

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

In the Matter of:

ELECTRONIC TARIFF FILING OF CITY)
OF AUGUSTA REVISING ITS) Case No. 2020-00277
WHOLESALE WATER SERVICE RATES)

**CITY OF AUGUSTA’S RESPONSE TO
BRACKEN COUNTY WATER DISTRICT’S MOTION FOR RULING
AND ESTABLISHMENT OF PROCEDURAL SCHEDULE**

Nearly six months have passed since Bracken County Water District (“Bracken District”) submitted a letter to the Commission indicating it had no objection to the City of Augusta’s proposed rate increase. Suddenly and without a detailed explanation, Bracken District now seeks to rescind its prior position and demand that the Commission create a new procedural schedule even though the deadline to request a hearing has long since expired. Augusta, by counsel, explains why Bracken District’s dilatory approach should be rejected in the following Response:

I. Background

Pursuant to the Water Purchase Contract between the Augusta and Bracken District, there is a Water Treatment Plant Advisory Board, composed of a representative of Augusta, Bracken District, and the City of Brooksville. Due to restrictions related to the Covid-19 pandemic, the Advisory Board was unable to meet for several months in spring 2020. At the meeting on July 15, 2020, the Advisory Board discussed a rate increase and factors driving the need for the

increase (e.g., increased insurance expense and increases in production costs).¹ Augusta proposed an increase from \$2.35 per 1,000 gallons to \$2.50 per 1,000 gallons. It initially proposed the increase to be effective on August 1, 2020, but later changed that to September 1, 2020. Augusta filed this information with the Commission on July 29, 2020.

Bracken District advised Augusta and the Commission that it did not object to the rate increase. In a letter to the Commission, counsel for Bracken District stated:

Please be advised that **Bracken County Water District will not file an objection to the proposed adjustment** or seek to intervene in any proceeding regarding the proposed adjustment. Bracken County Water District further waives its right under Paragraph 14 of its Water Purchase Contract with Augusta to receive at least 60 days prior notice of the proposed adjustment.²

Bracken District's letter was submitted to the Commission on July 30, 2020. Over the next two weeks, Augusta provided additional information in response to informal questions from Commission Staff.³

Despite Bracken District's explicit statement that it did not object to the proposed rate, the Commission found that an investigation was necessary to determine the reasonableness of the proposed rate. On August 25, 2020, the Commission suspended the effective date of the proposed rate through February 1, 2021. In that order, the Commission found that Bracken District had a "significant interest" in the case and afforded it (and others) an opportunity to file a motion to intervene by September 14, 2020. The Commission also established a procedural schedule that provided for requests for information issued to Augusta, intervenor testimony,

¹ See Letter from Doug Padgett, WTP Operations Manager, to Anthony Habermehl, Chairman of Bracken District (July 23, 2020).

² See Letter from Gerald Wuetcher, Counsel for Bracken District, to Kent Chandler, Executive Director of the Commission (July 30, 2020)(emphasis added).

³ This information is included in the record of this case.

requests for information to intervenors, and a deadline by which to request an evidentiary hearing.

During that three-month period that ended with the December 1, 2020, deadline by which an evidentiary hearing could be requested, Bracken District took no action. Bracken District's inaction was consistent with its prior statement that it would not object to the proposed rate increase or even intervene in the case.

Then, on January 20, 2021—nearly six months after saying that it did not object to the rate—Bracken District filed the pending motion in which it seeks a review of Augusta's operational and maintenance practices and associated costs. It also seeks a new procedural schedule.⁴

Bracken District's requests must be denied. These requests are not timely. Bracken District has not demonstrated good cause to extend deadlines, let alone seek an entirely new procedural schedule. And Bracken District's requests are also precluded by the doctrine of laches.

II. Analysis

A. Bracken District's requests must be denied because they are not timely.

As mentioned above, on August 25, 2020, the Commission entered a procedural schedule, setting forth dates by which written discovery could be issued, intervenor testimony filed, and requests for hearing submitted. Bracken District did not file any written discovery requests, intervenor testimony, or a request for hearing. Despite these failures, Bracken District is belatedly seeking an extremely lengthy continuance of the previous procedural schedule.

⁴ Bracken District also seeks a ruling on its motion for intervention, to which Augusta does not object because the Commission has already made a finding that Bracken District has a "substantial interest" in this case.

In its Order, the Commission specifically stated that it “does not look favorably upon motions of continuance. Accordingly, motions for extensions of time with respect to the schedule herein shall be made in writing and will be granted only upon a showing of good cause.” Bracken District has not demonstrated good cause to review additional information or for a new procedural schedule. At most, Bracken District makes a conclusory statement that it “has ascertained information that suggests that Augusta is not properly or efficiently operating and maintaining its water treatment facility.”⁵ Bracken District provides no indication as to what information it is referring, when it obtained that information, and whether it could have previously obtained that information. The Commission has considered these types of general statements to be insufficient to demonstrate good cause. *See, e.g., Duke Energy Kentucky, Inc.*, Case No. 2017-00321, 2017 WL 4864708, at *1 (Ky. PSC Oct. 24, 2017)(finding that a movant “proffered general reasons for the delay but failed to clearly set forth why it was unable to meet the October 13, 2017 intervention request deadline in light of the fact that it had at least two and a half months’ notice of the instant matter”).

Moreover, Bracken District is now seeking to re-open the evidentiary record of this case nearly two months after it closed. The procedural schedule required requests for hearing by December 1, 2020. Neither Bracken District nor August filed a request for hearing in this case. The Commission typically treats this type of silence as being deemed a waiver of the right to hearing. *See, e.g., Licking Valley Rural Elec. Coop. Corp.*, Case No. 2016-00077 at 1 (Ky. PSC Dec. 12, 2016).

B. Bracken District’s due process rights have been satisfied.

Contrary to Bracken District’s argument, its due process rights have not been negatively impacted in this case. “The essential requirements of due process . . . are notice and an

⁵ Bracken District at Motion at 2.

opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.” *Lafferty v. Board of Educ. of Floyd County*, 133 F. Supp. 2d 941, 946 (E.D. Ky. 2001)(quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985)).

Bracken District had both notice and opportunity to respond to the proposed increase. In fact, Bracken District took the opportunity to respond by informing that Commission on July 30, 2020, that it did not object to the proposed increase or the less-than-60-day notice period. Even after that point, Bracken District had actual knowledge of the case established by the Commission. It had the opportunity to ask written questions of Augusta, to present its own testimony, and to request a hearing in advance of the deadline.⁶ Bracken District chose not to do so. Ultimately, Bracken District’s due process rights have been satisfied.

C. Augusta and the Commission will be prejudiced if Bracken District’s requests is granted.

Pursuant to KRS 278.190(2), requires the Commission to issue a decision on new rates within ten months after the filing of those rates. In this case, Augusta filed the new rates on July 29, 2020. The Commission, therefore, must issue a decision no later than May 28, 2021.

Prior Commission rate cases involving municipalities demonstrate that four months is insufficient to complete a thorough and complete review of a municipal wholesale rate. The

⁶ If Bracken District attempts to argue that it did not have these opportunities because it had not yet been granted intervention, the argument should not be well taken. First and foremost, Bracken District took advantage of its opportunity by explicitly stating that it did not object to the rate increase. Second, it had the opportunity to file data requests, submit testimony, and request a hearing, regardless of whether it had been formally granted intervention. Movants for intervention commonly submit data requests prior to the Commission’s decision on intervention. *See, e.g., Kentucky Utilities Co.*, Case No. 2016-00370 (EKPC as movant submitted data requests on January 10, 2017, prior to an order on its motion issued on February 1, 2017); *Kentucky-American Water Co.*, Case No. 2017-00383 (two individuals as movants submitted data requests on October 26, 2017, prior to being granted intervention on October 30, 2017); *Red Fiber Parent, LLC*, Case No. 2020-00259 (Charter as movant submitted data requests on September 4, 2020, prior to an order on its motion issued on October 26, 2020). Moreover, there is little question that Bracken District meets the criteria for intervention in this case because the Commission has already made a finding that it has a “significant interest.” *See* Order of August 25, 2020, at 2

following list shows how long it took the Commission to investigate the reasonableness of a proposed wholesale rate in recent fully litigated cases after a suspension order was issued.

Princeton Water and Wastewater Commission – Case No. 2019-00444 – 6 months

City of Pikeville – Case No. 2019-00080 – 9 months

Lebanon Water Works – Case No. 2017-00417 – 8 months

These cases demonstrate that Bracken District’s late request will put a significant strain on Augusta and the Commission to conclude this case within four months.⁷

In addition, Augusta has not requested inclusion of rate-case expense in this matter, in part because Bracken District agreed to the proposed rate when it was first discussed. Augusta believes that its initial communications with Bracken District is consistent with prior Commission cases in which the Commission has encouraged municipal wholesale suppliers to communicate with their wholesale customers in advance of a rate increase. *See, e.g., Hopkinsville Water Envir. Auth.*, Case No. 2009-00373 (Ky. PSC July 2, 2010). Certainly, the amount of rate-expense in a fully litigated case is substantial. For example, in Augusta’s last case, the Commission noted that the two parties had approximately \$140,000 in rate-case expense documented in the record. *See City of Augusta*, Case No. 2015-00039 at 8 (Ky. PSC Apr. 15, 2016). If the scope of this case is expanded, Augusta would be prejudiced by not recovering rate case expenses or by being required to request the addition of those expenses.

D. The doctrine of laches requires rejection of Bracken District’s arguments.

The doctrine of laches “serves to bar claims in circumstances where a party engages in unreasonable delay to the prejudice of others rendering it inequitable to allow that party to reverse a previous course of action. *See Plaza Condominium Ass’n, Inc. v. Wellington Corp.*, 920

⁷ I Even in the last case involving these two parties—Augusta and Bracken District—approximately 14 months elapsed between the suspension order and final order.n that case, Augusta agreed to reset the 10-month statutory deadline during that case.

S.W.2d 51 (Ky. 1996)(citing *Kendall v. Mussman*, 247 S.W.2d 502, 503–04 (Ky. 1952)). As stated by the Commonwealth’s highest court:

‘Laches’ in its general definition is laxness; an unreasonable delay in asserting a right. In its legal significance, it is not merely delay, but delay that results in injury or works a disadvantage to the adverse party. Thus there are two elements to be considered. As to what is unreasonable delay is a question always dependent on the facts in the particular case. Where the resulting harm or disadvantage is great, a relative brief period of delay may constitute a defense while a similar period under other circumstances may not. What is the equity of the case is the controlling question. Courts of chancery will not become active except on the call of conscience, good faith, and reasonable diligence. The doctrine of laches is, in part, based on the injustice that might or will result from the enforcement of a neglected right.

Denison v. McCann, 197 S.W.2d 248, 249 (Ky. 1946), quoting *City of Paducah v. Gillispie*, 115 S.W.2d 574, 575 (Ky. 1938).

Each element of the doctrine of laches is met on the issue raised by Bracken District, and the discussion above demonstrates this. First and foremost, there is unquestionably an unreasonable delay. Bracken District waited approximately six months to raise an issue on which they provided no evidentiary support. There can be no doubt that wasting six months of a ten-month statutory window is unreasonable. Likewise, Augusta (and the Commission) will have a significant disadvantage if it is not afforded sufficient time to demonstrate the reasonableness of its rates and if it must incur additional rate-case expense. Accordingly, the Commission should also reject Bracken District’s requests based on the doctrine of laches.

III. The Commission should approve Augusta’s proposed wholesale rate.

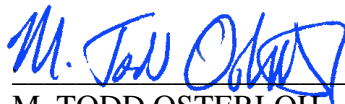
For the reasons stated above, the Commission should reject Bracken District’s arguments to investigate new issues and enter a new procedural schedule. Instead, the Commission should approve Augusta’s proposed rate of \$2.50 per 1,000 gallons.

IV. Notice

Pursuant to KRS 278.190(2), Augusta hereby provides notice to the Public Service Commission of its intent to implement the proposed rates to Bracken District for water sold after February 1, 2021, if the Commission has not reached its decision in this matter by that date. This increase will be first reflected on the bill issued in March 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8(7), this is to certify that the January 27, 2021, 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 January 27, 2021; and that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding. A copy will also be served on counsel for Bracken District. Paper copies of the foregoing shall be filed in the Commission's offices within 30 days after the state of emergency is lifted, which is consistent with the findings in Case No. 2020-00085.



COUNSEL FOR CITY OF AUGUSTA