

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**In the Matter of:**

**ELECTRONIC APPLICATION OF MONROE     )**  
**COUNTY WATER DISTRICT FOR RATE     ) CASE NO. 2017-00070**  
**ADJUSTMENT PURSUANT TO 807 KAR 5:076   )**

**MOTION FOR RECONSIDERATION AND CLARIFICATION**

Monroe County Water District (“Monroe District”) moves for reconsideration of those portions of the Commission’s Order of August 18, 2017 denying the request for the establishment of a procedural schedule to permit the parties to conduct discovery of Commission Staff and requiring only Monroe District to provide advance notice of its witnesses and exhibits that it intended to present at hearing. Monroe District further moves that the Commission specifically identify the “factual issues that need to be resolved” before a decision can be rendered, limit the hearing to those issues, and clarify whether 807 KAR 5:076, Section 11(c) precludes the taking of further evidence on those issues on which Commission Staff has issued a finding that all parties have admitted explicitly or by failure to object and which the Commission has not specifically determined requires further review.

**Argument**

- 1. The Commission’s refusal to permit discovery of Commission Staff is not supported by 807 KAR 5:076 and violates Monroe District’s right to due process.**

In its Order of August 18, 2017, the Commission bases its refusal to permit discovery on Commission Staff on two faulty premises. It asserts that 807 KAR 5:076 “does not provide for a party to conduct discovery upon Commission Staff.” Order at 2. It also appears to suggest that discovery upon Commission Staff is not permissible since 807 KAR 5:076, Section 3, limits the

record upon which the Commission can base its decision and information obtained through discovery upon Commission Staff is not among the listed sources.

As to the first premise, while 807 KAR 5:076 does not expressly provide for a party to conduct discovery on Commission Staff, it grants the Commission discretion to permit such discovery. 807 KAR 5:076, Section 10(2) provides: “The commission may establish different arrangement for discovery if it finds different arrangements are necessary to evaluate an application or to protect a party’s rights to due process.” In this proceeding, Commission Staff at the Commission’s direction has filed in the record of this proceeding a Report that is in some aspects adverse to Monroe District’s interests. At a minimum, due process requires that Monroe District be permitted to conduct discovery upon Staff to know the bases for Staff’s opinions as well as its qualifications to render such opinions.

In this regard, the current proceeding is strikingly similar to *Kentucky-American Water Co. v. Cowan*, 847 S.W.2d 737 (Ky. 1993), in which Commission Staff entered into a stipulation with a utility in a rate case proceeding over the objections of the intervening parties. The Commission refused to permit Commission Staff to be subject to discovery or cross-examination. Upon judicial review of the Commission’s order approving the stipulation, the Kentucky judiciary at each level found the Commission had denied the intervening parties due process of law by denying the parties the opportunity to conduct discovery upon Commission Staff regarding the stipulation.

The Kentucky Supreme Court stated:

The AG also claims that the Commission erred by not allowing the Staff to be subjected to Discovery and Cross-Examination; and thus, violated due process. Under due process, the AG and the City were entitled to know what evidence is being considered and are entitled to an opportunity to test, explain and/or refute that evidence. The AG participated in the settlement conference and the hearing. The AG was given the opportunity to cross-examine KAWC witnesses, but not Staff witnesses. In this case, the Staff

acted in an adverse manner by negotiating, signing and publicly recommending a compromise of the case that did not include the AG and the City. In view of this, the AG and the City were entitled to know the factual material on which the Staff relied so that this evidence might be refuted. Thus, **the AG should not have been prevented from taking Discovery or Cross-Examining the Staff members who recommend the settlement.**

*Kentucky-American Water Co.* at 741 (emphasis added).

The omission of responses to discovery requests propounded to Commission Staff from Section 3 is also not an adequate basis upon which to deny Monroe District's request for discovery. Notwithstanding the language in Section 3 and its predecessor, the Commission has permitted such requests in prior Alternative Rate Filing Procedure proceedings.<sup>1</sup> While the responses to such requests are not part of the record that the Commission may consider, these responses are likely to lead to the discovery of relevant evidence that may be properly introduced at the evidentiary hearing and become part of the record that the Commission may lawfully consider.<sup>2</sup> Denial of Monroe District's request on the basis of Section 3 is inconsistent with the Commission's longstanding policy that that discovery "is essential to proper litigation" and discovery's purpose "is to ensure mutual knowledge of all relevant facts gathered by the parties."<sup>3</sup>

In summary, no Commission regulation prohibits a party from conducting discovery upon Commission Staff in a proceeding in which Commission Staff has offered evidence into the record and taken positions on controverted issues. The Commission has the discretion to permit such discovery and has on numerous occasions permitted the parties to serve

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<sup>1</sup> See, e.g., *Alternative Rate Filing of Hillridge Facilities, Inc.*, Case No. 2010-00426 (Ky. PSC Feb. 11, 2011

<sup>2</sup> 807 KR 5:076, Section 3(7) provides that the Commission may base its decision upon the record of any hearing.

<sup>3</sup> *Green River Steel Corporation v. Kentucky Utilities Co.*, Case No. 10300 (Ky. PSC Jan. 6, 1989) at 6.

interrogatories and requests for information on Commission Staff.<sup>4</sup> This practice has ensured the development of a full and complete record and reduced the length and expense of hearings before the Commission. It should be permitted in the current proceeding.

**2. The requirement that Monroe District only provide advance notice of its witnesses and exhibits impairs Monroe District's right to a fair hearing and should be either rescinded or amended to apply to the Attorney General and Commission Staff.**

By its Order of August 18, 2017, the Commission creates an unlevel playing field and places Monroe District at a distinct disadvantage. The Commission directs Monroe District to file a list of its witnesses and exhibits with the Commission at least seven days prior to the scheduled hearing, but does not impose a similar obligation on the Attorney General (“AG”) or Commission Staff. Although both have been deeply involved in this proceeding, have taken positions adverse to Monroe District, and have the opportunity to present witnesses and evidence at the scheduled hearing, neither the AG nor Commission Staff is required to disclose the names of its witnesses or provide copies of its expected exhibits.<sup>5</sup> While the Commission may have legitimate reasons for requiring advance notice of a party’s witnesses and exhibits, such reasons are likely to extend to all parties. The Commission has not stated any reason for applying its directive to Monroe District alone.

By requiring only Monroe District to make such disclosures, the Commission favors the other participants in this proceeding. By enabling the other participants to have advanced notice of Monroe District’s witnesses and exhibits, the Commission grants them the opportunity to

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<sup>4</sup> See, e.g., *Alternative Rate Filing of Hillridge Facilities, Inc.*, Case No. 2010-00426 (Ky. PSC Feb. 11, 2011); *Investigation of the Operating Capacity of Martin County Water District Pursuant To KRS 278.280*, Case No. 2002-00116 (Ky. PSC July 25, 2002); *An Investigation of the Wholesale Water Service Rate of Montgomery County Water District No. 1* (Ky. PSC Feb. 2, 1998); *Application of Kenton County Water District No. 1 (A) To Issue Revenue Bonds In the Approximate Amount of \$21,930,000, (B) To Construct Additional Plant Facilities of Approximately \$19,214,000; And (C) Notice of Adjustment of Rates Effective May 1, 1987*, Case No. 9846 (Ky. PSC June 2, 1987).

<sup>5</sup> In light of Commission Staff member J. Scott Lawless’s pending retirement, the identity of the Commission Staff member who will testify on the issues surrounding Monroe District’s revenue requirements has great significance.

develop hearing strategies to counter Monroe District's arguments and to more effectively prepare cross-examination for Monroe District's witnesses. By failing to place the same obligations upon the AG and Commission Staff, it deprives Monroe District of the same opportunity and restricts Monroe District's ability to advance its position.

An applicant for rate adjustment is entitled to a fair hearing on its application. This right is impaired when the Commission, without justification, imposes procedural requirements solely on the applicant. Those requirements clearly place the applicant at a procedural disadvantage to the other parties, unduly and unnecessarily benefit the other parties, and are fundamentally unfair. Accordingly, the Commission should rescind that portion of its Order that requires Monroe District to provide advance notice of its witnesses and exhibits or, in the alternative, extend it to Commission Staff and the AG.

**3. In view of the acceptance of most of the Commission Staff's findings and recommendations by the Attorney General and Monroe District, the Commission should specifically identify "the factual issues that remain to be resolved."**

In its Order of August 18, 2017, the Commission noted that "factual issues" needed to be resolved before a final decision could be rendered in this matter.<sup>6</sup> While the Commission stated that these issues "include, but are not limited to, the level of employee benefits and the appropriate service lives assigned to Monroe District's plant asset account groups," it failed to identify any other issues and concluded by finding that "an evidentiary hearing should be held on **all issues in this case.**" Order at 2 (emphasis added).

Monroe District respectfully questions the need to conduct a hearing on all issues. As a result of the responses of the AG and Monroe District to the Commission Staff Report, the only

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<sup>6</sup> In its Order, the Commission referred to a decision "as to the reasonableness of the rates recommended in the Staff Report." Order at 2. As KRS 278.190(1) refers to "a hearing concerning the reasonableness of the new rates," Monroe District assumes the Commission intended to refer to the rates set forth in Monroe District's Application.

factual issue in dispute as between the parties and Commission Staff was the appropriate service life assigned to water mains. 807 KAR 5:076, Section 11(c) addresses responses to Commission Staff reports. It provides:

If a party's written response fails to contain an objection to a finding or recommendation contained in the commission staff report, it shall be deemed to have waived all objections to that finding or recommendation.

In its Order of April 12, 2017, the Commission advised the parties:

A party's failure to file written objections to a finding contained in the Commission Staff Report within 14 days after the date of the filing of the Commission Staff Report shall be deemed a waiver of all objections to that finding.

In its response to the Report, the AG did not object to any of the findings contained in the Commission Staff. Pursuant to the terms of Section 11(c) and the Order of April 12, 2017, the AG has waived his right to object to the findings. Similarly, Monroe District objected only to the Commission Staff's findings regarding the appropriate service life assigned to water mains and, by not objecting to any other finding, waived any objections to all other findings. To the extent that a hearing is held on any issues other than the appropriate service life of water mains, Monroe District and the AG are bound by their failure to object to the Commission Staff finding and may not legally present any evidence contrary to the Commission Staff finding.

807 KAR 5:076, Section 11(e) makes clear that the parties' acceptance of Commission Staff findings does not preclude the Commission "from conducting a hearing on the application, taking evidence on the applicant's financial operations, or ordering rates that differ from or conflict with the findings and recommendations established in the commission staff report." Notwithstanding the responses of the AG and Monroe District, the Commission retains the discretion to conduct a hearing on issues other than the appropriate service life of Monroe District's water mains.

Monroe District respectfully submits, however, that conducting a hearing on all issues is a wasteful and unnecessary exercise and is contrary to the intent of Section 11. Section 11 was intended to expedite and simplify small utility rate proceedings and reduce the expense of such proceedings by focusing the Commission and the parties on the issues in dispute and avoiding hearing on issues on which agreement existed. To conduct a hearing on all issues would render Section 11 meaningless. Furthermore, it would amount to a declaration that the Commission Staff Report in this proceeding was inadequate, incomplete, and unworthy of any weight.

Monroe District respectfully urges the Commission to adopt an approach that is more consistent with the letter and spirit of Section 11 and that will achieve a more effective and economical use of the Commission's limited resources. Under such approach, the Commission would specifically identify those issues which it finds were insufficiently addressed in the Commission Staff Report and would limit the hearing to those issues and the issue of water main service lives. This approach allows all to concentrate their attention and efforts on the issues that require resolution rather than disperse their attention and resources along a wider range of issues that have been resolved.

Regardless of whether the Commission adopts this approach, the Commission should clarify whether, as to those issues that the PSC has identified as requiring hearing, and which the parties had waived any objections, the Parties are prohibited by Section 11 from presenting evidence or argument contrary to the waived Commission Staff findings or otherwise contesting the finding.

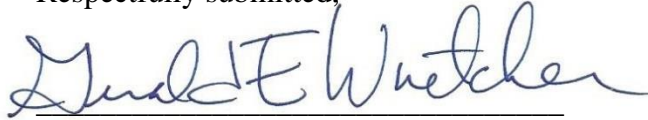
### **Conclusion**

Monroe District requests that the Commission reconsider its Order of August 18, 2017 and (1) establish a procedural schedule that permits discovery to be conducted upon Commission Staff; (2) require all parties and Commission to file a list of its witnesses and exhibits with the

Commission at least seven days prior to the scheduled hearing; and (3) identifies more specifically the factual issues that are in dispute and upon which evidence will be taken at the scheduled hearing and limit the evidence taken to those issues.

Dated: August 29, 2017

Respectfully submitted,



Gerald E. Wuetcher  
Stoll Keenon Ogden PLLC  
300 West Vine Street, Suite 2100  
Lexington, Kentucky 40507-1801  
gerald.wuetcher@skofirm.com  
Telephone: (859) 231-3017  
Fax: (859) 259-3517

*Counsel for Monroe County Water District*

CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, I certify that Monroe County Water District's August 29, 2017 electronic filing of this Motion is a true and accurate copy of the same document being filed in paper medium; that the electronic filing has been transmitted to the Commission on August 29, 2017; 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 Application will be delivered to the Commission on or before August 31, 2017.



Gerald E. Wuetcher