

the existing procedural schedule to permit Bracken District to serve additional requests for information regarding Augusta's auditor and the documents that she prepared.²

Bracken District respectfully declines to submit such requests. Written requests for information are an inadequate substitute for live cross-examination. They offer virtually no opportunity to confront and challenge a witness. There is no opportunity for immediate follow-up questions based upon a witness's response nor is there any means to view the witness's demeanor or otherwise assess the veracity of the witness through verbal and visual cues. Furthermore, when responding to written questions a witness has the opportunity to consult with and rely upon the assistance of counsel to prepare his or her response.

Moreover, the PSC's Order of September 16, 2015 has the unintentional effect of requiring Bracken District to assist Augusta in proving Augusta's case-in-chief. In this matter, Augusta has the burden of proof.³ It made a deliberate and calculated decision not to present testimony from its auditor – the person who prepared the financial statements and rate calculations upon which Augusta's proposed rate is based.⁴ Neither of Augusta's witnesses at the hearing sponsored those documents. Furthermore, neither witness was qualified to explain how those documents were prepared and was unable to offer explanations for the Auditor's findings and calculations. Any request for information that Bracken District now poses at this

² Order of Sept. 16, 2015 at 3.

³ See, e.g., Case No. 96-616, *The Application of Winchester Municipal Utilities for Approval for Collection of System Development Charges* (Ky. PSC Aug. 8, 1997); Case No. 98-283, *Proposed Adjustment of the Wholesale Water Service Rates of the City of Owenton, Kentucky* (Ky. PSC Sept. 22, 1998); Case 2005-00369, *Proposed Adjustment of the Wholesale Water Service Rates of the City of Versailles* (Ky. PSC Dec. 22, 2005); Case 2015-00151, *Proposed Adjustment of the Wholesale Water Service Rates of the City of Salyersville* (Ky. PSC Sept. 25, 2015).

⁴ Augusta has previously informed the PSC on two occasions that its auditor would testify. See City of Augusta's Response to the PSC's Order of February 10, 2015, Item 1 (filed Mar. 31, 2015); City of Augusta's Response to Commission Staff's Second Request for Information, Item 1 (filed Apr. 27, 2015). Therefore, its decision not to present her as a witness cannot be considered inadvertent or accidental.

late stage of the proceeding merely allows Augusta another bite at the apple to meet its burden of proof and to offer the evidence that it consciously chose not to present earlier.

Motion to Strike Documents and Dismiss the Proceeding

As the proponent of the proposed rate adjustment, Augusta has the burden of proof to demonstrate the reasonableness of its proposed rate.⁵ To meet this burden, Augusta relies upon a rate calculation entitled “Water Treatment Plant Costs” that its auditor Donna Hendrix prepared and included as part of Augusta’s Audited Basic Financial Statements for the Year Ended June 30, 2014. By failing to provide a sponsoring witness for this rate calculation and the financial statements, Augusta has failed to meet its burden of proof and dismissal of its request for rate adjustment is required.

The Water Purchase Contract, which Augusta and Bracken District entered on March 4, 1993, places singular emphasis on the report of Augusta’s auditor. It requires Augusta to

determine the rate or charges for wholesale water purchases for the next wholesale billing rate year based upon a calculation of the following demonstrable costs. Such costs shall be taken from the annual financial report of the Seller for the preceding operating year which has been examined by a firm of Certified Public Accountants.⁶

Throughout this proceeding, Augusta has repeatedly emphasized its reliance upon Ms. Hendrix’s audit report and rate calculation. When submitting its proposed rate adjustment, it specifically referred to the rate calculation as the reason for the increase and included a copy of it.⁷ In response to a PSC Staff request for information, Augusta explained that Ms. Hendrix’s audit was “the informational basis for calculating the proposed rate needed to be charged by the

⁵ Supra note 2.

⁶ Water Purchase Contract - Variable Rate Schedule, Section 5.

⁷ Letter from Gretchen Usleaman, Augusta City Clerk, to Brent Kirtley, Manager, Tariff Branch, Public Service Commission (filed Jan. 8, 2015) (“Per our audit completed by Donna J. Hendrix, Bracken County’s new water rate as of February 11, 2015 will be \$1.95 per thousand.”)

Regional Water Treatment Plant.”⁸ Gretchen Usleaman, Augusta’s City Clerk, stated that the “proposed change in the wholesale rate is a direct result of the City of Augusta’s annual audit conducted by Donna Hendrix, CPA.”⁹

In his prepared testimony, Doug Padgett, Augusta’s newly appointed Water Treatment Plant Operations Manager, noted the critical importance of Ms. Hendrix’s report. He testified:

At the close of Fiscal Year 2014, the City requested that Donna J. Hendrix, CPA, perform an audit of the City’s financial statements, funds, and related activities. The City also requested Ms. Hendrix to calculate the cost of operating the water treatment plant, as required by the contract between the City and BCWD. Ms. Hendrix completed her review and presented her final report on December 12, 2014. The City reviewed Ms. Hendrix’s report and accepted the general auditing contained in the report. . . . Based on the formula provided in the contract between the parties, the CPA’s review demonstrated that the City should charge BCWD \$1.95 per 1,000 gallons that BCWD purchases plus \$6,090 per month for capital costs.¹⁰

Simply put, Ms. Hendrix determined Augusta’s proposed rate. There is no evidence to suggest that any other person played a role in developing the rate calculations. Neither of the witnesses that testified in support of Augusta’s proposed rate are auditors or accountants. Neither could testify with certainty regarding the review that Ms. Hendrix conducted or how she reached her results.

Despite Ms. Hendrix’s pivot role, she is virtually absent from this proceeding. She does not sponsor any exhibit or documents. She has filed no written testimony. She is not responsible for responding to any requests for information.¹¹ She was not present at the evidentiary hearing. Augusta has offered no reason why Ms. Hendrix did not testify. In fact, Augusta’s earlier

⁸ City of Augusta’s Response to Commission Staff’s Second Request for Information, Item 1 (filed Apr. 27, 2015). *See also* City of Augusta’s Response to the PSC’s Order of February 10, 2015, Item 25 (

⁹ *Id.* at Item 2a.

¹⁰ Testimony of Doug Padgett at 3.

¹¹ *But see* City of Augusta’s Response to Bracken District’s Third Request for Information, Item 9 (filed June 2, 2015) (stating that Ms. Hendrix provided the response). This response was not made under oath nor was it accompanied by a signed certification as 807 KAR 5:001, Section 4(12) requires.

pronouncements in this proceeding that Ms. Hendrix would testify strongly suggest that her absence was a deliberate and calculated decision on Augusta's part.¹²

In Case No. 98-283, the PSC was faced with a similar situation. There, the City of Owenton refused to offer any testimony in support of its proposed rate. In the face of this refusal, the PSC declared:

KRS 278.200 provides that no rate between a municipal utility and a public utility may be changed "until a hearing has been had before the commission in the manner prescribed" by KRS Chapter 278. *See also Simpson County Water District v. City of Franklin, Ky.*, 872 S.W.2d 460 (1994). At such hearing and through the Commission proceeding, the municipal utility seeking the rate adjustment bears the burden of showing that the proposed adjustment is reasonable. *Energy Regulatory Commission v. Kentucky Power Co., Ky.App.*, 605 S.W.2d 46, 50 (1980). *See also Lee v. International Harvester Co., Ky.*, 373 S.W.2d 418 (1963); KRS 278.190(3). If the municipal utility refuses to produce any evidence in support of its proposed rate adjustment, it fails to meet its burden of proof and its proposed rate adjustment must be denied.

Owenton's refusal to present any testimonial evidence precludes it from meeting this burden. **Even if its case for the proposed rate adjustment is based solely upon documentary evidence, the testimony of a witness is required to establish the proper foundation for the introduction and admission of those documents into evidence. In the absence of any direct testimony, Owenton has not met its burden of proof and its proposed rate adjustment must be denied.**¹³

The PSC then denied the municipal utility's proposed rate adjustment.

In the current proceeding, there is no sponsoring witness for the rate calculation and financial statements. Such a witness is essential to establish the proper foundation for the introduction of the financial statements and rate calculation. In the absence of such a witness, Augusta's financial statements and rate calculations cannot be made part of the record, cannot be

¹² Supra note 3.

¹³ Case No. 98-283, Order of Sept. 22, 1998 at 1-2 (emphasis added).

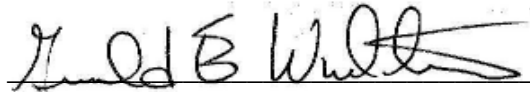
considered by the PSC, and should be struck from the record. Without those documents, there is no evidence to demonstrate that the proposed rate adjustment is reasonable or consistent with the terms of the parties' Water Purchase Contract. Under these circumstances, Augusta's request for rate adjustment must be denied.

Summary

In summary, Bracken District respectfully declines to serve any requests for information on Augusta regarding the financial statements and rate calculations that Ms. Hendrix prepared. Given the clear precedent on this issue, the PSC should strike all references in the record to such documents in light of Augusta's failure to produce Ms. Hendrix to testify regarding such documents and should then dismiss Augusta's request for rate adjustment for failure to meet its burden of proof.

Dated: September 29, 2015

Respectfully submitted,

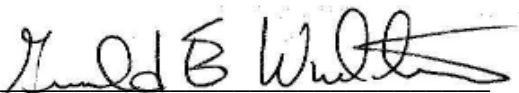


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CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, I certify that Bracken District's September 29, 2015 electronic filing of this paper is a true and accurate copy of the same paper being filed in paper medium; that the electronic filing has been transmitted to the Commission on September 29, 2015; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that an original paper medium of this paper will be delivered to the Commission on or before October 1, 2015.

A handwritten signature in black ink, appearing to read "Gerald E. Wuetcher", written over a horizontal line.

Gerald E. Wuetcher