

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PROPOSED ADJUSTMENT OF THE)
WHOLESALE WATER SERVICE RATES OF) **CASE NO. 2015-00039**
THE CITY OF AUGUSTA)

**BRACKEN COUNTY WATER DISTRICT'S REPLY TO THE CITY OF AUGUSTA'S
RESPONSE TO NOTICE AND MOTION TO STRIKE AND DISMISS**

Bracken County Water District ("Bracken District") submits this reply to the City of Augusta's ("Augusta") Response to Bracken District's Notice and Motion to Strike Documents and Dismiss Proceedings.

Under the terms of the Public Service Commission's ("PSC") Order of August 14, 2015, the Report of the 2013-14 Audit is not admissible. Allowing Bracken District the opportunity to conduct post-hearing discovery does not alter this fact, but rather condones Augusta's calculated decision not to present a sponsoring witness for the document that serves as the "informational basis" for Augusta's proposed rate adjustment. Given that Augusta's responses to any post-hearing discovery requests provide Augusta with the opportunity to further explain the Report's contents, any post-hearing discovery provides Augusta with a second chance to prove its case and assists Augusta in meeting its burden of proof. This uneven enforcement of the procedural rules violates Bracken District's right to due process.

1. Due process is not afforded when procedural rules are unevenly applied.

In its Order of August 14, 2015, the PSC established the conditions under which testimony could be offered in this proceeding. It directed the parties to identify those persons that would present evidence at hearing and to file those witnesses' written testimony no later

than August 21, 2015.¹ Failure to identify a witness or file the witness's written testimony would preclude the introduction of such testimony.

The report of the 2013-14 Audit is testimony. It contains Donna Hendrix's findings, opinions, and conclusions regarding the costs that Augusta incurred to operate its Water Treatment Plant and provide treated water to Bracken District. Augusta has acknowledged that Ms. Hendrix's report "served as the information basis for calculating the proposed [wholesale] rate,"² that the proposed [rate] change is a direct result" of the audit report, and that the report was one of two factors in "determining the proposed change in the wholesale rate."³ Under the terms of the parties' 1993 Water Purchase Contract, the report's findings are the principal determinant of any adjustment of Augusta's wholesale water rate.

Regarding Ms. Hendrix and her report, Augusta failed to comply with the Order of August 14, 2015. It did not identify Ms. Hendrix, who conducted Augusta's 2013-14 Audit and who perform the rate calculation upon which Augusta bases its proposed rate adjustment, as a witness nor did it file any written testimony from her. Despite repeated assurances made earlier in this proceeding that Ms. Hendrix would be called as a witness,⁴ Augusta did not make her available to testify at the hearing or offer any reason for its failure to produce her.

By failing to complying with the Order of August 14, 2015 or offer any reason for its failure to comply, Augusta failed to meet the conditions necessary to introduce Ms. Hendrix's report of the 2013-14 Audit and her rate calculations into evidence. By allowing the report to remain in the record in the face of Augusta's deliberate and calculated decision not to identify her as a witness or have her appear, the PSC not only fails to enforce its Order of August 14,

¹ The PSC subsequently extended the time for filing testimony to August 27, 2015.

² Augusta's Response to the PSC's Order of February 10, 2015, Item 1 (filed Mar. 30, 2015).

³ Augusta's Response to the PSC Staff's Second Request for Information, Item 2(c) (filed April 27, 2015).

⁴ Augusta's Response to the PSC's Order of February 10, 2015, Item 1 (filed Mar. 30, 2015); Augusta's Response to the PSC Staff's Second Request for Information, Item 2(c) (filed April 27, 2015).

2015, but effectively applies its procedural rules in an unequal and disparate manner that deprives Bracken District of its right to due process.

Once the PSC has established the procedural rules for a proceeding, it is obligated to enforce those rules in a fair and even-handed manner. In this proceeding, however, the PSC has on several occasions permitted Augusta to ignore those procedural rules. In most rate municipal utility rate proceedings,⁵ the PSC has required a municipal utility at the outset of the proceeding to file written verified direct testimony of each of its intended witnesses. Failure to submit that testimony has resulted in the threat of dismissal or the outright dismissal of the proceeding.⁶ In its Order of February 10, 2015, the PSC directed Augusta to the direct testimony of its witnesses.⁷ Despite being granted an extension of time to comply, Augusta failed to provide such testimony.⁸ It again failed to provide this testimony⁹ when PSC Staff, noting Augusta's failure to comply with the Order of February 10, 2015, requested such written testimony in its request of April 13, 2015.¹⁰ Only after being directed a third time did Augusta file written testimony.

When it directed for the third time that Augusta filed written testimony on August 14, 2015, the PSC required both parties to this proceeding to simultaneously file the direct written testimony of their witnesses. The decision to not enforce the original order clearly benefited Augusta and placed Bracken District at a procedural disadvantage. It allowed Augusta six

⁵ See, e.g., Case No. 2014-00392, *Proposed Adjustment of the Wholesale Water Service Rates of the City of Danville, Kentucky* (Ky. PSC Nov. 14, 2014).

⁶ See, e.g., Case No. 98-283, *Proposed Adjustment of the Wholesale Water Service Rates of the City of Owenton, Kentucky* (Ky. PSC Sept. 22, 1998); Case No. 99-131, *Proposed Adjustment of the Wholesale Water Service Rates of the City of Warsaw, Kentucky* (Ky. PSC Oct. 12, 1999); Case 2005-00369, Case 2015-00151, *Proposed Adjustment of the Wholesale Water Service Rates of the City of Salyersville* (Ky. PSC Sept. 25, 2015).

⁷ Order of February 10, 2015, Appendix B, Item 1. The PSC originally directed Augusta to respond to its order within nine days. It subsequently extended the period to respond to 48 days.

⁸ Augusta's Response to the PSC's Order of February 10, 2015, Item 1 (filed Mar. 30, 2015). This response merely listed the expected witnesses, which included Ms. Hendrix.

⁹ Augusta's Response to the PSC Staff's Second Request for Information, Item 1 (filed April 27, 2015).

¹⁰ PSC Staff's Second Request for Information to the City of Augusta, Item 1 (filed Apr. 13, 2015)

months to craft its written direct testimony, to learn the opposing party's arguments and theories, and to develop and formulate responses to those arguments its direct testimony. It also denied Bracken District, which timely filed the written testimony of its witness, any opportunity to review Augusta's direct written testimony prior to submitting its own testimony, to respond to Augusta's testimony or to even know the identity of Augusta's direct witnesses.

The opportunity to conduct post-hearing discovery affords no "additional procedural protections" to Bracken District. To the contrary, such discovery merely affords Bracken District the opportunity to assist Augusta in proving Augusta's case-in-chief. Despite repeated statements that Ms. Hendrix's work was the "informational basis" for the proposed rate and that Ms. Hendrix would testify, Augusta chose not to call her as a witness or make her available at hearing. Under the terms of the August 14, 2015, her report – "her testimony" – cannot be properly considered. A response to any post-hearing discovery request is an opportunity for Augusta to explain, to clarify and to elaborate upon the report's contents – evidence that is otherwise excluded by Augusta's failure to comply with the Order of August 14, 2015. Augusta further benefits from this process as it prepares its responses to post-hearing discovery requests with full knowledge of all of the testimony and arguments contained in the written testimony and as well as that provided at the evidentiary hearing. Furthermore, its counsel may assist in drafting responses to these requests. Such assistance would not have been available to Augusta's witnesses at the evidentiary hearing.

As to Augusta's contention that Bracken District should have subpoenaed Ms. Hendrix to compel her appearance at the hearing, Augusta as the applicant for a rate adjustment has the

burden of proof.¹¹ It is not Bracken District's responsibility to assist Augusta in meeting this burden by subpoenaing Ms. Hendrix or requesting her appearance. Augusta is the master of its case.¹² It is represented by experienced counsel familiar with PSC procedures who could be expected to know the consequences of failing to call Ms. Hendrix as a witness to sponsor and verify her report.¹³ Augusta certainly recognized the importance of Ms. Hendrix's testimony as it had previously identified her report as a critical to its case and identified her to the PSC as a witness.

As to the assertion that Case No. 2012-00520¹⁴ supports the proposition that the submission of written post-hearing questions to witnesses in lieu of a witness's live appearance is generally accepted, Augusta has ignored several critical points. The parties in Case No. 2012-00520 agreed that witnesses who had filed written testimony and who were not expected to be questioned at the evidentiary hearing would not be required to attend the hearing but could be subjected to post-hearing questions if issues within their subject-matter arose at the hearing.¹⁵ The parties sought to avoid the unnecessary and costly appearance of witnesses. In the present case, however, there is no agreement to waive the appearance of any witness, Ms. Hendrix did not file written testimony in verified form, and Ms. Hendrix's findings are a critical element of

¹¹ 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).

¹² See, e.g., Case No. 90-108, *Americoal Corporation v. Boone County Water and Sewer District* (Ky. PSC Aug. 21, 1991) at 2 ("absent unusual circumstances . . . a complainant is entitled to be the master of his case and should have the right to determine how it is presented to the Commission").

¹³ In light of Augusta's request for rate case expenses of \$40,000, most of which will represent legal fees, the suggestion that Bracken District must subpoena a hostile witness to introduce evidence that supports Augusta's case or otherwise assist Augusta's counsel in the prosecution of Augusta's case is absurd.

¹⁴ Case No. 2012-00520, *Application of Kentucky-American Water Company for An Adjustment of Rates Supported By a Fully Forecasted Test Year* (Ky. PSC June 3, 2013).

¹⁵ Case No. 2012-00520, VR 06/05/2013 18:13:00 – 18:13:30.

Augusta's case that all clearly recognized would be examined at the hearing. Moreover, Augusta has yet to offer any reason for its failure to make Ms. Hendrix available at hearing.

In summary, the PSC's measures to address Augusta's failure to comply with PSC's Order of August 14, 2015 do not afford Bracken District due process of law. By permitting Augusta to introduce evidence that would otherwise be impermissible, the PSC fails to evenly enforce its procedural rules. Moreover, its measures require Bracken District to assist Augusta in proving its case-in-chief. They place Bracken District at a distinct disadvantage and reward Augusta for its deliberate non-compliance with a PSC Order. They encourage parties in other proceedings to engage in similar conduct to game the procedural rules and to push the envelope to ascertain how far a party may ignore established rules.

2. Ms. Hendrix is needed to present the proper foundation for the introduction of the Audit Report and rate calculation into the record.

In its Response, Augusta argues that Ms. Hendrix is not needed to authenticate her report or rate calculation as her calculation is "a simple calculation" and that no need exists for her to "verify simply mathematics." According to this argument, Augusta's auditor does nothing more than sum the numbers provided to her by Augusta's employees.

In truth, the rate calculation is a very complex process. The rate calculation sheet contains a summary of various expense categories. It does not list individual expenses, does not contain a description of the information sources, and does not discuss the process used to review an expense to ascertain whether it met the definition of a "cash operation and maintenance expense" or the methodology used to allocate common or joint expenses that were shared with other city departments. To understand the calculation and how it was developed requires the testimony of the calculation's preparer.

To suggest that the rate calculation is a mere calculation also ignores the 1993 Water Purchase Contract. The Water Purchase Contract defines “cash operation and maintenance expense” charge, the volumetric rate that is at issue in this proceeding, as:

All operating expenses, excluding depreciation expenses, excluding capital costs of improvements, betterments, replacements, etc. and excluding debt service costs (principal and interest, paying agent’s fees, sinking fund reserves, etc.) for the Seller’s operating year as identified and recognized in the annual examination of the Seller’s financial records, by the firm of Certified Public Accountants conducting the examination of the Seller’s financial records for the most recent fiscal year. The rate shall be based on demonstrable costs to the Seller for providing treated water.¹⁶

The Water Purchase Contract envisions the auditor performing more than a simple calculation. The rate calculation must be based upon the auditors’ examination of Augusta’s financial records. The auditor must determine which costs are “demonstrable costs . . . for providing treated water.” The Contract’s literal language requires an examination of each included cost.

The elaborate procedure set forth in the 1993 Water Purchase Contract for the selection of an auditor further underscores the significance of the auditor’s role. The Contract places limits on Augusta’s authority to select an auditor. Augusta must select the auditor from a list of firms recommended by the Water Supply Advisory Board. This Board was to be composed of one representative each from Augusta, Bracken District, and the City of Brooksville. The parties deemed the auditor’s work of such importance that they sought to ensure that no one entity would control his selection. It obviously involved more than making a “simple calculation.”

The record does not support Augusta’s assertion that its employees are in a better position to testify regarding Water Treatment Plant expenses than the auditor. Neither Mr. Padgett nor Ms. Usleman is an accountant or auditor. Mr. Padgett has no training or experience in

¹⁶ Prepared Direct Testimony of Anthony Habermehl, Exhibit A at 9.

accounting or auditing. At the time of the hearing, he had been employed as Augusta Water Treatment Plant Operations Manager for only 22 days.¹⁷ His only previous involvement with the Augusta Water Treatment Plant was to service its computers. He testified that had not spoken with Ms. Hendrix regarding the audit or rate calculations. The record does not reflect that Ms. Usleaman has any specialized training or education.¹⁸

The record further does not reflect that Augusta's witnesses established the foundation for introduction of Ms. Hendrix's report of her 2013-14 Audit or of her rate calculation. In his testimony, Mr. Padgett speaks exclusively to rate case expense. In her testimony, Ms. Usleaman discusses expenses not considered in the audit report or the rate calculation and raises questions regarding the accuracy of the audit and the rate calculation. Neither sponsored the audit report or rate calculation in their written or live testimony. Neither offered any explanation or description as to how the audit was performed, the audit findings or the rate calculations.

3. Augusta has failed to distinguish the current case from Case No. 98-283.

Augusta seeks to distinguish the *City of Owenton* decision on the basis that, unlike *Owenton* where no written testimony was submitted, Augusta filed written testimony in this proceeding and that post-hearing discovery is available to the intervening party. These arguments ignore the limited nature of the testimony of Augusta's witnesses and Augusta's conduct in the proceeding.

Merely offering testimony is not enough. The PSC noted in *Owenton* that if a municipal utility's case for the proposed rate adjustment is based upon documentary evidence, "the

¹⁷ VR 09/08/2015 10:02:20 – 10:02:27.

¹⁸ In its Response, Augusta states that Bracken District's Chair Anthony Habermehl is not qualified to testify about the rate calculation. Response at 6, n.2. In his written testimony, Mr. Habermehl acknowledges that he is "not a financial analyst or a ratemaking expert," but only a layman offering his view. Prepared Direct Testimony of Anthony Habermehl at 9.

testimony of a witness is required to establish the proper foundation for the introduction and admission of those documents into evidence.”¹⁹ The testimony must be related to the documents and establish a foundation for their admission. While Doug Padgett and Gretchen Usleaman filed testimony on Augusta’s behalf, none of that testimony provided a foundation the introduction of the audit report or the rate calculation. Neither sponsored the audit report or rate calculation in their written or live testimony. Neither offered any explanation or description as to how the audit was performed, the audit findings or the rate calculations.²⁰

Augusta ignores several facts in its effort to draw a parallel between the PSC’s decision to grant rehearing in *Owenton* and the PSC’s decision to permit post-hearing discovery in the present case. The PSC’s dismissal in *Owenton* came relatively early in the proceeding and was followed by the municipal utility’s prompt compliance with earlier Orders to file testimony and petition for rehearing. The municipal utility’s initial failure to file testimony did not impair wholesale customer’s participation in the proceeding. In contrast, the current proceeding is in its final stages. Augusta’s failure to file the necessary testimony to support documentary evidence follows repeated failures to comply with PSC requests for written testimony. As discussed earlier, these failures have placed Bracken District at a procedural disadvantage. Allowing post-hearing discovery requests will not reverse these disadvantages.

Summary

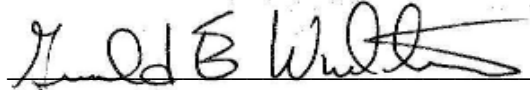
The PSC should strike all references in the record to such documents in light of Augusta’s failure to produce Ms. Hendrix to testify regarding such documents and should then dismiss Augusta’s request for rate adjustment for failure to meet its burden of proof.

¹⁹ Case No. 98-283, Order of Sept. 22, 1998) at 2.

²⁰ In her testimony, Ms. Usleaman impliedly criticizes Ms. Hendrix’s audit. She notes several alleged examples of costs that were not correctly allocated to the Water Treatment

Dated: October 12, 2015

Respectfully submitted,

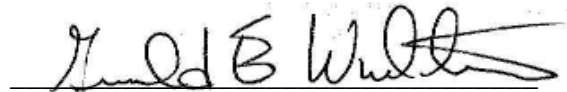


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CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, I certify that Bracken District's October 12, 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 October 12, 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 14, 2015.



Gerald E. Wuetcher