provides, “after such hearing, . . . the commission may make those orders with reference thereto as it deems proper in the matter.”⁹ Subsection 2 of KRS 278.190 clearly requires the Commission to hold a hearing concerning the substance of the proposed rates prior to issuing orders with respect to the merits of the case.¹⁰

Related provisions within the same subsection further support a finding that KRS 278.190 requires the Commission to hold a hearing on the merits of new rate schedules that are filed by a utility. If the Commission does not issue a final order prior to the expiration of the suspension period, subsection 2 of KRS 278.190 authorizes the Commission “upon completion of the hearing and decision” to order the utility to provide refunds to customers that were overcharged during any period of the rate case. Again, the clear design of this statutory provision dictates that the Commission hold an evidentiary hearing on the utility’s proposed rates. By granting the Intervenors’ motion, the Commission would be acting in contravention of KRS 278.190(2).

Further, KRS 278.190(3) gives a utility the right to place its rates into effect ten months after filing its rate schedules if the Commission has not issued a final order. By dismissing a rate application at this stage, the Commission would be depriving WSCK of its due process right to be heard and have a final order on the merits of its rate application before being deprived of what

⁷ KRS 278.190(2).

⁸ Id. 278.190(1).

⁹ Id. 278.190(2) (emphasis added).

¹⁰ The Commission has previously held that the parties may waive their right to a hearing. See, e.g., Case No. 2012-00309, Southern Water and Sewer Dist. (Ky. PSC Dec. 21, 2012). WSCK has not yet waive that right in the present case.

would otherwise be its right to put its proposed rates into effect at the end of the ten-month period set forth in KRS 278.190(3). As the Kentucky Supreme Court has stated, “Even a public utility has some rights, one of which is the right to a final determination of its claim with a reasonable time and in accordance with due process.”¹¹ Dismissal of WSCK’s rate case at this stage would violate WSCK’s right to a final substantive determination after a hearing.

The statutory scheme of KRS 278.190 requires the Commission to render a decision on the substance of whether the utility has met its burden of proof to show that the increased rate is just and reasonable, not on a procedural delay that is early in the procedural process. If the Commission were to dismiss this rate case or if it were to deny WSCK the opportunity to respond to the requests for information, it would potentially be depriving WSCK of the opportunity to meet its burden of proof, thereby violating WSCK’s due process rights. Accordingly, the Intervenor’s motion should be denied.

III. Dismissal with prejudice is unconstitutional, unauthorized, and unwarranted.

The Intervenor has moved for dismissal of the rate case with prejudice. Even if it were not premature to dismiss this matter and KRS 278.190 authorized dismissal at this stage in the proceeding, dismissal of a rate case with prejudice is unconstitutional, unauthorized and unreasonable.

It is not clear exactly what the Intervenor means in their request for dismissal with prejudice, nor have they provided any written explanation. “[A] dismissal with prejudice deprives a litigant of the opportunity to pursue his or her claim.” Manning v. Wilkinson, 264 S.W.3d 620, 624 (Ky. App. 2007). Conversely, dismissal without prejudice “does not have the effect of adjudication on the merits and will not bar another action on the same subject matter.” Hays v. Sturgill, 193 S.W.2d 648, 649 (Ky. 1946). These common definitions suggest that the

¹¹ Kentucky Power Co. v. Energy Regulatory Comm’n, 623 S.W.2d 904, 908 (Ky. 1981)

Intervenors would have the Commission dismiss WSCK's rate case and ban WSCK from filing any future rate cases. Banning WSCK from future rate cases would inevitably result in confiscatory rates that are prohibited by the state and federal constitutions. Com. ex rel. Stephens v. S. Cent. Bell Tel. Co., 545 S.W.2d 927, 930 (Ky. 1976).

To the extent that the Intervenors suggest that dismissal with prejudice would prohibit WSCK from filing another rate case with the same historical test period, such a request would be illogical and unreasonable. By requiring WSCK to file a rate case based on an updated test period, the OAG, Hickman County Fiscal Court, and the City of Clinton may cause rates to increase due to inflationary factors and additional capital investment.

Even if it were statutorily authorized and ripe to dismiss the case at this stage, it would be unconstitutional, unauthorized, and unreasonable to dismiss this case with prejudice. This is evidenced by the fact that the Intervenors have not cited any statutory law, court decisions, or Commission orders providing legal authority that a general rate case can be dismissed with prejudice.

IV. WSCK has provided an explanation as to why it did not provide responses by the November 22, 2013, deadline, and why it did not file a motion for an extension at least four days in advance of the deadline.

The Intervenors argue that dismissal of this case is appropriate because WSCK has failed to comply with two provisions of the Commission's Order dated October 18, 2013. In WSCK's Second Motion to Extend the Procedural Schedule and Set an Informal Teleconference, WSCK requested a teleconference with Staff and the parties so that it could explain the circumstances of its responses to the Staff's Second Request for Information and the OAG's Initial Request for Information.

During the teleconference, WSCK explained that its limited staff resources¹² combined with activities in other rate cases in other jurisdictions caused difficulties in providing responses by the November 22, 2013, deadline. WSCK further explained that it did not comply with the Commission's order requiring four-day notice for a motion to extend deadlines because, as late as November 21, WSCK aimed to provide complete responses by November 22. Ultimately, however, the voluminous nature of the request proved to be too great.¹³

WSCK has been open and honest with the Commission, Commission Staff, and the Intervenors as to its inability to file responses by the November 22 deadline. It has explained its reasoning for failing to provide advanced notice for its request to extend the deadlines. WSCK is not hiding anything. Most importantly, it fully intends on providing responses to the requests for information sought by Commission Staff and OAG so as to prove the reasonableness of the rates that it has proposed. Accordingly, the Intervenors' motion should be denied.

V. The Intervenors attempt to distract the Commission's attention with false, illogical, and irrelevant statements.

There is one thing that is glaringly absent from the Intervenors' motion: legal authority to support it. The Intervenors have not provided any statutory law, case law, administrative regulation, or Commission decision promoting their positions. Instead, the Intervenors attempt to use red herrings to guide the Commission to their desired, albeit improper and unreasonable, result. WSCK is compelled to highlight some of these statements.

¹² These limited staff resources span WSCK's corporate parent, Utilities, Inc. ("UI's"), and are not a direct indication of allocated resources to UI's Kentucky operations. The Intervenors' suggestion that UI is not prioritizing Kentucky's rate case is not accurate.

¹³ The voluminous nature of these requests have been mentioned in previous filings by WSCK. Commission Staff and OAG collectively asked 136 items, excluding subparts, and 217 items, including subparts. In comparison, Commission Staff's Second Request for Information and the Attorney General's Initial Request for Information in WSCK's last rate case, Case No. 2010-00476, was collectively comprised of 38 items, excluding subparts. All four written Requests for Information that were issued in Case No. 2010-00476 only amassed 89 total questions, less than the 113 questions asked by the OAG in its Initial Request for Information in the present case.

Contrary to the Intervenor's statements,¹⁴ WSKC never requested an "expedited" schedule. After the Commission entered a procedural schedule on October 18, 2013, the OAG asked Commission Staff if the procedural schedule provided for a reasonable time in which to issue initial requests for information and asked the Intervenor if they would object to an extension.¹⁵ Staff responded that the OAG would need to file a motion with the Commission to request an extension.¹⁶ WSKC stated that it would be WSKC's "preference" that the schedule be maintained "if possible."¹⁷ Although WSKC does not want unnecessary delays, WSKC has not requested an expedited schedule in this matter.¹⁸

The Intervenor criticizes WSKC for encouraging the parties to submit requests for information.¹⁹ As discussed in the preceding paragraph, when the procedural schedule was issued, the OAG had concerns about whether it would have sufficient time to review certain materials and issue requests for information within the timeframe provided. Counsel for the OAG wanted confirmation that "should the OAG forgo requesting information during this initial round of discovery that we [the OAG] will be afforded the opportunity to pursue original lines of questioning in our supplemental requests for information."²⁰ Because of the vague nature over whether the OAG would be asking any questions during the initial round of information requests, counsel for WSKC responded: "We would encourage, however, that parties not completely forgo all questioning during the initial request phase simply because there may be additional, original

¹⁴ See Intervenor's Motion to Dismiss at 2-3.

¹⁵ See Email from Gregory Dutton, Counsel for OAG, to Ann Ramser, Counsel for the Commission, et al. (Oct. 21, 2013 3:23 PM) (filed in the record on Oct. 28, 2013).

¹⁶ See Email from Ann Ramser, Counsel for the Commission, to Gregory Dutton, Counsel for OAG (Oct. 21, 2013 4:05 PM) (filed in the record on Oct. 28, 2013).

¹⁷ See Email from Todd Osterloh, Counsel for WSKC, to Gregory Dutton, Counsel for OAG (Oct. 21, 2013 8:40 PM) (filed in the record on Oct. 28, 2013).

¹⁸ In addition, contrary to the Intervenor's statement that WSKC sought a hearing for early-March, counsel for WSKC specifically requested that a hearing not be scheduled for early March based on a personal matter and a federal jury trial scheduled from March 11-13, 2014.

¹⁹ See Intervenor's Motion to Dismiss at 2.

²⁰ See Email from Gregory Dutton, Counsel for OAG, to Ann Ramser, Counsel for the Commission (Oct. 21, 2013 5:01 PM) (filed in the record on Oct. 28, 2013).

topics to be covered in the supplemental requests.”²¹ The rationale behind WSCK’s encouragement for information requests is simple: WSCK wants the opportunity to demonstrate the reasonableness of its rates. By receiving information requests early in the process, WSCK can provide responses, and the parties are afforded an opportunity to ask follow-up questions to clarify issues that may need to be addressed. Despite WSCK’s encouragement to receive information requests early in the process so that it can demonstrate the reasonableness of its rates, which is the very purpose of this proceeding, the Intervenors are criticizing WSCK’s actions. Such criticism is illogical and unjustified.

The Intervenors emphasize that WSCK filed a Notice of Election of Use of Electronic Filing Procedures on June 20, 2013, and indicated that it intended on filing an application for rate adjustment by the end of July 2013.²² This fact has no relevance to their motion. WSCK filed the Notice because it decided to use the electronic filing procedures as a means of eliminating unnecessary rate case expenses and potentially reducing the rates for its customers. The notice form requests the date on which a utility intends on filing its case, but that date has no other significant under statutory law or regulation. Unfortunately, two UI staff members departed the company in the summer, and the company is seeking to fill these positions. Regardless of the reasoning for the date of the filing, the Intervenors have not been prejudiced by the fact that WSCK filed its application in September as opposed to July. Ultimately, the date on which WSCK indicated that it intended on initially filing its application has no relevance whether the Intervenors’ motion should be granted.

²¹ See Email from Todd Osterloh, Counsel for WSCK, to Gregory Dutton, Counsel for OAG (Oct. 21, 2013 8:40 PM) (filed in the record on Oct. 28, 2013).

²² See Intervenors’ Motion to Dismiss at 2.

The Intervenors suggest that UI is prioritizing its rate case in Florida over its rate case in Kentucky.²³ This is simply not true. UI organizes its accounting staff into regional teams. The regional team that is assigned to the Florida rate case cited by the Intervenors is a different group of individuals than the regional team that is assigned to WSCK's rate case. The regional team that includes Kentucky is handling several matters across several jurisdictions and is committed to demonstrating the reasonableness of WSCK's proposed rates to the Kentucky Commission.

With their only statutory reference in the entire motion, the Intervenors suggest that WSCK and UI have failed to comply with KRS 278.190 and were in "default from day one."²⁴ There is absolutely no truth to this. WSCK has complied with all requirements set forth in KRS 278.190 and 807 KAR 5:001 in filing this rate application. The Commission recognized this when it accepted the application as filed by letter dated October 8, 2013. Yet again, the Intervenors attempt to distract the Commission with false statements without providing any real support for their motion.

VI. Conclusion

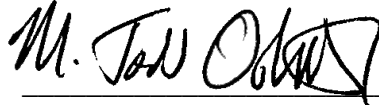
As discussed above, it is premature to dismiss WSCK's this early in the proceedings. The procedural schedule proposed by WSCK provides sufficient time by which the parties will have adequate due process to be heard and for the Commission to render a decision on the substantive issues presented in the case. Moreover, dismissal of the rate case at this stage in the proceeding would be contrary to the provisions of KRS 278.190. The Intervenors have attempted to distract the Commission's attention with false, irrelevant, and illogical statements, and have failed to provide any legal authority for their motion. Moreover, WSCK has dedicated and will continue to dedicate the resources necessary to demonstrate the reasonableness of its

²³ See *id.* at 6.

²⁴ See *id.* at 5.

proposed rates and is committed to providing responses to the requests for information by the proposed extended deadline of December 13, 2013. As such, the Intervenor's motion should be denied, and WSCK's motion to amend the procedural schedule should be granted.

Respectfully submitted,



M. TODD OSTERLOH
CHARLES D. COLE
STURGILL, TURNER, BARKER & MOLONEY, PLLC
333 W. Vine Street, Suite 1400
Lexington, Kentucky 40507
Telephone No.: (859) 255-8581
tosterloh@sturgillturner.com

ATTORNEYS FOR WATER SERVICE CORPORATION
OF KENTUCKY

x:\wdox\clients\64592\0004\pleading\00355754.docx