

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF CALDWELL COUNTY)	
WATER DISTRICT FOR RATE ADJUSTMENT)	Case No.
PURSUANT TO 807 KAR 5:076)	2016-00054

ATTORNEY GENERAL’S MOTION FOR REHEARING AND RECONSIDERATION

Comes now, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and hereby moves the Kentucky Public Service Commission (hereinafter “Commission”) to reconsider the Final Order tendered in this matter. In support of his motion, the Attorney General states that the Final Order should be reversed since the decision was not based on evidence in the record and the Commission impermissibly shifted the burden of proof to the Attorney General.

I. Authority to Review

Pursuant to KRS 278.400, any party to a proceeding may, within twenty (20) days after service of the order, apply for a hearing with respect to any of the matters determined.¹ Commission precedent has been that a rehearing requested under KRS 278.400 may be reheard, regardless of whether the case was determined without hearing.² In the Attorney General’s

¹ KRS 270.400

² In Re E. Kentucky Power Co-Op., Inc., 2009-00106, 2009 WL 4908837 (Aug. 19, 2009) Stating: “the Commission finds that its longstanding practice has been to consider a request for rehearing filed under KRS 278.400 irrespective of whether the determination sought to be reheard was made after a hearing or without a hearing.” Citing: Filing of East Kentucky Power Cooperative, Inc. to Request Approval of Proposed Changes to Its Qualified Cogeneration and Small Power Production Facilities Tariff. Case No. 2008-00128 (June 3, 2008)

Comments filed May 18, 2016, he stated that he did not believe it necessary to request a hearing at the time and therefore did not request one.³ Although neither party in this matter requested a hearing, KRS 278.400 and prior Commission precedent dictates that the Attorney General may move the Commission to reconsider its Final Order in this matter and pursuant to KRS 278.390, the Commission has the power to revoke or modify its orders.⁴

II. Commission's Decision and Rationale

In the Final Order in this case the Commission held that Caldwell County Water District's (hereinafter "Caldwell") wage increase of 14 and 15 percent for two Caldwell employees was not reasonable as it failed to "present any evidence to justify . . . the pay-raise percentages awarded to its employees."⁵ In his Comments, the Attorney General agreed with Commission staff's recommendation that the 14 and 15 percent increase in wages for two employees was unreasonable due to the lack of any justification, but also noted that he disagreed with the staff report's allowance of a three (3) percent wage increase to all employees, as Caldwell had failed to provide any evidence or justification to support any increase at all.⁶ Rather than basing their decision on the lack of evidence in the record and denying any increase at all, the Commission instead compared Caldwell's compensation packages to that of South Hopkins Water District as justification to increase wages three (3) percent and stated that the

³ Application of Caldwell County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076, 2016-00054. Attorney General's Comments (May 18, 2016)

⁴ KRS 278.390; In Re E. Kentucky Power Co-Op., Inc., 2009-00106, 2009 WL 4908837 (Aug. 19, 2009) stating in part: "the Commission does have the continuing authority to reconsider its decisions..."

⁵ Application of Caldwell County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076, 2016-00054. Final Order, Page 12 (July 21, 2016); Application of Caldwell County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076, 2016-00054. Staff Report, Page 8 (May 4, 2016)

⁶ Application of Caldwell County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076, 2016-00054. Attorney General's Comments, Page 6 (May 18, 2016)

Attorney General failed to demonstrate the wage increase was unreasonable.⁷ The compensation package of South Hopkins Water District was not at issue nor was it part of the record in this case.

III. Burden of Proof

Inexplicably, the Commission has deviated from the law and Commission precedent, as the decision in this case was not based on evidence in the record and was instead based upon extrajudicial evidence from a prior case. Additionally, in coming to its conclusions, the Commission stated more than once in the Order that they are allowing expenses because the Attorney General had failed to demonstrate they weren't unreasonable, indicating it understood the burden to prove reasonableness rested with the Attorney General.⁸ This is even more concerning since the Commission explicitly stated the opposite as rationale for a decision earlier in its order.⁹ By placing a burden on intervenors the Commission deviated from the statutory requirement that the utility carries the burden of proof as to the reasonableness of the proposed charges, not that intervenors must prove proposed increases are unreasonable.¹⁰ As previously noted the Attorney General made it very clear in his Comments that there is no justification in the record for any increase in wages.¹¹

IV. Caldwell Presented No Evidence to Justify Wage Increase

⁷ Application of Caldwell County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076, 2016-00054. Final Order, Page 12 & 13 (July 21, 2016)

⁸ *Id.*

⁹ Application of Caldwell County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076, 2016-00054. Final Order, Page 4 (July 21, 2016) stating: Staff noted that "the burden of proof is upon Caldwell District to demonstrate that the test-year expense is reasonable and necessary." Citing Application of Caldwell County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076, 2016-00054. Staff Report, Page 15 (May 4, 2016)

¹⁰ KRS 278.190(3)

¹¹ Application of Caldwell County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076, 2016-00054. Order, Page 2 (February 18, 2016); Application of Caldwell County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076, 2016-00054. Attorney General's Comments, Page 6 (May 18, 2016)

In the event neither party in this matter requested a hearing, the Commission stated that the failure to request one would be deemed a waiver to a hearing and a request that the case “stand submitted for decision.”¹² The Attorney General understands this to mean that the case was to be submitted to the Commission for a decision based on the record compiled in this case, although on previous occasions the Commission indicated that fact more explicitly.¹³ It is well understood that the Commission is a “creature of statute” and accordingly only has the powers afforded to it by the General Assembly.¹⁴ While a “creature of statute”, the courts have long held that the Commission’s authority is expansive, insofar as the Commission has the exclusive jurisdiction to “fix rates and establish reasonable regulation of service.”¹⁵ The fact is, although the Commission does have expansive authority, there is no indication that the General Assembly has granted the Commission the power to waive the statutory burden of proof previously mentioned, nor make decisions based on evidence not in the record.¹⁶ In fact, upon judicial review of Commission decisions, the “obligation of the court is to determine whether the protestants have shown by “clear and satisfactory evidence” from the record that the Commission orders are unlawful or unreasonable.”¹⁷ Both the Supreme Court of Kentucky and statute note that the decision of the Commission must be based on the evidence in the record.¹⁸

X. Commission Considered Evidence Outside of the Record

¹² Application of Caldwell County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076, 2016-00054. Order, Page 2 (February 18, 2016);

¹³ See Case No. 2011-00488, Order (January 26, 2012); Case No. 2011-00489, Order (January 26, 2012)

¹⁴ Public Service Commission of Kentucky v. Commonwealth of Kentucky, and Duke Energy Kentucky, Inc., f/k/a The Union Light, Heat and Power Company, 320 S.W.3d 660, 665 (Ky. 2016) citing, Boone County Water and Sewer Dist. v. PSC, 949 S.W.2d 588, 591 (Ky.1997).

¹⁵ *Id.* citing Smith v. Southern Bell Telephone & Telegraph Co., 104 S.W.2d 961, 963 (1937)

¹⁶ KRS 278.190(3)

¹⁷ Kentucky Indus. Util. Customers, Inc. v. Kentucky Utilities Co., 983 S.W.2d 493, 499 (Ky. 1998); KRS 278.430

¹⁸ Morris v. City of Catlettsburg, 437 S.W.2d 753, 755 (Ky.1969); KRS 278.440

In the Final Order in this matter, the Commission considered evidence not in the record when they found Caldwell's compensation package similar to that of South Hopkins, and thus reasonable.¹⁹ By considering the reasonableness of Caldwell's increases, not in light of the evidence presented in the matter, but rather by comparing it to a similarly situated Water District in which no discovery, testimony or evidence referenced during the case, the Commission denied the Attorney General the opportunity to inspect and cross-examine any evidence associated with South Hopkins.²⁰ By considering evidence outside of the record, the Commission not only violated its duty to have a full and complete record in which it based its decision, but by considering evidence extra-judicially the Commission also deprived all parties of their Constitutional right to procedural due process.²¹

XI. Additional Considerations and Inconsistencies

The Attorney General would like the Commission to review the suspect irregularities in this case as noted above, but also as to other aspects. Of particular concern is the inconsistent manner in which the Attorney General's filings are treated, within and between cases. In this matter the Attorney General's initial Motion to Intervene was held in abeyance for ten (10) days, but his Supplemental Motion to Intervene, which was filed two (2) days later, sat without a

¹⁹ Application of Caldwell County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076, 2016-00054. Final Order, Page 11 & 12 (July 21, 2016)

²⁰ *Id.*

²¹ Hilltop Basic Res., Inc. v. Cty. of Boone, 180 S.W.3d 464, 469 (Ky. 2005) citing: Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (internal citation and quotation omitted) Quoting: "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."""; citing: Morris v. City of Catlettsburg, 437 S.W.2d 753, 755 (Ky.1969) quoting: "Procedural due process in the administrative or legislative setting has widely been understood to encompass "a hearing, the taking and weighing of evidence if such is offered, a finding of fact based upon a consideration of the evidence, the making of an order supported by substantial evidence, and, where the party's constitutional rights are involved, a judicial review of the administrative action."""; see also Kaelin v. City of Louisville, 643 S.W.2d 590, 591 (Ky.1982)

ruling for 41 days. This is of particular concern, not only because the Attorney General has a statutory right of intervention, but because in this case the Commission chose not to rule on the Attorney General's Intervention until the seventh (7th) of the fourteen (14) days between the Staff Report was filed and Comments were due.²² Nevertheless, when the Attorney General stated in his Comments that he was unable to adequately provide evidence on a particular subject, the Commission noted that pursuant to 807 KAR 5:076, Section 10(1)(a) the Attorney General had twenty-one (21) days to conduct discovery, ignoring the fact that his Comments in this case were required in seven (7), wholly a result of the Commission's own actions.²³

WHEREFORE, since Caldwell County Water District failed to provide evidence in support of its Application for a rate adjustment as required by law and the Commission incorrectly placed the burden of proof upon the wrong party, the Attorney General respectfully requests the Commission review and reconsider the Final Order in this matter, thereby denying any request in the Application not supported by substantial evidence.

²² KRS 367.150(8); Application of Caldwell County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076, 2016-00054. Order, (May 11, 2016)

²³ Application of Caldwell County Water District for a Rate Adjustment Pursuant to 807 KAR 5:076, 2016-00054. Final Order, Page 18 (July 21, 2016)

Respectfully submitted,

ANDY BESHEAR
ATTORNEY GENERAL



KENT A. CHANDLER
ANGELA M. GOAD
ASSISTANT ATTORNEYS GENERAL
1024 CAPITAL CENTER DRIVE,
SUITE 200
FRANKFORT KY 40601-8204
(502) 696-5456
FAX: (502) 573-1005
Kent.Chandler@ky.gov
Angela.Goad@ky.gov