

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

ELECTRONIC APPLICATION OF)	
KENTUCKY-AMERICAN WATER)	CASE NO. 2018-00358
COMPANY FOR AN ADJUSTMENT OF)	
RATES)	

**KENTUCKY-AMERICAN WATER COMPANY’S RESPONSE TO
LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT’S MOTION TO STRIKE**

Pursuant to 807 KAR 5:001, Section 5(2), Kentucky-American Water Company (“KAWC”) hereby responds to Lexington-Fayette Urban County Government’s (“LFUCG”) June 18, 2019 Motion to Strike (“Motion”). LFUCG seeks to strike the very same information that LFUCG itself claims it requested. LFUCG’s basis is that KAWC was not timely in providing it, but the record proves otherwise. More importantly, it was LFUCG’s *own* timing that resulted in the “harm” it now claims, as LFUCG: (1) waited until the evidentiary hearing to actually request the information at issue; and (2) failed to notify KAWC that it viewed KAWC’s post-hearing discovery response as incomplete for *eighteen* days. LFUCG cannot have it both ways. It cannot wait until the record is about to close, ask for information, receive it, and then claim it received it too late. KAWC respectfully requests the Public Service Commission (“Commission”) deny LFUCG’s Motion because: (1) KAWC appropriately answered LFUCG’s discovery request initially and by supplement; (2) any “harm” LFUCG alleges was caused solely by LFUCG’s own timing; and (3) LFUCG’s cited authority does not support striking evidence.

KAWC Appropriately Answered LFUCG’s Discovery Request

As an initial matter, and as KAWC explained in its June 14, 2019 Reply Brief, LFUCG’s attempts to portray KAWC as having withheld information are patently incorrect. Item 5(b) of

LFUCG's Post-Hearing Data Request stated: "Provide copies of contracts, invoices, *or* other documentation that support charges incurred in the preparation of this case."¹ In addition to other rate case expense information, KAWC provided precisely what LFUCG requested—invoices it had received for legal fees. Item 5(b) did not ask for legal fee time detail. It did not ask for contemporaneous time entry information. It simply asked for "contracts, invoices, *or* other documentation." So KAWC provided invoices in accordance with the May 24, 2019 response deadline.

In its Motion and despite the fact that KAWC responded to the question as written, LFUCG alleges that KAWC's initial response was inadequate because of the Commission's directive in Case No. 2011-00036 that rate case expenses should be supported by unredacted copies of invoices.² In that case (and in Case No. 2003-00433 cited in LFUCG's Post-Hearing Brief for the same premise³), the issue of producing unredacted attorney time entries had already arisen in the case.⁴ Particularly, in Case No. 2011-00036, after being asked, the utility had previously refused to produce unredacted attorney time entries.⁵ Fundamentally, it cannot be the case that KAWC was obligated to read words into the request that are not there. But more importantly, KAWC has not refused to provide anything at all. In fact, as soon as KAWC learned that LFUCG wanted attorney time detail information, KAWC provided it, in full, with no redactions whatsoever. KAWC did so to: (1) provide LFUCG what it claims it asked for (but did

¹ LFUCG Post-Hearing Date Request at 5(b) (emphasis added).

² Motion at 3, n.6.

³ LFUCG Post-Hearing Brief at 22, n.83.

⁴ *Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Case No. 2011-00036, Order at 3-6 (Ky. PSC Jan. 29, 2013); *An Adjustment of the Gas and Electric Rates, Terms, and Conditions of Louisville Gas and Electric Company*, Case No. 2003-00433, Order at 38-40 (Ky. PSC June 30, 2004).

⁵ *Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Case No. 2011-00036, Order at 3-6 (Ky. PSC Jan. 29, 2013).

not); and (2) provide it to the Commission in case the Commission would like to have it as it considers the issue of rate case expense.⁶

KAWC's original May 24, 2019 response to Item 5(b) was responsive and complete. But even if KAWC's response was incomplete, the Commission should not strike the evidence KAWC later provided by supplement because KAWC reasonably interpreted LFUCG's request. The Commission has previously denied a motion to strike an untimely filing when the untimely filing was due to the filer's "reasonabl[e] interpretat[ion]" of the briefing schedule.⁷

Any "Harm" LFUCG Alleges Was Caused by LFUCG's Own Timing

LFUCG argues that KAWC is unfairly advantaged by the production of the detailed time entry information after the "close of testimony" because LFUCG had no opportunity to "confront" the information.⁸ Without considering the fact that LFUCG argues that it is disadvantaged by both KAWC's *lack* of production and then *production* of the same information, KAWC has not caused the "harm" LFUCG alleges. Instead, the inability to "confront" the information (which does not need to be "confronted" and is not challenged substantively at all in LFUCG's Motion) is due to LFUCG's own timing in asking for it.

KAWC has been transparent about its legal rate case expense throughout this proceeding. As part of the initial filing requirements, KAWC was required to submit a rate case expense schedule. KAWC did so as set forth at Exhibit 37F to its November 28, 2018 Application⁹ in which it itemized the various components of rate case expense, including legal expense. In addition to that Application Exhibit, KAWC also submitted direct testimony describing its rate

⁶ KAWC's June 14, 2019 Supplemental Response to Item 5(b) of LFUCG's Post-Hearing Data Request.

⁷ *Investigation of Telecommunications Services by Americall Dial-O Services, Inc. Alleged Violations of KRS Chapter 278*, Case No. 90-0001, Order at 2 (Ky. PSC May 4, 1990) ("South Central Bell reasonably interpreted the Commission's remarks concerning the briefing schedule, and therefore its briefs should not be considered untimely.").

⁸ LFUCG Motion, p. 3.

⁹ Application, Exhibit 37F, Page 9 of 10.

case expense.¹⁰ Then, on November 30, 2018, the Commission approved KAWC's November 28, 2018 filing as having no deficiencies. Next, on December 12, 2018, in response to PSC 1-1 which requested KAWC to provide a copy of its "workpapers and calculations," KAWC submitted even more rate case expense detail, including its legal expense. That information was set forth in an Excel file named "Regulatory Expense Exhibit" as Workpaper 3-6. So there can be no question that, at the beginning of the case, KAWC provided adequate information about its rate case expense to put all on notice of its request to recover it. Indeed, LFUCG's own witness proposed a disallowance of a portion of rate case expense unrelated to legal fees.¹¹

LFUCG had ample opportunity to ask for legal rate case expense information long before the May 13-14, 2019 evidentiary hearing. LFUCG asked KAWC 94 data requests (excluding subparts) in the first round of discovery and 32 data requests (excluding subparts) in the second round of discovery. LFUCG asked nothing regarding legal fee invoices at those times. Instead, it waited until the evidentiary hearing to ask about rate case expense—knowing that it would not receive a response until after the hearing concluded which LFUCG now characterizes as "the close of testimony."¹² The Commission has previously rejected due process concerns in denying a motion to strike a report sponsored by a witness unavailable at hearing when the moving party had ample opportunities to otherwise pursue an examination of the witness.¹³ That reasoning applies here as well.

¹⁰ Direct Testimony of James S. Pellock at 9-10 (Ky. PSC Nov. 28, 2018).

¹¹ Direct Testimony of Lane Kollen at 41-44 (Ky. PSC Mar. 15, 2019).

¹² LFUCG Motion at 3. LFUCG's contention that the "close of testimony" occurred when the parties filed responses to post-hearing data requests conflicts with the Commission's May 14, 2019 Order in this case stating that "[t]his case shall stand submitted for decision by the Commission effective 12:01 a.m., Eastern Daylight Time, on June 15, 2019."

¹³ *Proposed Adjustment of the Wholesale Water Service Rates of the City of Augusta*, Case No. 2015-00039, Order at 15 (Ky. PSC Feb. 3, 2016). The Commission recognized that "[p]rocedural due process is not a static concept, but calls for such procedural protections as the particular situation may demand." *Id.* (citing *Kentucky Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583, 590 (Ky. 1995)). The Commission found that "the various options that were available to [moving party] to pursue an examination of [witness] were more than adequate to allow [moving party]

By failing to request further information about KAWC's rate case expense earlier in the proceeding, LFUCG itself limited its ability to "confront" the legal fee information. Even if KAWC had provided the detailed time entry information when it filed its initial response to Item 5(b) on May 24, 2019, LFUCG would not have been able to cross examine KAWC about the information because the hearing had already concluded. Thus, LFUCG's own timing foreclosed its ability to cross examine KAWC about its detailed time entries, not KAWC's timing in providing the detailed time entries. And an argument that LFUCG was "harmed" by not having the information prior to the filing of its Post-Hearing Brief would be equally without merit, because LFUCG already argued in its Post-Hearing Brief that *all* legal rate case expense should be excluded from rate recovery.

In addition to the "harm" LFUCG caused itself by waiting until the hearing to ask for the information at issue, LFUCG compounded that "harm" by its complete failure to attempt to remedy the discovery dispute it perceived. LFUCG first took issue with KAWC's response in its Post-Hearing Brief, a full *eighteen days* after KAWC provided its initial response. If LFUCG had contacted KAWC and explained that it considered KAWC's initial response deficient earlier, KAWC would have disagreed, but it would have immediately provided the time detail. This would have allowed LFUCG time to review the time entries and address them in its Post-Hearing Brief. Instead, LFUCG made no attempt to communicate with KAWC and waited until its Post-Hearing Brief to complain.

Noticeably absent is any attempt by LFUCG to resolve its perceived discovery dispute. The Commission's own regulation contemplates such an attempt to resolve a discovery dispute. 807 KAR 5:001, Section 4(12)(e) requires a party to describe efforts to resolve a disagreement

to confront and challenge [witness] through a live examination and that [moving party] has been afforded procedural due process."

over the production of requested information before filing a motion to compel. LFUCG did not contact KAWC informally or file a motion to compel. Indeed, KAWC had no idea that a discovery “dispute” even existed. Instead, LFUCG chose a way to contest the sufficiency of KAWC’s initial response which did not require it to contact KAWC to resolve the issue. Again, had LFUCG explained that it thought KAWC’s initial response was deficient, KAWC would have disagreed, but KAWC also would have provided the detailed time entries at a moment’s notice—which it did when KAWC finally learned of LFUCG’s position. The solution was obvious and simple, but LFUCG chose otherwise. Ironically, that choice has now increased rate case expense.

LFUCG’s Cited Authority Is Not Applicable

LFUCG cites three cases in which the Commission struck evidence offered as part of a post-hearing *brief* in support of its request to strike information KAWC provided in response to LFUCG’s own *discovery* request. First, KAWC did not provide legal time detail as part of its June 14, 2019 Reply Brief. It provided that detail as a supplemental discovery response before it filed its Reply Brief. Beyond that, none of LFUCG’s cited cases are applicable to the facts at hand. In fact, one case LFUCG cites supports the denial of LFUCG’s Motion.

In Case Nos. 2012-00470,¹⁴ 2013-00237,¹⁵ and 2013-00291,¹⁶ the Commission struck new evidence that a party attempted to introduce for the first time in its post-hearing brief. These cases are easily distinguished because they involved striking evidence that a party introduced in

¹⁴ *Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity to Construct and Finance a Waterworks Improvements Project Pursuant to KRS 278.020 and 278.300*, Case No. 2012-00470, Order at 4 (Ky. PSC Jan. 3, 2014). Footnote 7 of LFUCG’s Motion quotes this Order and cites to page 5. The quote is actually found on page 6, not page 5.

¹⁵ *Application of Water Service Corporation of Kentucky for an Adjustment of Rates*, Case No. 2013-00237, Order (Ky. PSC July 11, 2014).

¹⁶ *Harold Barker; Ann Barker; and Brooks Barker v. East Kentucky Power Cooperative, Inc.*, Case No. 2013-00291, Order at 12 (Ky. PSC July 6, 2015). Footnote 4 of LFUCG’s Motion quotes this Order and cites to page 8. The cited quote is actually found on page 13, not page 8.

its brief to advance new arguments, not *supplemental evidence that the moving party had requested*.

LFUCG relies on these cases to argue that it was similarly disadvantaged by the inability to respond to the “new” evidence that KAWC provided. Citing due process concerns, the Commission found it persuasive in Case Nos. 2012-00470 and 2013-00291 that the party introducing the evidence for the first time in its post-hearing brief could have introduced the evidence at an earlier point in the case.¹⁷ That is not the case here because LFUCG never asked for the information earlier in the case when it easily could have. When it finally asked, KAWC provided the supplemental response as soon as practicable after learning that the LFUCG disagreed with KAWC’s interpretation of the data request.

LFUCG cites to the Commission’s Order in Case No. 2013-00237 involving Water Service Corporation of Kentucky (“WSKY”) in support of its Motion, but neglects to mention the Commission’s full holding. In that case, the intervenors, including the Attorney General (“AG”), jointly filed a Motion to Strike WSKY’s brief because it contained information that was not part of the record. While the Commission did strike some new evidence introduced in the brief, the Commission specifically refused to strike Exhibit 2 of WSKY’s brief, which contained an AG witness’s testimony from another case (Case No. 2004-00103) that was not previously part of the record. The Commission explained that WSKY had previously submitted a request for information to the AG for copies of the witness’s testimony in prior utility cases. In response, the AG did not include the witness’s testimony filed in Case No. 2004-00103. The

¹⁷ *Harold Barker; Ann Barker; and Brooks Barker v. East Kentucky Power Cooperative, Inc.*, Case No. 2013-00291, Order at 12 (Ky. PSC July 6, 2015) (“The Commission finds that each of the four items noted by EKPC relate to information or evidence that Complainants could have discovered with reasonable due diligence.”); *Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity to Construct and Finance a Waterworks Improvements Project Pursuant to KRS 278.020 and 278.300*, Case No. 2012-00470, Order at 4 (Ky. PSC Apr. 30, 2013) (“The Water District, therefore, had ample opportunity to present this evidence at the hearing on this issue in direct or rebuttal testimony or to present this evidence at the hearing on this issue in direct or rebuttal testimony or to cross-examine the Intervenors’ witnesses.”).

Commission noted that had the AG completely provided all of the information requested, the testimony would have been part of the record in the case, and, thus, all parties had notice that WSKY wished to review this information. While striking other evidence from the brief that the Commission identified as “new,” the Commission specifically refused to strike the witness’s testimony filed in Case No. 2004-00103. The Commission explained:

Under the circumstances presented here, the Commission will allow submission of this prior testimony based on the AG’s omission, perhaps inadvertently, of any reference to such prior testimony in response to WSKY’s Request for Information. This prior testimony should not be stricken and will be taken into consideration and given weight based on all other evidence currently in the record.¹⁸

This ruling shows that an intervenor cannot have it both ways as LFUCG requests. It cannot, on the one hand, fail to take steps in discovery (e.g., fail to initially ask for legal fee time detail), and then, on the other hand, claim harm when the information is provided later. Like the Commission’s decision in Case No. 2013-00237, the Commission should not strike the information KAWC provided to supplement its data response.

WHEREFORE, for the reasons stated herein, KAWC respectfully requests that the Commission deny LFUCG’s Motion to Strike.

¹⁸ *Application of Water Service Corporation of Kentucky for an Adjustment of Rates*, Case No. 2013-00237, Order at 6-7 (Ky. PSC July 11, 2014).

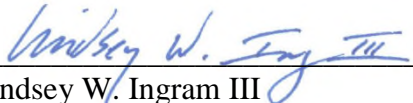
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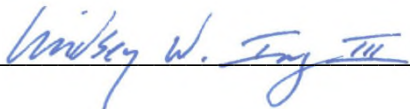
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CERTIFICATE

This certifies that Kentucky-American Water Company's electronic filing is a true and accurate copy of the documents to be filed in paper medium; that the electronic filing has been transmitted to the Commission on June 21, 2019; that a paper copy of the filing will be delivered to the Commission within two business days of the electronic filing; and that no party has been excused from participation by electronic means.

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