COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

In the Matter of:

Proposed Adjustment of the Wholesale Water Service Rates of the City of Augusta	)))	Case No. 2015-00039

CITY OF AUGUSTA'S RESPONSE TO BRACKEN COUNTY WATER DISTRICT'S RENEWED MOTION TO STRIKE DOCUMENTS AND DISMISS THE PROCEEDING

The City of Augusta ("City"), by counsel, hereby provides the following response to Bracken County Water District's ("BCWD") renewed Motion to Strike Documents and Dismiss the Proceeding.

The Commission has previously denied BCWD's motion to strike that was presented at the evidentiary hearing. In conjunction with its denial, the Commission afforded BCWD with additional procedural protections. Instead of taking advantage of those opportunities, BCWD is wasting the Commission's and the City's resources by renewing its motion. As such, the Commission should again deny BCWD's renewed Motion to Strike and Dismiss the Proceeding.

A. BCWD's due process rights have not been violated.

BCWD suggests that it has been deprived due process of law through the Commission's order by not affording it an opportunity to cross-examine Donna Hendrix, the certified public

accountant that prepared the rate calculation on which the City is basing its proposed rate increase. There has not been a due process violation.[1]

The Commission has broad discretion in how to handle evidentiary issues. Cf. Citizens for Alternative Water Solutions v. Kentucky Pub. Serv. Comm'n, 358 S.W.3d 488, 490 (Ky. App. 2011)("The Commission serves as fact-finder and possesses sole discretion to judge the credibility of evidence.") It has used this discretion in a variety of ways. For example, in the most recent rate case for Kentucky-American Water Company, the Commission permitted the parties to submit written questions after the evidentiary hearing to any witness who previously submitted written testimony and did not testify at the hearing. Kentucky-American Water Co., Case No. 2012-00520, 2013 WL 2456099, at *1 (Ky. PSC June 3, 2013).

In the present case, the Commission determined that it could adequately handle the concerns of both parties by denying BCWD's oral motion to strike but allowing BCWD to present written questions to the City regarding Hendrix and her rate calculation within twenty days after the hearing. See Order dated September 16, 2015, at 3. The Commission also provided an opportunity for either party to request an additional evidentiary hearing. Id.

Several courts and administrative agencies have determined that a paper record provides sufficient due-process protections. Several federal circuit courts have determined that differing administrative agencies can rule on administrative matters through the submission of written

[1] In addition to the arguments presented in the main body of this Response, it is not clear whether BCWD can maintain a due-process claim in this matter. In Kentucky Indus. Util. Customers, Inc. v. Kentucky Utilities Co., 983 S.W.2d 493, 497 (Ky. 1998), our high court stated:

> It is well established that in order to succeed in either a procedural or substantive due process claim, such claimant must demonstrate a legitimate entitlement to a vested property interest. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Utility ratepayers have no vested property interest in the rates they must pay for a utility service despite the fact that it is provided by a regulated monopoly.

The present case pertains directly to the rates that BCWD would pay. This opinion states that a ratepayer has no property interest in the specific rates for utility service and, therefore, has no constitutional due process rights. It would appear that BCWD falls into this category.

evidence. For example, the Fifth Circuit rejected a lack-of-due-process argument, finding that the Interstate Commerce Commission "in conducting a full and fair hearing, need only consider the submission of written evidence, as distinct from oral testimony elicited on cross-examination. Bonney Motor Exp., Inc. v. United States, 640 F.2d 646, 650 (5th Cir. 1981)(citing Subler Transfer, Inc. v. United States, 396 F.Supp. 762, 764 (S.D. Ohio 1975)); see also Amador Stage Lines, Inc. v. United States, 685 F.2d 333, 335 (9th Cir. 1982)("The Commission in its discretion may deny an oral hearing even where material facts are disputed so long as the disputes may be adequately resolved by the written submissions."); Cities of Carlisle & Neola, Iowa v. F.E.R.C., 741 F.2d 429, 431 (D.C. Cir. 1984)("In those cases there was 'no need for more than a paper hearing' because the [Federal Energy Regulatory] Commission was able to consider fully the issues without recourse to more formal procedures.").

Likewise, administrative agencies have also supported the use of written evidence only in their cases. The Federal Energy Regulatory Commission has specifically found that a paper hearing can sufficiently resolve issues in specific matters, despite the objection for a lack of an opportunity to cross-examine witnesses. See, e.g., Ameren Servs. Co. N. Indiana Pub. Serv. Co., 131 FERC ¶ 61214, 62084-85, 2010 WL 2228395 (June 3, 2010); Texas Gas Transmission Corp., 55 FERC ¶ 61369, 62126 (June 6, 1991)("[T]he Commission has held that the mere assertion that cross-examination and discovery is necessary will not suffice to prevent proceeding under the paper hearing procedure. Rather, the party making such assertion must 'specif[y] why it is unable to develop facts through written submission', or 'show that discovery is necessary to resolve any factual dispute . . . .'"); Pub. Serv. Co. of Indiana, Inc., Opinion No. 349, 51 FERC ¶ 61,367, 62,219, 113 P.U.R.4th 305 (F.E.R.C. June 28, 1990) ("The mere

assertion that a trial-type hearing is necessary, without identifying specific factual disputes that cannot be resolved on the basis of a written record, is not sufficient.")

This Commission has followed this rationale in permitting written questioning of witnesses under certain circumstances. As discussed above, this method was used in Kentucky-American Water Company's last rate case. Kentucky-American Water Co., Case No. 2012-00520, 2013 WL 2456099, at *1 (Ky. PSC June 3, 2013).

BCWD has not articulated why it is unable to develop facts through written questions and answers, or show that the cross-examination of Hendrix is necessary to resolve any factual dispute. In addition, BCWD has not argued that the rate calculation submitted by the City is not authentic or that Hendrix was in some way biased. It only argues that written requests for information are "an inadequate substitute for live cross-examination." See BCWD's Motion at 2. As discussed above, the wealth of case law and administrative decisions does not adopt BCWD's viewpoint.

Moreover, BCWD failed to afford itself of an opportunity to participate in the process that the Commission established. Pursuant to the Commission's order, BCWD could have issued information requests after the evidentiary hearing, but it deliberately declined to do so. BCWD could have also requested that the Commission issue a subpoena for Hendrix to appear at the evidentiary hearing, see KRS 278.320, but it did not. In fact, BCWD knew that the City did not intend on calling Hendrix as a witness when the parties participated in a pre-hearing informal conference on September 2, 2015, but BCWD did not request Hendrix to be available to testify. Both courts and agencies, including this Commission, have determined that there is no due process violation when a person fails to participate in the proceeding as specifically authorized by the governing body or law. In a rate case involving Atmos Energy, the Commission found

that there was no due process violation when an intervenor, *inter alia*, could have filed supplemental requests for information to Atmos but chose not to do so. Atmos Energy Corp., Case No. 2013-00148, 2014 WL 1653618, at *32-33 (Ky. PSC Apr. 22, 2014).

The Kentucky Court of Appeals made a similar ruling involving a prison inmate in Hatfield v. Thornberry, No. 2011-CA-000383-MR, 2011 WL 5599661, at *3 (Ky. App. Nov. 18, 2011). In that case, the Court stated:

> Hatfield was permitted by prison officials to obtain testimony from witnesses through interrogatories. He rejected the opportunity because he felt the evidentiary method was too restrictive. While he disagrees with the procedural methods used, prison officials have broad discretion regarding the handling of inmate witnesses. Baxter v. Palmigiano, 425 U.S. 308, 322, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). Therefore, we conclude that Hatfield's due process rights were not violated by the use of interrogatories.

Id.

This ruling does not only apply in Kentucky; federal courts have also applied it in a variety of matters. See, e.g., Farhat v. Jopke, 370 F.3d 580, 596 (6th Cir. 2004)("[W]here the employee refuses to participate or chooses not to participate in the post-termination proceedings, then the employee has waived his procedural due process claim."); Clentscale v. Beard, No. CIV.A. 07-307J, 2008 WL 3539664, at *5 (W.D. Pa. Aug. 13, 2008)("Merely because he did not to utilize this process does not mean that he was denied procedural protections. Rather, having been provided with such procedural protections, he cannot complain that he was deprived of any interest without process if he failed to utilize the very process put into place to address such inmate grievances.")

B. The City provided proper foundation for the calculation

BCWD maintains that the City has failed to provide proper evidentiary foundation for introduction of the document that briefly itemizes how the rate calculation was performed. This is not accurate. Augusta's City Council approved the calculation and proposed rate in December 2014. The City Clerk, Gretchen England, is the records custodian for the City. She is undoubtedly the best witness that can testify as to the authenticity of the document that has been introduced into the record.

The rate calculation is a simple calculation. It merely sums the expenses that were allocated to the Water Treatment Plant and divides those total costs by the total gallons produced. There is no need to have Hendrix verify simple mathematics. See, e.g., Perkins v. Hausladen, 828 S.W.2d 652, 655 (Ky. 1992) (quoting Prosser & Keeton, on the Law of Torts, § 39 (5th ed.1984))(holding that an expert is not needed to testify as to information that a layman can produce).

To the extent that BCWD is suggesting that Hendrix would be needed to testify as to the City's expenses underlying the calculation, city employees would be in a better position than Hendrix to testify as to these expenses. City employees, such as the City Clerk and the Water Treatment Plant Operations Manager, have direct involvement in the expenses of the Water Treatment Plant and are in the best position to provide testimony on those expenses.[2]

In fact, information related to the Water Treatment Plant underlying expenses from City employees are more important than Hendrix's methodology because these underlying expenses are how the Commission traditionally determines rate. "Kentucky law generally holds utility contracts are subject to rate changes ordered by the PSC, no matter what the contracts provide."

[2] In its renewed motion, BCWD states that England and Padgett are not qualified to testify. If this were accurate, BCWD's Chairman Anthony Habermehl would likewise not be qualified to testify.

Nat'l-Southwire Aluminum Co. v. Big Rivers Elec. Corp., 785 S.W.2d 503, 517 (Ky. App. 1990)(citing Bd. of Educ. of Jefferson Cnty. v. William Dohrman, Inc., 620 S.W.2d 328 (Ky. App. 1981). If the Commission had no discretion as to review the proposed rates because the contract dictated the result, this Commission proceeding would not have been established. Rather, the parties would have been forced to accept the rates as calculated by Hendrix or pursue alternate avenues, such as BCWD retaining an independent auditor. Because the Commission has this authority, the City produced two employees with the most information related to the underlying expenses.

C. Case Number 98-283 is distinguishable

BCWD suggests that Case Number 98-283 dictates that the Commission dismiss this case. There are several facts that distinguish the City of Owenton's case with Augusta's case. First and foremost, Owenton did not provide any testimony to support its proposed rates. In contrast, Augusta pre-filed written testimony by England and Padgett, and they provided oral testimony at the evidentiary hearing.

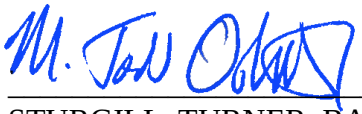
Moreover, after the Commission dismissed Owenton's case, Owenton filed a petition for rehearing and the Commission allowed the case to proceed after Owenton filed testimony. By affording BCWD an opportunity to ask written questions to Augusta, the Commission has allowed the parties an opportunity to proceed through those written questions and a possible additional evidentiary hearing. BCWD has failed to take advantage of that opportunity. It deliberately declined to file any written questions. Ultimately, the Commission's decision in the present case is consistent with the Owenton case because it is enabling the parties to process the case while affording BCWD due process. Even recognizing this consistency, the Owenton decision does not support BCWD's arguments in the present case because Owenton failed to

provide any testimony in support of its proposed rate case, unlike Augusta, which produced two witnesses.

D. Conclusion

The Commission appropriately denied BCWD's motion to strike that was submitted at the evidentiary hearing. There is no reason for the Commission to reconsider its decision, particularly in light of the fact that BCWD has not taken advantage of written questioning that the Commission authorized. As discussed above, by its own actions, BCWD has essentially waived its due process rights by not acting. Moreover, the City has produced the witnesses with the relevant information needed to the Commission and parties to investigate the City's proposed rate and its underlying expenses. Accordingly, the Commission should deny BCWD's renewed Motion to Strike and Dismiss the Proceeding.

Respectfully submitted,



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CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, I certify that the City of Augusta's electronic filing of these Supplemental Responses is a true and accurate copy of the same document being filed in paper medium; that the electronic filing was transmitted to the Commission on October 6, 2015; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that a paper copy of this Notice has been mailed to the Commission on October 6, 2015.

COUNSEL FOR CITY OF AUGUSTA