

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PROPOSED ADJUSTMENT OF THE WHOLESALE	)	
WATER SERVICE RATES OF THE CITY OF	)	Case No. 2019-00080
PIKEVILLE TO MOUNTAIN WATER DISTRICT	)	

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**PIKEVILLE’S RESPONSE TO MWD’s MOTION TO COMPEL**

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Mountain Water District (“MWD”) filed a Motion to Compel, seeking a Commission order requiring the City of Pikeville to provide information that it does not possess or control. As a general matter, a party cannot be compelled to produce discovery that the party does not possess or control. Accordingly, MWD’s motion must be overruled.

**I. Procedural Background**

On July 15, 2019, Pikeville filed its responses to 110 requests for information from Commission Staff and MWD. Three of those requests from MWD are as follows: Item 52 requested Utility Management Group’s (“UMG”) “financial statements (audited or not) for the last three years;” and Item 53 requested UMG’s profit margin and related calculations; Item 54 sought certain information related to Pikeville’s account categories labeled as “Public Works Water” and “UMG...Services.”

Pikeville provided responses to each of those Items.<sup>1</sup> With respect to Items 52 and 53 of MWD’s first request, there were three critical components of Pikeville’s response. First, Pikeville objected as to the relevance of those questions. Second, it explained that Pikeville requested UMG to provide the sought-after material and that UMG declined to provide the

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<sup>1</sup> Pikeville disagrees with MWD’s suggestion that Pikeville “declined” to provide information. *See* Motion to Compel at 1. The responses demonstrate that Pikeville did not have the requested information, but nevertheless requested the information, and provided a response to the information requests.

specific information. Implicit in this response is the fact that Pikeville does not have UMG’s financial statements or the ability to calculate UMG’s profit margins. Third, it referred MWD to Pikeville’s response to Item 24 of the Commission Staff’s second request for information.

Item 24 of the Commission Staff’s second request for information sought UMG’s profit and loss statements. Pikeville similarly responded, including an objection to relevancy. Notwithstanding that objection, Pikeville also attached the information that UMG was willing to provide. Specifically, Pikeville produced the following chart obtained from UMG that includes a line item for “profit”:

<b>Breakdown of UMG costs for Pikeville Water Service</b>						
<b>PSC 2-24, 2-25, 2-26, 2-27; MWD 1-52, 1-53</b>						
Labor	\$ 825,635	including fringes				
Fuel	\$ 39,200	including plant, meter readers and distribution				
Telephone	\$ 4,929					
Uniforms	\$ 2,400					
Safety	\$ 15,000	include PPE and signs etc.				
Tools	\$ 25,000	hand tools and speciality tools				
Chemicals	\$ 86,000	for plant and some additional pump sites				
Vehicles	\$ 48,220	for UMG vehicles				
Office Supplies	\$ 5,500					
Insurance	\$ 61,000	includes vehicle and liability				
Overhead	\$ 68,000	includes office staff, training and some lab				
Repairs	\$ 65,000	equipment and vehicle repairs				
Out of Scope	\$ 175,000	equipment rental or other contracted work				
Profit	\$ 250,000					
	\$ 1,670,884					

Pikeville also attached to its response the letter in which UMG informed Pikeville it would not produce additional information related to finances or employees. See Letter attached as Exhibit 1 to this Response.

Item 54 of MWD's first request for information asked for (a) an explanation of Pikeville's accounts labeled as "Public Works Water" and "UMG...Services," (b) how those expenses were determined to go into the City accounts, (c) an itemization of expenses in those City accounts, and (d) who determined the expenses to be included in those City accounts. Pikeville responded that (a) "Public Works Water" is the monthly contract amount for water services for Utility Management Group and "UMG Services" is items purchased for operations of the water system as allowed by contract, (b) the expenses entered into the accounts are based on whether they are the monthly contractual amount or items purchased for the operation of the water system, (c) an itemization of the expenses could be found at specifically identified pages of the General Ledger, and (d) Pikeville approves payment of expenditures by UMG related to the water system in semi-monthly meetings.

Without first reaching out to Pikeville, MWD filed a motion on July 18, 2019, that requested an order compelling Pikeville "to provide responses to Items 52, 53, and 54 of its first data request." *See* MWD Motion to Compel at 4. Because Pikeville has provided responses to those items and because MWD's motion asks for an order requiring Pikeville "to provide responses," Pikeville interprets the motion as one seeking different responses, including records or information not in the possession, custody, or control of Pikeville.

## **II. Analysis**

At the outset, MWD's motion should not be well taken because MWD has not attempted to communicate with Pikeville as to the nature of the disagreement before filing the motion pending before the Commission. Section 4(12)(e)(3) of 807 KAR 5:001 requires a party filing a motion to compel shall state "[the] efforts taken to resolve any disagreement over the production of the requested information." MWD's Motion to Compel does not identify the efforts taken to

resolve this issue. The obvious reason for not stating what efforts have been taken to resolve the disagreement is the fact that no efforts were made.

Notwithstanding the fact that MWD took no affirmative steps to resolve this discovery dispute, there are substantive reasons why MWD's motion must be overruled. First and foremost, Pikeville has provided a response to the requests and does not have additional information on these topics.

With respect to Item 54, Pikeville responded to each of the subparts of the question. In its motion, MWD does not identify any specific reason why Pikeville's response to Item 54 is somehow insufficient. Accordingly, MWD's motion on this item must be overruled.

With respect to Items 52 and 53, Pikeville does not have UMG financial statements or the ability to calculate UMG's profit margins. Pikeville requested the information sought by MWD and Commission Staff from UMG, and UMG produced the letter and information that was attached to Pikeville's response to Item 24 of the Commission Staff's second request for information. Pikeville has no other information that can be produced related to those items.

State and federal courts in Kentucky have routinely explained that a party cannot be compelled to produce information or records that are not in that party's possession, custody, or control. For example, in *Metropolitan Property & Cas. Ins. Co. v. Overstreet*, 103 S.W.3d 31, 45 (Ky. 2003), the Supreme Court of Kentucky held that an insurance company could not be compelled to produce the business or financial records of a doctor who performed an independent medical examination on the plaintiff because those business and financial records were not in the insurance company's possession, custody, or control. Similarly, in *Gluc v. Prudential Life Insurance Co. of America*, 309 F.R.D. 406, 416 (W.D. Ky. 2015), the court found that a party "appropriately responded that it does not have possession, custody or control

of the requested documents” and that the court was “bound to accept this representation, which is a sufficient response under the rules.” *See also Bentley v. Highlands Hospital Corp.*, 7:15-CV-97-ART-EBA, 2016 WL 762686, at \*7 (E.D. Ky. Feb. 23, 2016)(finding that “the Court cannot compel what HRMC proclaims is not in their possession nor require it to create documents that do not presently exist”).

Pikeville acknowledges that the standard set forth in Kentucky Rule of Civil Procedure 34.01 and Federal Rule of Civil Procedure 34 is broader than simple possession, but Pikeville does not have custody, control, or the contractual ability to demand business and financial records from UMG. Section 2.20 of the contract between Pikeville and UMG allows Pikeville’s inspection of records and documents concerning the operations of the Public Works Department upon reasonable notice, but it is not so expansive such that Pikeville can review UMG’s business and financial records.<sup>2</sup> Much like the insurance company in *Metropolitan Property & Casualty Insurance*, Pikeville’s contractual relationship with UMG does not confer the right of Pikeville to inspect UMG’s business and financial records. Accordingly, Pikeville does not have “possession, custody, or control” of those records. Because Pikeville does not have those records or the contractual ability to obtain those documents, Pikeville cannot be compelled to produce them.

MWD seemingly takes issue with Pikeville’s responses by arguing that UMG cannot object to the requested information because UMG is not a party to this proceeding. *See* MWD Motion to Compel at 4. Although MWD correctly notes that UMG is not a party to this case, UMG’s status in the case has no bearing on whether it can object to a specific question. Rather, the reason UMG cannot file an objection to MWD’s request is because MWD did not request

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<sup>2</sup> Section 2.20 states: “UMG shall maintain all records and documents required specifically herein and such other documents concerning the operation of the CITY’s Public Works Department such that they may be inspected by the CITY.”

information from UMG. MWD did not seek a subpoena duces tecum pursuant to Section 4(6) of 807 KAR 5:001. It, instead, requested information of Pikeville. Accordingly, MWD's argument that UMG cannot object to a request that was not directed at UMG is misplaced.

There are several other issues raised by MWD in its Motion to Compel that are erroneous. First and foremost, MWD incorrectly states that Pikeville has the burden to prove the reasonableness of contractual services. *See* MWD Motion to Compel at 3.<sup>3</sup> This Commission has followed a long history of judicial and administrative cases finding that contracts negotiated at arms-length deserve a presumption of reasonableness. *See West Ohio Gas Co. v. Ohio Pub. Util. Comm'n*, 294 U.S. 63 (1935); *Pa. Publ. Util. Comm'n v. Phila. Elec. Co.*, 561 A.2d 1224 (Pa. 1989). This Commission has previously held that Pikeville's decision to contract for the operation and maintenance of its water system is a management decision that is presumed to be reasonable. *City of Pikeville*, Case No. 2002-00022 at 8 (Ky. PSC Oct. 18, 2002). Accordingly, "[t]he burden of overcoming the presumption of managerial good faith falls on the party challenging it," which is MWD in this case. *See id.*

MWD also incorrectly analogizes Pikeville's request for wholesale rate increase with the mandate of the Commission for Martin County Water District to obtain a third-party management company to cure problems resulting from years of bad management within the Water District. In the Commission's order in that case, it explicitly stated that the Commission's proposed remedy "is based upon the unique facts presented." *See Martin County Water District*,

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<sup>3</sup> In support of its position, MWD cites to a request for information in Case No. 2014-00342 from Commission Staff. This request was not an order of the Commission, but rather issued by Staff under the Executive Director's signature. "[T]he commission, like a court, acts and speaks only through its written orders." *Union Light, Heat and Power Co. v. Public Ser. Comm'n*, 271 S.W.2d 361, 365 (Ky. 1954)). "Commission Staff's actions do not substitute for an Order of this Commission." *Bee's Old Reliable Shows, Inc. v. Kentucky Power Co.*, 334 S.W.2d 765 (Ky. 1960). Accordingly, "[t]he representations of Commission Staff members are not binding upon the Commission." *Mallard Point Disposal Systems, Inc.*, Case No. 2006-00331 at 2.

Case No. 2018-0017 at 5 (Ky. PSC Nov. 11, 2018). The Commission was careful to limit its ruling to the facts of that case.

Moreover, MWD's request for UMG's profit margin is not relevant. This can be most aptly demonstrated by the slippery slope it presents. If it were relevant, intervenors in future cases may be tempted to ask for the profit margin of Ferguson Waterworks and Badger Meters because those companies supplied materials for the water utility, or for the profit margin of the utility's local attorney who provided services to the utility throughout the year, or for the profit margin of the electric utility's coal supplier.

### **III. Conclusion**

Because Pikeville has responded to each question with the information it has within its possession, custody, and control, and because Pikeville cannot be compelled to produce documents or information that is not within its possession, custody, and control, MWD's Motion to Compel must be overruled.

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE**

In accordance with 807 KAR 5:001, Section 8(7), this is to certify that the City of Pikeville's July 25, 2019, electronic filing is a true and accurate copy of the documents being filed in paper medium; that the electronic filing has been transmitted to the Commission on July 25, 2019; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that an original and a copy of the filing are being delivered to the Commission within two (2) business days.

A handwritten signature in blue ink, appearing to read "M. Jon O'Connell", is written over a horizontal line.

Counsel for City of Pikeville.