COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ATTORNEY GENERAL'S PETITION FOR REHEARING

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention ("Attorney General"), and pursuant to KRS 278.400, hereby tenders his Petition for Rehearing ("Petition") to the Kentucky Public Service Commission ("Commission"), regarding the June 27, 2019 Final Order ("Final Order") in this matter.[1] The purpose of the Attorney General's Petition is to afford the Commission an opportunity to rectify certain material errors and omissions in the Commission's Final Order in Kentucky-American Water Company's (hereinafter "Kentucky-American" or the "Company") base rate case. In that Final Order, Kentucky-American was awarded a rate increase of approximately $13.4 million along with an annual surcharge for the Company's Qualified Infrastructure Program ("QIP").[2] The primary errors and omissions the Attorney General seeks to correct through the Commission on rehearing from are: 1) the Commission neglected to make findings on multiple issues of record, 2) the Commission failed to properly consider evidence and arguments before it, and 3) the Commission unlawfully placed or shifted the burden of proof to the intervenors.

As an initial matter, it is imperative to point out that the Final Order in this matter inappropriately relied upon the direct testimony sponsored by the Attorney General and Lexington-

[1] Commission Order ["Final Order"], Case No. 2018-00358 (Ky. Commission June 27, 2019).
[2] Final Order at 67, 83.

Fayette Urban County Government ("LFUCG"). The Commission's Final Order consistently refers to the direct expert testimony of Mr. Lane Kollen and Mr. Richard Baudino as "Attorney General/LFUCG" positions or arguments.[3] Testimony is "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit."[4] Although a witness may make arguments in support of their expert contentions as part of their testimony, such as Messrs. Kollen and Baudino did in this matter, the Post-hearing briefs of each party are the filing "prepared by counsel as the basis for arguing a case, consisting of legal and factual arguments and the authorities in support of them."[5] The Commission's Final Order unnecessarily complicates an already complicated case by conflating witnesses' arguments in favor of the proposition presented in their expert testimony with the factual and legal arguments presented by a party in its brief on the merits of the matter. Courts have previously held, "[o]ne of the basic requirements of a fair trial is the right to be heard. A litigant is deprived of this right if his counsel is not afforded an opportunity to inform the court of the reasons why the case should be decided in his favor."[6] The Attorney General understands the time constraints presented by these cases, particularly the short period afforded the Commission to enter an order following a hearing.[7] Nevertheless, by treating expert testimony (that was limited in its subject matter) as the Attorney General's legal and factual arguments on the Company's Application *in toto*, the Commission effectively chose efficiency over the ability of the statutorily-designated consumer advocate to plead his case on behalf of customers. This may have proven an effective shortcut for the Commission to enter its order by

[3] The Final Order cited "The Attorney General/LFUCG" 146 times; To rectify the issue of conflating a party's argument with an expert's argument, the Commission could merely state that a particular expert's testimony was sponsored by a party, and when citing to those arguments made by a witness the Commission could state that the "witness argues."
[4] Black's Law Dictionary (11th ed. 2019), testimony.
[5] Black's Law Dictionary (11th ed. 2019), brief.
[6] *Moran Towing & Transportation Co., Inc. v. Conners-Standard Marine Corp.*, 285 F.2d 368, 371 (2d Cir. Dec. 21, 1960).
[7] Commission Order, at 2–4 (Ky. Commission Dec. 5, 2018).

the statutory deadline, but it is nonetheless a manifest injustice for the Company's customers.

Furthermore, by erroneously referring to the arguments presented by intervening parties' witnesses as the arguments of *both* the Attorney General and LFUCG *combined*, the Commission has further foreclosed on the ability of each party to effectively plead their case. The Commission has already found in this case "that LFUCG has a special interest that cannot be adequately represented by the Attorney General."[8] Solely because intervening parties choose to co-sponsor certain direct expert testimony does not permit the Commission to ignore the unique perspective each party may have on that testimony, or what legal implications the evidence exposes. Additionally, lumping parties together in the manner shown by the Commission ignores the vast number of issues presented in the case that were not addressed by intervenor testimony, and the chasm that is likely present between the parties' positions on those issues. Indeed, as evidenced by the Post-Hearing briefs in these matters the Attorney General and LFUCG disagreed on issues and addressed issues the other did not.

The Commission Neglected To Make Findings On Multiple Issues Of Record

The Final Order did not address or make findings on multiple issues of record, which were subject to cross-examination at the evidentiary hearing and were raised in the Attorney General's Post-Hearing Brief.

American Water Employee Stock Purchase Program Discount

In direct testimony, Kentucky-American described its employee stock purchase plan ("ESPP"), through which all employees of American Water and its subsidiaries are able to

[8] Commission Order, at 4 (Ky. Commission Jan. 10, 2019).

purchase shares of American Water common stock at a discount.[9] The stock purchases are made through voluntary payroll deductions, and are limited to a maximum of $25,000 per year.[10] As of May 2019, the discount on stock purchases that participating employees receive increased from 10% to 15%.[11] The corresponding expense for the base period totaled $14,837, while the expense for the fully forecasted test period is $17,459.[12]

At the evidentiary hearing, Kentucky-American witness Pellock confirmed that the expense of offering the Company's employees American Water Company stock at a discounted fifteen percent is included in the cost of service, and will therefore be borne by Kentucky-American customers.[13] This type of benefit for Kentucky-American employees should only be funded by shareholders of the Company, not customers. The Final Order did not address this issue and did not make any findings as to the sufficiency of Kentucky-American's proposal.

Dues Related To Covered Activities Not Properly Removed From The Application

The Company admitted in this matter that dues to certain organizations it sought recovery for were related to covered activities and had not been properly removed from the rate case, which it later confirmed in a Post-Hearing Data Request stating, "[t]he lobbying portion of the Commerce Lexington, Greater Lexington Apartment Association and Kentucky Chamber of Commerce in the amount of $3,453 was erroneously recorded to Company Dues/Memberships, and therefore should be removed from the forecast period."[14] The Commission failed to address this issue and make an appropriate finding in the Final Order.

[9] Kogler Direct at 13.
[10] *Id*.
[11] *Id*.
[12] Pellock Direct at 10.
[13] May 13 VTE at 7:25:05 *et. seq.*; Attorney General's Post-Hearing Brief, at 37.
[14] Company's Response to Attorney General's Post-Hearing Data Request, Item 2.

As to these issues which were not sufficiently addressed in the Final Order, the Commission should grant rehearing to make appropriate findings on these issues.

The Commission Failed To Properly Consider Evidence and Arguments Before It

Cash Working Capital

In its Final Order in this matter the Commission denied the Attorney General's recommendation, based on Mr. Kollen's testimony, to reduce the Cash Working Capital, writing,

> [t]he Commission notes that Kentucky-American's lead/lag study uses the same methodology that we have accepted since 1983. We agree with Kentucky-American that the Attorney General has consistently presented, and the Commission has consistently refused to adopt, the arguments raised here regarding the inclusion of non-cash items in the calculation of working capital. The Attorney General/LFUCG offered no new evidence or arguments in the current proceeding to disturb our previous findings or to support a change in our position on the matter. Therefore, consistent with precedent and based upon the evidence in the record, we find the Attorney General's/LFUCG's proposal regarding cash working capital should be denied.[15]

First, this conclusory paragraph neglects the contents of two-thirds of the Cash Working Capital section of the Final Order, addressing neither the Cash Dividend Expense nor the Service Company Charges, despite devoting several pages introducing each of these topics. After describing the Attorney General's positions and arguments in these sections, and the evidence provided by Mr. Kollen, the Commission neglected to make any findings related to them.

Second, Mr. Kollen's testimony did present new evidence and arguments as to Kentucky-American's inclusion of non-cash items in the Cash Working Capital, specifically that the correct expense lag days for "never" is infinity as opposed to the zero lag days used by the Company.[16] The Commission failed to properly consider this new evidence in denying Mr. Kollen's

[15] Final Order, at 8–9.
[16] Kollen Direct at 14.

adjustments. As such, the Commission should grant rehearing, address the new evidence, and make a proper finding.

Incentive Compensation

The Commission's Final Order approved portions of Kentucky-American's APP incentive compensation plan.[17] By approving a portion of Kentucky-American's proposed incentive compensation through reliance on Case No. 2014-00396, the Commission ignored a more recent expression of its own, on-point precedent. In Case No. 2017-00321, the Commission denied Duke Energy Kentucky ("Duke")'s recovery of *base compensation*, solely because it was provided to employees in the form of restricted stock units. In that case, Duke argued in favor of recovery of those costs stating,

> Mr. Kollen fundamentally misconstrues and misinterprets the Company's compensation plans. In Mr. Kollen's calculation of the $1.634 million show in in the incentive comp worksheet included in the "AG Recommendations excel file", filed with Mr. Kollen's testimony, $541,424 of restricted stock unit amounts charged to the Company are proposed to be eliminated. His inclusion of restricted stock units in his adjustment is flawed because the receipt of *restricted stock units is in no way tied to the results of any financial metric under the Company's compensation packages*. The Company has determined it is beneficial to issue a portion of market-competitive pay in the form of restricted stock units as a means to improve retention of critical skills and encourage a long-term mindset. The vesting of restricted stock units is not tied to corporate financial performance and *the employee will receive these restricted stock units irrespective of whether the Company his financial targets.*[18]

The Commission ultimately ruled that,

> It has been the Commission's practice to disallow recovery of the cost of employee incentive plans that are tied to EPS or other earnings measures and we find that Duke Kentucky's argument to the contrary does nothing to change this holding, as

[17] Final Order, at 43–44.

[18] *Electronic Application Of Duke Energy Kentucky, Inc. For 1) An Adjustment Of The Electric Rates; 2) Approval Of An Environmental Compliance Plan And Surcharge Mechanism; 3) Approval Of New Tariffs; 4) Approval Of Accounting Practices To Establish Regulatory Assets And Liabilities; And 5) All Other Required Approvals And Relief,* Case No. 2017-00321, Rebuttal Testimony of Thomas Silinski, at 7–8 (Ky. Commission Feb. 14, 2018) emphasis added.

it is unpersuasive.[19]

Thus, the Commission held in the Duke matter that the *form* of the compensation, restricted stock units in that case, was the basis of the denial, not the threshold as to when or how it is provided to employees. In the Duke case the Commission did not distinguish between the funding and performance measures. There, the *funding* measure was directly tied to financial performance, while the performance measure was simply the performance of the employee's basic duties. The employee would have received the restricted stock units even if Duke did not hit its financial targets.

This more-recent finding directly contradicts with the Commission's ruling in Case No. 2014-00396,[20] and this more recent precedent supports denial of 100% of the APP test-year amounts. Kentucky-American's plan will be *funded* according to a financial measure, an earnings per share target, while the performance measure is split between financial and non-financial measures. Kentucky-American's situation is more analogous to that of Duke than the Kentucky Power Company in Case No. 2014-00396. Therefore, the Commission must clarify the relative precedential value of this more recent and relevant decision against its findings in the Final Order.

QIP

The Attorney General recognizes that the Commission can, if it so finds reasonable, grant an annual recovery mechanism such as the QIP.[21] However, the Commission cannot grant the QIP solely on the basis that the Attorney General failed to rebut portions of Kentucky-American's proposal with evidence of his own.[22] Further, the final order misquoted and mischaracterized the

[19] Commission Final Order, Case No. 2017-00321, at 21 (Ky. Commission Apr. 13, 2018).
[20] The result in the Kentucky Power Company rate case was the product of a non-unanimous settlement, unlike the Duke rate case or the instant Kentucky-American case, which were both fully litigated.
[21] See *Kentucky Public Service Comm'n v. Commonwealth of Kentucky, ex rel. Jack Conway*, 324 S.W.3d 373 (Ky. 2010).
[22] *See* KRS 278.190(3).

testimony of Mr. Baudino and the position and arguments of the Attorney General. The Commission carried out both of these errors by referring to a direct quote of Mr. Baudino, who addressed the QIP in a limited fashion, by stating that "[t]he Attorney General/LFUCG addressed the QIP mechanism within the context of regulatory principles but declined to address the reasonableness or prudence of the proposed QIP."[23] Although the Attorney General addresses the issue of conflating testimony with a party's position or argument *supra*, Mr. Baudino declining to address the "necessity or prudence of the Company's QIP as Mr. O'Neill described it,"[24] in terms of pure engineering necessity, does not equate to the Commission's simplified conclusion that the Attorney General "declined to address the reasonable or prudence of the proposed QIP."[25] In fact, Mr. Baudino's testimony and the Attorney General's Post-Hearing Brief addressed "the reasonableness or prudence of the proposed QIP" at length.[26] What the Attorney General did not do is address whether or not the five (5) years of projects proposed to be recovered through the QIP (i.e. the projects described by Mr. O'Neill) were necessary or prudent. Rather, as noted multiple times, in his Post-Hearing Brief the Attorney General addressed not whether the investment projects themselves were needed, but rather whether or not the Commission should have to *further* incentivize a utility who receives a hearty return on equity to invest the necessary capital through an annual mechanism, in addition to its rate increase, in order to ensure it provides a reasonable level of service.[27]

The Attorney General contends that Kentucky-American wholly failed to meet its burden

[23] Final Order, at 77.
[24] Baudino Direct Testimony, at 3.
[25] Final Order, at 77.
[26] *See* Attorney General's Post-Hearing Brief, at 48–56; Baudino Direct Testimony, at 49–61.
[27] Attorney General's Post-Hearing Brief, at 48–56. For instance, on page 49 the Attorney General stated, "If Kentucky-American is asserting that it will not replace and maintain its infrastructure unless incentivized to do so, the Commission should deny the QIP and institute an investigation to determine whether a separate entity will commit to investing the necessary capital to maintain what is now Kentucky-American's service territory."

on whether a regulatory mechanism such as the QIP is necessary.[28] In regards to the underlying investments, the Attorney General agrees with the Commission that the "hard facts" are that Kentucky-American failed to timely invest in its system for years, which had the effect of increasing water loss and has now created a crisis that can only be "fixed" by instituting a mechanism that benefits shareholders to the detriment of customers.[29] The Commission should grant rehearing to clarify that the Attorney General did "address the reasonableness or prudency of the proposed QIP," but that Mr. Baudino declined to address the "necessity or prudence of the Company's QIP as Mr. O'Neill described it." Additionally, insofar as its conclusion regarding the reasonableness of the QIP was based in any part on the Attorney General's choice not to address the investments Kentucky-American stated it intends to recover through the QIP (which, given the timing of those investments and the intention to recover through a different matter, are not even before the Commission in this case), the Commission inappropriately placed a burden of proof on the Attorney General that is unlawful, and thus the Commission should grant rehearing to rectify it.

Labor Expenses

The Commission granted an increase to Kentucky-American's full-time employee complement, denying "the Attorney General/LUFCG's proposed adjustment to labor expense."[30] The Attorney General will discuss separately, below, his concern with the Commission's determination being based on the Attorney General's position rather than the Company meeting its burden of proof, but in this section he points out the failure of the Commission to consider his second argument against Kentucky-American's proposed level of labor expenses. Although the

[28] Attorney General's Post-Hearing Brief, at 48, stating "Kentucky-American has failed to meet its burden to show that the QIP is necessary."
[29] Final Order, at 81.
[30] *Id*. at 39–40.

Commission properly notes that the Attorney General discussed the vacancies expected during the test year in his Post-Hearing Brief, the Final Order fails to mention or consider the second issue presented by the Attorney General. The Attorney General noted that although the Company reduced overtime to reflect a full complement of employees, it did not reduce any overtime to reflect the addition of *new* full time employee ("FTE") additions. As the Attorney General stated in his Post-Hearing Brief, "[i]f the reduction in overtime reflects only an assumption that the seven (7) ordinarily empty positions are full, then it is clear Kentucky-American was unable to take into account the effect of the new FTE additions."[31] The Commission should grant rehearing in order to consider the entirety of the Attorney General's argument and, as noted below, to determine whether Kentucky-American met its burden of proof to support the test-year level of labor expenses, and not whether the Attorney General's non-existent "burden" to prove his "proposed adjustment" was met.

Base Period Update

The Commission granted Kentucky-American a deviation to certain regulations in its Final Order that the Company never sought, nor addressed in their Post-Hearing Briefs.[32] The Commission found that although the Company updated its forecast after the regulatory time period allowed, "good cause exists to permit Kentucky-American to deviate from the requirement."[33] The Commission reasoned that; 1) "the update was filed within one day of the regulatory deadline," and 2) the Attorney General took an inconsistent position since he objected to certain increases but not decreases as presented in the Base period Update.[34] Contrary to the Commission's conclusion,

[31] Attorney General's Post-Hearing Brief, at 32.
[32] Final Order, at 18.
[33] *Id*.
[34] *Id*. at 19.

the Attorney General's position is not inconsistent. The increases provided for in the Base Period Update are updates to the forecast, the action prohibited by the relevant regulation, as opposed to the decreases, which were instead related to subjects and issues addressed in intervenor direct testimony, like excess ADIT. These types of changes to the Application, usually concessions in light of intervenor testimony, are ordinarily addressed by all other utilities in their rebuttal testimony. If the Commission's finding for good cause is based on the Attorney General's alleged "inconsistent position," the Commission should grant rehearing on the subject so as to amend its reasoning to be consistent with record evidence.

The Commission Unlawfully Placed Or Shifted The Burden Of Proof To The Intervenors

In regards to the cost of construction for a chemical complex at a Kentucky-American treatment station, LFUCG argued that those expenses should be disallowed since Kentucky-American did not request a CPCN, and that as a result of such omission the Commission has not made a proper determination as to the reasonableness of this cost.[35] The Attorney General also participated in discovery on this issue.[36] In describing the Commission's rationale the Final Order stated,

> [t]he Commission notes that the Attorney General and LFUCG submitted data requests to Kentucky-American regarding the chemical complex but offered no evidence or testimony regarding the ratemaking treatment of the chemical complex. The Commission's findings must be supported by sufficient evidence. Here, with no evidentiary support in the record regarding the proposed adjustment, the Commission is without any basis, much less sufficient evidence, to justify an adjustment, and therefore we deny LFUCG's proposed adjustment to remove expenses related to constructing the chemical complex.[37]

[35] LFUCG Post-Hearing Brief, at 16–19.
[36] Attorney General's Initial Data Request Items 77 & 79.
[37] Final Order, at 51.

The Commission's reasoning in denying LFUCG's argument rested squarely upon the lack of evidence to support an adjustment *denying recovery of the cost of the projects in rates*, and failed to mention at all whether the Company met its burden in supporting cost-recovery of the expenses. It went on to explain that LFUCG misunderstood Commission findings in Case No. 2018-00281, maintaining that a bright-line rule regarding CPCNs was not established and that "each determination is fact specific, takes into account all of the facts."[38] However, the findings stop there and no more analysis or explanation of the determination to grant recovery of these expenses is given.

The Commission gave similar reasoning in describing its decision to grant an increase in the customer charge, which the Attorney General opposed, writing,

> [t]he Commission notes that the Attorney General offered no evidence or testimony regarding an increase in the customer charge. The Commission's findings must be supported by sufficient evidence, and therefore the Commission finds that the proposed customer charges are within the cost to serve. Thus, the proposed customer charges should be approved, with the difference between the proposed and awarded revenue requirement applied to the volumetric charge.[39]

In finding that the reason for its decision on both of these issues was that the Attorney General provided no evidence or testimony on the subject, the Commission unlawfully placed the burden of proof on the Attorney General, and not the Company. As the Attorney General stated in his Post-Hearing Brief, the Company carries the "burden of proof to show that the increased rate or charge is just and reasonable."[40] Contrary to the Commission's finding, intervenors do not have a burden to support a "proposed adjustment." Whether an intervenor provided evidence that a rate, charge or cost should be denied is immaterial, as the burden to support recovery of such a rate,

[38] *Id*. at 51–52.
[39] *Id*. at 69–70.
[40] *See* Attorney General's Post Hearing Brief, at 4, citing KRS 278.190(3).

charge, or cost is on the utility.[41] If an intervenor wishes to provide evidence, whether documentary or through discovery, the Commission may afford whatever weight it deems necessary to the evidence in its consideration of whether the Company's proposed rates and charges are reasonable. An intervenor's choice to not provide testimony evidence on a subject does not by default, as the Commission's order erroneously concludes, grant recovery of costs through the proposed rates and charges. Under Commission precedent, the applicant must prove its rates and other requested relief in its application are necessary.[42] Unless an intervenor "advances proposals in areas or on issues that Kentucky-American has not addressed in its application . . . [he] has no burden of proof to meet."[43] The Attorney General advanced no proposals outside of the areas or issues presented in the Company's Application. The Commission's findings approving certain of the Company's proposals *solely* due to the fact that the Attorney General did not support expert testimony on the subjects is contrary to law, Commission precedent, and even other portions of the Final Order.

The Commission is bound by Kentucky law, and may only approve rates that are fair, just, and reasonable.[44] The Commission may not grant approval to proposals in which the applicant has not sufficiently made its case.[45] There is no requirement that parties intervene in proceedings before the Commission, and no requirement that an intervening party must object and rebut an applicant's proposal in order for the Commission to deny the requested relief. In its post-hearing brief, the Company wrongly argued that a proposal "Has Not Been Contested" by intervenors,

[41] The Attorney General includes the term cost for context, but given that the Commission uses cost-based ratemaking, rates and charges reflect cost, and are thus two sides of the same coin.
[42] Commission Order, *In the Matter of: Proposed Adjustment of the Wholesale Water Service Rates of the City of Augusta*, Case No. 2015-00039, at 16 (Ky. Commission February 3, 2016) ("Although the applicant has the burden of proof, it is the Commission that decides whether the applicant has met its burden of proof based upon all of the evidence in the record and in light of the arguments of the parties made in their briefs").
[43] Commission Order, *In Re. Adjustment of the Rates of Kentucky-American Water Company*, Case No. 2004-00103, at 2 (Ky. Commission October 27, 2004) (referencing specifically the Attorney General as intervenor).
[44] KRS 278.030.
[45] *See Allen v KHRA*, 136 S.W.3d 54 (Ky. Ct. App. May 14, 2004) (regarding administrative agencies requiring an order to be supported by substantial evidence).

implying that no intervenor's expert evidence sufficiently rebutted its claims, thus ostensibly rendering its requested relief reasonable.[46] Kentucky-American's argument was and remains misplaced.[47] The Company cited to no law or precedent in support of this claim, essentially arguing that but for intervention *and* the proffer of contrary evidence, its application is afforded the benefit of a presumption of reasonableness and thus deserves approval by default. Thankfully, the treatment in which Kentucky-American believes it is entitled to receive, and which the Commission granted them, is not supported by law.

Kentucky-American's application, as supported by the record and "in light of the arguments . . . made in [its] brief []," must stand on its own.[48] In finding otherwise, the Commission's Final Order is unlawful, and thus subject to appeal.[49] Interestingly, the Commission's sudden inclination to afford Kentucky-American's application a presumption of reasonableness applies only to issues not addressed by intervenors, but apparently the same treatment does not apply to proposals the Commission has concerns with itself. For instance, the Commission discussed in its Final Order certain "Support Services Expense," noting that although the Commission previously placed Kentucky-American "on notice" regarding the expenses, "Kentucky-American was unable to provide the Commission with a detailed listing and description of business development costs or external affairs and public policy costs" in the test-year.[50] No intervenor supported testimony on this issue, and the only two items cited in support of the Commission's ultimate adjustment was a single Company data-request response to Staff, and an order from a 2004 Kentucky-American rate case.[51] Notably, in citing the previous order, the

[46] Company's Post-Hearing Brief, Case No. 2018-00358, at 10, 12, 50 (Ky. Commission May 31, 2019).
[47] Attorney General's Post-Hearing Brief, at 5.
[48] Commission Order, Case No. 2015-00039, at 16 (Ky. Commission February 3, 2016).
[49] See KRS 278.190(3) stating that the burden of proof is upon the applicant utility, and KRS 278.410, stating that a party may bring suit in Franklin Circuit Court to set aside an order that is unlawful or unreasonable.
[50] Final Order, at 40.
[51] *Id*.

Commission stated in a footnote, "[p]lacing this burden upon Kentucky-American is consistent with Kentucky-American's statutory duty as an applicant to demonstrate that its proposed rate are reasonable.[52] While in other portions of its Final Order the Commission granted recovery for costs *solely* because intervenors chose not to support testimony on the subject, the Commission, in parts of its Final Order, properly denied recovery of costs in light of Kentucky-American's failure to meet its statutory obligation to demonstrate that the proposed rates are reasonable. Rehearing must be granted to rectify the unlawful placing or shifting of a burden to the intervenors. Rehearing on this issue should include, but not be limited to the following instances in the Final Order where the Commission placed the burden of proof on intervenors, not the Company:

1. The Commission granted the entirety of the proposed customer charge increase because "the Attorney General offered no evidence or testimony regarding an increase in the customer charge."
2. The Commission granted cost-recovery of Kentucky-American's chemical complex, asserting that LFUCG failed to prove the expenses should be disallowed, rather than properly making a finding that the Company met its burden of proof that the expenses should be recovered. Specifically, the Commission stated that LFUCG "offered no evidence or testimony regarding the ratemaking treatment of the chemical complex," and thus provided "no evidentiary support . . . to justify an adjustment."[53] The Commission made no finding that the proposed costs were reasonable, or whether the projects required a CPCN (the legal and factual argument *actually* made by LFUCG). In fact, the Commission made no findings of fact at all regarding the projects, but

[52] *Id*., footnote 146.
[53] *Id*. at 51.

instead focused solely on LFUCG's "adjustment," while LFUCG's adjustment was merely an argument that the Company failed to meet its burden of proof in order to receive cost recovery of the related expenses.[54]

3. The Commission granted Kentucky-American's test-year level of labor expense by finding that the Attorney General's proposed adjustment "should be denied," rather than finding that Kentucky-American, as the applicant, met its burden of proof on the subject.[55]
4. Insofar as the Commission approved the QIP based on the Attorney General not providing testimony on the prudency of the investments underlying the mechanism, it must grant rehearing to make clear that the burden of proof regarding that matter is not on the Attorney General, and given the timing of the investments, is not even properly before the Commission in this case.

WHEREFORE, the Attorney General requests that the Commission, based upon the evidentiary record and this Petition, grant the Attorney General's request for rehearing.

[54] LFUCG Post-Hearing Brief, at 16–19.
[55] Final Order, at 40.

Respectfully submitted,

ANDY BESHEAR
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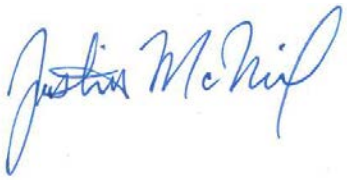

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