

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

**IN THE MATTER OF:**

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

**KENTUCKY-AMERICAN WATER COMPANY’S RESPONSE TO  
ATTORNEY GENERAL’S PETITION FOR REHEARING**

Pursuant to 807 KAR 5:001, Section 5(2), Kentucky-American Water Company (“KAWC”) hereby responds to the Petition for Rehearing (“Petition”) filed on July 22, 2019 by the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention (“AG”). The Commission’s June 27, 2019 Order appropriately considered all evidence in the record and approved reasonable rates. The AG’s Petition gives the Commission no reason to disturb its order and should be denied because: (1) the Petition fails to meet the standard for rehearing; (2) the Commission appropriately considered and weighed all evidence and issued a reasonable order based on that effort; and (3) KAWC met its burden of proof. KAWC therefore respectfully requests that the Commission deny the AG’s Petition in its entirety. Finally, rather than an exhaustive recitation of all the evidence and argument already in the record pertaining to the discrete ratemaking issues raised in the Petition, KAWC hereby incorporates and relies upon its May 31, 2019 and June 14, 2019 briefs.

**The AG’s Petition Fails to Meet the Standard for Rehearing**

The Commission should deny the AG’s Petition because it fails to present any new evidence. As the Commission stated in this case in denying the AG’s prior request for rehearing: “[T]he standard of review for rehearing is whether the party requesting rehearing could, with

reasonable diligence, have offered evidence upon which rehearing is requested prior to the Commission's determination."<sup>1</sup> In other words, rehearing is limited to "new evidence not readily discoverable at the time of the original hearings."<sup>2</sup> The Commission has also clarified that rehearing is not an "opportunity to relitigate a matter fully addressed in the original order"<sup>3</sup> and "final orders of the Commission remain undisturbed absent extraordinary circumstances or the appearance of new evidence that was not available during the pendency of the case."<sup>4</sup> Thus, in the absence of new evidence or argument or the need to correct a material error or omission, which does not exist here, the Commission should deny a motion for rehearing.<sup>5</sup>

The Petition provides no new evidence or argument and instead criticizes the verbiage the Commission used<sup>6</sup> and asserts that the Commission did not sufficiently review the AG's evidence and argument. The AG argues that the Commission "should grant rehearing in order to consider the entirety of the Attorney General's argument," but rehearing is improper unless a new argument actually exists. Mere disagreement with a Commission order does not warrant a rehearing of it; rather, a credible showing of new evidence that "could not without reasonable diligence have been offered" earlier in the proceeding is required. For this reason alone, the Commission should deny the AG's Petition.

### **The Commission Appropriately Considered All Evidence and Argument**

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<sup>1</sup> Case No. 2018-00358, Order at 2 (Ky. PSC Jan. 8, 2019).

<sup>2</sup> *In the Matter of: Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing Construction of the Northern Division Connection*, Case No. 2012-00096, Order at 4 (Jan. 23, 2014).

<sup>3</sup> *Electronic Application of Kentucky Power Company for a Certificate of Public Convenience and Necessity to Construct a 161 kV Transmission Line in Perry and Leslie Counties, Kentucky and Associated Facilities*, Case No. 2017-00328, Order at 5 (Ky. PSC Nov. 14, 2018).

<sup>4</sup> *In the Matter of: Dan Gibson v. Cellular Phone of Kentucky, Inc. d/b/a/ Ramcell*, Case No. 95-430, Order at 2 (Oct. 2, 1195).

<sup>5</sup> *See, e.g.*, Case No. 2012-00096, Order at 6 (Jan. 23, 2014) ("In summary, the Commission finds that Kentucky-American has not met the burden set forth in KRS 278.400 to require a rehearing in this matter. It has failed to present any new evidence or argument to disturb our earlier findings. In the absence of any discernible error in the Order of April 25, 2013, Kentucky-American's Petition for Rehearing should be denied.").

<sup>6</sup> Items 3 and 4 at page 6 of the AG's Petition simply request that the Commission clarify its language.

As the exclusive trier of fact, the Commission considered and weighed all evidence and argument in determining rates that are fair, just, and reasonable. In determining the reasonableness of a Commission order, the Supreme Court has been clear that it is the “result reached not the method employed which is controlling.”<sup>7</sup> The Supreme Court further explained: “It is not theory but the impact of the rate order which counts. . . . The fact that the method employed to reach that result may contain infirmities is not then important.”<sup>8</sup> Kentucky courts have agreed, holding that when reviewing a rate order, the question is whether the “end result” reasonably balances investor and consumer interests.<sup>9</sup> Thus, because the Commission’s overall result is reasonable in this case, it is of no consequence whether the Commission explicitly addressed every minor issue, argument, or allegation presented in the case.

The AG ignores this premise and argues that because the Commission did not explicitly address certain items in its final order that it did not fully consider the evidence in this case. But the Commission is not required to address every argument and each iota of evidence proffered by the parties in its final order – such a standard would be nearly impossible to satisfy. The AG focuses on two issues that it claims were not addressed in the Commission’s final order: the employee stock purchase program discount and certain dues related to covered activities. Regarding the stock purchase program discount, the Commission considered all of the evidence presented by KAWC and the intervenors regarding KAWC’s employee benefits and compensation and reached an overall revenue requirement based on that consideration. And although the Commission did not explicitly address certain dues related to covered activities that represent less than 0.02 percent of the revenue requirement approved by the Commission, the

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<sup>7</sup> *Federal Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (internal citations omitted).

<sup>8</sup> *Id.*

<sup>9</sup> *National-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 513 (Ky. App. 1990) (quoting *Jersey Central Power & Light Co. v. Federal Energy Regulatory Comm’n*, 810 F.2d 1168 (D.C. Cir. 1987)).

Commission is not required to explicitly address all *de minimis* items that are discussed in the case if the overall result is reasonable.

The AG next claims that the Commission unlawfully considered only the AG's expert testimony, conflated the AG's and Lexington-Fayette Urban County Government's positions, and failed to consider arguments that the AG advanced at hearing and in his post-hearing brief. This is not the case. Despite the AG's arguments to the contrary, the Commission considered all of the AG's arguments regarding cash working capital, incentive compensation, the qualified infrastructure program,<sup>10</sup> labor expenses, and the base period update. The AG's disagreement with the Commission's decisions reached on those issues does not entitle the AG to relitigate them. And on the issue of incentive compensation, it must be noted that the AG's dissatisfaction with the Commission's reliance on a Kentucky Power case<sup>11</sup> is inconsistent with its *own expert witness*. Mr. Kollen specifically quoted, cited, and relied upon that same Kentucky Power decision in his argument for a disallowance of that expense.<sup>12</sup> The Commission properly relied upon the Kentucky Power case as it is the most analogous decision to the case at bar.

### **KAWC Met Its Burden of Proof**

KAWC met its burden of proof with its numerous flings in this case, beginning with its November 28, 2018 Application and the accompanying filing requirements. On November 30, 2018, the Commission approved KAWC's November 28, 2018 filing as having no deficiencies. KAWC added to the evidentiary record with written direct and rebuttal testimony accompanied by supporting studies, in-person testimony at the hearing, extensive discovery responses, and a

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<sup>10</sup> The AG perplexingly criticizes the approval of KAWC's Qualified Infrastructure Program, while recognizing that the Commission had the plenary authority to do so.

<sup>11</sup> *Application of Kentucky Power Company for: (1) A General Adjustment of its Rates for Electric Service; (2) An Order Approving its 2014 Environmental Compliance Plan; (3) An Order Approving its Tariffs and Riders; and (4) An Order Granting All Other Required Approvals and Relief*, Case No. 2014-00396, Order (Ky. PSC June 22, 2015).

<sup>12</sup> Kollen Direct Testimony, March 15, 2019, p. 25.

post-hearing brief and reply brief. Through all of this evidence, KAWC met its burden of proof. Each portion of the Commission's order was supported by substantial evidence submitted by KAWC.

The AG misinterprets the Commission's statements regarding the AG's lack of evidence as an unfair "burden shifting." The Commission did not approve certain aspects of KAWC's application "*solely* due to the fact that the Attorney General did not support expert testimony"<sup>13</sup> as the AG claims, but instead approved those proposals because KAWC provided substantial evidence in support of its proposals, and the Commission weighed the totality of the evidence and found KAWC's evidence and argument to be persuasive.

For instance, the AG takes issue with the Commission's approval of the increase in the customer charge. The Commission correctly states that the AG "offered no evidence or testimony regarding an increase in the customer charge."<sup>14</sup> This is factually accurate; the AG made legal arguments in its post-hearing brief on the issue, but did not proffer a witness on this issue. Although the AG equates the Commission's statement with a shift of the burden of proof, the Commission simply weighed the available evidence as the exclusive trier of fact. Of course, the Commission may have given greater weight to Ms. Heppenstall's written direct testimony and in-person hearing testimony than the AG's general policy position opposing higher customer charges stated in its post-hearing brief, but the Commission reviewed and approved KAWC's proposed rate design because it was supported by substantial evidence; not because the AG presented no other alternative. The Commission's accurate statements that the AG did not offer evidence or testimony about certain issues do not equate to an improper shifting of the burden of proof. Instead, those statements mean that KAWC carried its burden of proof and the AG failed

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<sup>13</sup> Petition at 13.

<sup>14</sup> Order at 69.

to rebut that proof with anything more persuasive. In other words, the totality of the evidence and argument required the Commission to find in KAWC's favor on the issues the AG raised in the Petition. Those statements simply reflect that the Commission reviewed all the evidence before it and reached its decisions accordingly.<sup>15</sup>

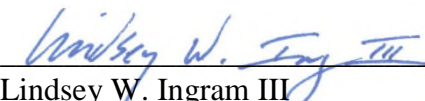
The Commission's June 27, 2019 Order appropriately considered all evidence in the record and approved reasonable rates. The AG's Petition gives the Commission no reason to modify its decision.

WHEREFORE, for the reasons stated herein, KAWC respectfully requests that the Commission deny the AG's Petition for Rehearing.

Date: July 29, 2019

Respectfully submitted,

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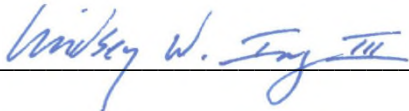
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<sup>15</sup> Similar to the evidence submitted for the customer charge, KAWC provided solid and persuasive evidence on the need for and cost of the proposed chemical treatment upgrades at two of its water treatment plants. That information was provided in Mr. O'Neill's Direct Testimony at pp. 15-16 and 19-21 and in numerous discovery responses. Since the AG's and LFUCG's shared witnesses did not even mention those upgrades in their testimony, KAWC did not address them in its May 31, 2019 Brief, but, upon seeing LFUCG's argument about them in LFUCG's June 11, 2019 Brief, KAWC addressed them in its June 14, 2019 Reply Brief. At bottom, the Commission had before it KAWC's sound evidence on these upgrades, and after considering that evidence, properly approved them.

**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 July 29, 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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By: 

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