

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	)	

**ATTORNEY GENERAL'S REPLY TO KENTUCKY-AMERICAN WATER COMPANY**

Comes now the intervenor, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention (“Attorney General”), and hereby tenders his Reply to Kentucky-American Water Company (“Kentucky-American”)’s Response to his Petition for Rehearing (“Petition”) regarding the Kentucky Public Service Commission (“Commission”)’s June 27, 2019 Final Order (“Final Order”) in this matter.<sup>1</sup> As the Supreme Court of Kentucky has previously noted, “an order of the commission continues in force until revoked or modified by the commission or unless suspended or vacated in whole or in part by the Franklin Circuit Court.”<sup>2</sup> Contrary to the assertions made by Kentucky-American’s Reply, as the Attorney General properly argues, the Commission has complete jurisdiction to hear the Petition for Rehearing before it.

Kentucky-American stated that the Attorney General’s Petition does not meet the standard for rehearing because it did not provide “new evidence or argument” and that there is no need to correct a material error or omission in this case. First, a plain reading of the statutory language in KRS 278.400 authorizing rehearing does not set any such standard. It also does not require new evidence as a threshold to clear prior to, or even after, granting rehearing, reading “[u]pon the rehearing any party *may* offer additional evidence that could not with reasonable diligence have

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<sup>1</sup> Commission Order [“Final Order”], Case No. 2018-00358, *Electronic Application of Kentucky-American Water Company for an Adjustment of Rates* (Ky. Commission June 27, 2019).

<sup>2</sup> *Commonwealth ex. rel. Stephens v. South Central Bell Telephone Co.*, 545 S.W.2d 927, 931 (Ky. 1976).

been offered on the former hearing.”<sup>3</sup> Thus, after rehearing has been granted a party has the *option* to offer further evidence, but it is not required.<sup>4</sup> Additionally, the Commission has argued in Franklin Circuit Court that it is improper to seek relief through an appeal under KRS 278.410 before a participant has fully exhausted their administrative remedies, and in particular, seeking rehearing under KRS 278.400.<sup>5</sup> Finally, it is axiomatic that if the standard for appeal is whether an order is unlawful or unreasonable,<sup>6</sup> and the Commission retains jurisdiction,<sup>6</sup> over its orders until revoked or modified,<sup>7</sup> then the Commission *at a minimum* has jurisdiction to hear a rehearing when the primary basis is to rectify those portions of an order that a party believes to be unreasonable or unlawful. To hold otherwise would create a situation where the self-help afforded the Commission by law to “revoke[] or modify” its orders may only be invoked *sua sponte*, creating a ridiculous and unworkable system.<sup>8</sup>

Kentucky-American’s Response goes on to state that rehearing is not an “opportunity to relitigate a matter fully addressed in the original order” and that without new evidence or argument “or the need to correct a material error or omission, which does not exist here” the Commission should deny the Attorney General’s Petition.<sup>9</sup> This claim ignores the fact that the Commission’s

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<sup>3</sup> KRS 278.400 [emphasis added].

<sup>4</sup> See Commission Order, Case No. 2000-00120, at 2–3 (Ky. Commission May 9, 2001) (The Commission granted applications for rehearing from both the Attorney General and Kentucky-American following its ruling in a base rate case. Footnote 3 explains that Kentucky-American argued that a potential refund from retroactively correcting previously set rates would result in a *de minimis* amount as compared to the cost of administering any such refund, but in its *Brief on Rehearing* the Company “presented no evidence upon the cost of any refund” and the requested relief was denied on this basis [emphasis added]. See also page 9, where Kentucky-American argued for a reconsideration of the denial of reorganization costs, but the Company presented no new evidence on the issue, and page 16 where the Company requested a reconsideration of the 11% Return on Equity awarded but its “sole argument [was] based upon evidence that the Commission found inadmissible and ordered struck.”).

<sup>5</sup> See Defendant’s Response, *Metropolitan Housing Coalition, et al v. Kentucky Public Service Comm’n*, Civil Action No. 18-CI-01115, at 3 (Franklin Cir. Court Nov. 15, 2018) (parallel citations to combined cases 18-CI-01117 and 18-CI-01129 omitted).

<sup>6</sup> KRS 278.410.

<sup>7</sup> *Commonwealth ex. rel. Stephens v. South Central Bell Telephone Co.*, 545 S.W.2d 927, 931 (Ky. 1976).

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

<sup>9</sup> Kentucky-American Response at 2 (citing Commission Order, Case No. 2017-00328, *Electronic Application Of Kentucky Power Company For A Certificate Of Public Convenience And Necessity To Construct A 161kV*

failure to make findings on multiple issues of record as well as its improper burden shifting certainly fall under material errors and omissions, rising to level of being unlawful.<sup>10</sup> Kentucky-American also stated that the Attorney General “criticizes the verbiage the Commission used”, a portion of his Petition “simply request[s] that the Commission clarify its language”, and “[m]ere disagreement with a Commission order does not warrant a rehearing of it.”<sup>11</sup> Interestingly, Kentucky-American has in the past been granted rehearing, based upon its *disagreement* with the Commission’s findings and by simply asking for a *reconsideration* of the Commission’s decision on certain issues.<sup>12</sup> Contrary to Kentucky-American’s assertions otherwise, the granting of rehearing is not limited solely to cases or issues with new evidence, new arguments, or material errors or omissions. In Case No. 2017-00321, Duke Energy Kentucky filed for rehearing, and the Commission subsequently granted the same for the diverse purposes of 1) more fully developing the record regarding certain adjustments,<sup>13</sup> 2) clarifying how vegetation management expense was calculated,<sup>14</sup> 3) further investigating the basis for Duke’s request for an adjustment to capitalization for Excess ADIT,<sup>15</sup> 4) modifying one portion of a finding regarding depreciation rates and deleting the paragraph of another finding,<sup>16</sup> 5) determining how much of Duke’s increase in costs is related to mailing to electric and combination customers after Duke complained that the final order

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*Transmission Line In Perry And Leslie Counties, Kentucky And Associated Facilities*, at 5 (Ky. Commission Nov. 14, 2018)).

<sup>10</sup> Commission Order, Case No. 2017-00328, at 5 (Ky. Commission Nov. 14, 2018).

<sup>11</sup> Kentucky-American Response at 2, Footnote 6.

<sup>12</sup> [Emphasis added]. See Commission Order, Case No. 2000-00120 (Ky. Commission May 9, 2001) (regarding the BWA Acquisition Adjustment, Source of Supply Investment, Community Education Costs, Industrial Sales, Deferred Debits, Reorganization Costs, Deferred Legal/Settlement Costs, and Return on Common Equity).

<sup>13</sup> Commission Order, Case No. 2017-00321, *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*, at 3 (Ky. Commission May 23, 2018).

<sup>14</sup> Commission Order, Case No. 2017-00321, at 3 (Ky. Commission May 23, 2018).

<sup>15</sup> *Id.* at 6.

<sup>16</sup> *Id.* at 7.

neglected to provide an explanation of unreasonableness or a finding of fact on this issue,<sup>17</sup> and 6) addressing the final order's silence on the recovery of regulatory assets associated with storm restoration, incremental depreciation expense, and AMI deployment, and the final order's failure to address Duke's request for approval of its Decommissioning Study.<sup>18</sup> The Attorney General's Petition makes arguments of similar import which are clearly in line with recent Commission precedent, as well as the Kentucky Civil Rules of Evidence upon which the Commission informally relies.<sup>19</sup>

Furthermore, Kentucky-American asserted with absolute certainty that "the Commission considered and weighed all evidence and argument" while simultaneously arguing that "it is of no consequence whether the Commission explicitly addressed every minor issue, argument, or allegation."<sup>20</sup> The Company must possess extraordinary insight to be able to completely ascertain what the Commission included in its deliberations of weighing all evidence and argument even though the order admittedly did not address each issue. Consequently, Kentucky-American's confidence in the Commission's comprehensive consideration of the issues is misplaced. The Attorney General's Petition argues not only that some issues of record were not addressed in the final order, but also that issues which were addressed were not addressed fully with the findings required of an administrative agency. The Commission is required to "make findings of specific evidentiary facts" in order to provide the proper record for administrative and judicial appeals.<sup>21</sup>

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<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.* at 10–11.

<sup>19</sup> See *Bailey v. Bailey*, 399 S.W.3d 797, 801 (2013) (discussing Kentucky Civil Rule 59.05, Motion to Alter, Amend or Vacate a Judgment, which does not define the grounds for relief under the rule. In absence of such definition, the Supreme Court of Kentucky cited to the Federal Rule of Civil Procedure 59(e), which provides four grounds, and which do not limit the relief to only those claims with new evidence).

<sup>20</sup> Kentucky-American Response at 3.

<sup>21</sup> *Energy Regulatory Commission v. Kentucky Power Co.*, 605 S.W.2d 46, 49 (1980) (citing to *Marshall County v. So. Central Bell Tel. Co., Ky.*, 519 S.W.2d 616 (1975) ("Furthermore, it has been repeatedly held that where the validity of an order of an administrative body depends on a determination of fact, the absence of findings of basic evidentiary facts is fatal to such an order." (citing to *Marshall County supra.*))

Without such findings an administrative body's decision can be challenged as illegal, arbitrary, and capricious. Furthermore, an erroneous, uncorrected order may have unintended precedential consequences in the future. Whether the amounts in question are *de minimis* to the overall ask is not of primary importance;<sup>22</sup> the process of full consideration and the making of legally adequate findings is. The Attorney General is not seeking to relitigate issues, but asks that the Commission make specific findings which demonstrate that proper consideration was given to these issues.

Finally, Kentucky-American claims that it "met its burden of proof with its numerous f[i]lings in this case" and that "[e]ach portion of the Commission's order was supported by substantial evidence submitted by KAWC."<sup>23</sup> However, a utility's mere filing of documents according to the procedural schedule and statutory requirements which claim to properly support the requested relief does not mean that the burden of proof has actually been met. Again, the Company claims that the Commission simply gave greater weight to its evidence on the customer charge issue and did not penalize the Attorney General for not providing evidence on this front through improper burden shifting, but the lack of a clear finding undermines this claim, in addition to others the Attorney General identified. If the Commission did give greater weight to the Company's evidence and found it legally sufficient, then the Final Order should so state.

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

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<sup>22</sup> Commission Order, *In Re. An Adjustment of Rates of Delta Natural Gas Company, Inc.*, Case No. 9059, at 3 (Ky. Commission Sept. 11, 1985) (stating "the treatment of the gas plant acquisition adjustment in this case does not have a material impact on the rates of Delta. The Commission does, however, feel that the issue is of sufficient importance to merit more than cursory consideration.").

<sup>23</sup> Kentucky-American Response at 4-5.

Respectfully submitted,

ANDY BESHEAR  
ATTORNEY GENERAL



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JUSTIN M. McNEIL  
KENT A. CHANDLER  
LAWRENCE W. COOK  
REBECCA W. GOODMAN  
ASSISTANT ATTORNEYS GENERAL  
700 CAPITOL AVE, SUITE 20  
FRANKFORT, KY 40601-8204  
PHONE: (502) 696-5453  
FAX: (502) 573-1005  
[Justin.McNeil@ky.gov](mailto:Justin.McNeil@ky.gov)  
[Kent.Chandler@ky.gov](mailto:Kent.Chandler@ky.gov)  
[Larry.Cook@ky.gov](mailto:Larry.Cook@ky.gov)  
[Rebecca.Goodman@ky.gov](mailto:Rebecca.Goodman@ky.gov)