

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

On June 18, 2019, the Lexington-Fayette Urban County Government (LFUCG) filed with the Commission a motion to strike Kentucky-American Water Company's (Kentucky-American) Supplemental Response filed on June 14, 2019, related to Item 5 of LFUCG's Post-Hearing Data Request.

Item 5 of LFUCG's Post-Hearing Data Request to Kentucky-American requested:

[A] detailed schedule of all expenses incurred to date for the preparation of this case that KAWC Water seeks to recover in rates. The schedule should include the date of each transaction, check number or other document references, the vendor, the hours worked, the rates per hour, amount, a description of the services performed, and the account number in which the expenditure was recorded.<sup>1</sup>

The post-hearing data request also directed Kentucky-American to "provide copies of contracts, invoices, or other documentation that support charges incurred in the preparation of this case."<sup>2</sup>

Kentucky-American filed its response to the request on May 24, 2019, which consisted of a single page monthly invoice. In its post-hearing brief, LFUCG argued that

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<sup>1</sup> LFUCG Post-Hearing Data Request, Item 5(a)

<sup>2</sup> *Id.* at Item 5(b).

Kentucky-American's response was inadequate and that only actual, reasonable rate case expenses should be recovered in rates.<sup>3</sup> LFUCG recommended that the Commission disallow the legal fees and internal labor costs, asserting that Kentucky-American failed to provide sufficient support for the fees.<sup>4</sup> In response to LFUCG's arguments, Kentucky-American filed unredacted time entries for its legal fees, arguing that LFUCG failed to raise this issue prior to raising it in its post-hearing brief.<sup>5</sup> It is these time entries that LFUCG seeks to strike.

As a basis for its motion, LFUCG asserts that in past cases the Commission has interpreted 807 KAR 5:001, Section 11(4), to prohibit the introduction of evidence into a proceeding after the close of testimony, and LFUCG asserts that testimony closed on May 24, 2019, when Kentucky-American filed its responses to the post-hearing data requests. LFUCG cites to three Commission Orders in which, LFCUG asserts, the Commission granted motions to strike because evidence was filed after the close of testimony.<sup>6</sup> LFCUG also cites to another Commission case in which LFCUG argues that the case supports the argument that rate case expenses must be supported by unredacted invoices.<sup>7</sup> LCFUG argues that Kentucky-American's late supplemental filing

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<sup>3</sup> LFUCG Brief at 20.

<sup>4</sup> *Id.* at 22.

<sup>5</sup> Kentucky-American Reply Brief at 20–21.

<sup>6</sup> Case No. 2012-00470, *Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity to Construct and Finance a Waterworks Improvements Project Pursuant to KRS 278.020 and 278.300* (Ky. PSC Jan. 3, 2014); Case No. 2013-00237, *Application of Water Service Corporation of Kentucky for an Adjustment of Rates* (Ky. PSC July 11, 2014); and Case No. 2013-00291, *Harold Barker, Ann Barker and Brooks Barker v. East Kentucky Power Cooperative, Inc.*, (Ky. PSC July 6, 2015).

<sup>7</sup> Case No. 2011-00036, *Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, (Ky. PSC Jan. 29, 2013).

gives Kentucky-American an “‘unfair advantage’ because ‘an opposing party has no opportunity to confront’ the information.”<sup>8</sup>

Kentucky-American, in its response, states that “LFUCG seeks to strike the very same information that LFUCG itself claims it requested.”<sup>9</sup> Kentucky-American asserts that it is LFUCG’s own timing that results in the harm that LFUCG claims.<sup>10</sup> Kentucky-American asserts that it appropriately answered the data request and provided precisely what LFCUG had requested, noting that LFUCG had requested “contracts, invoices, *or* other documentation.”<sup>11</sup>

Kentucky-American notes that the issue of providing detailed legal invoices in Case No. 2011-00036, to which LFCUG cites, was an issue that had already arisen in the case and that the utility had refused to provide the unredacted invoices before the Commission compelled their production. Kentucky-American also asserts that it has been transparent in discussing rate case expenses, citing to several parts in the record that exhibited it had provided information supporting rate case expenses. Kentucky-American notes that LFUCG has asked Kentucky-American for a total of 126 data requests prior to the formal hearing in this case but did not raise the issue until the formal hearing. Kentucky-American argues that LFUCG own timing foreclosed its ability to cross-examine Kentucky-American regarding rate case expenses. Kentucky-American also asserts that

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<sup>8</sup> LFCUG Motion to Strike (filed June 18, 2019) at 3, *quoting*, Case No. 2012-00470, *Application of Jessamine-South Elkhorn Water District for a Certificate of Public Convenience and Necessity to Construct and Finance a Waterworks Improvements Project Pursuant to KRS 278.020 and 278.300* (Ky. PSC Jan. 3, 2014) at 3.

<sup>9</sup> Kentucky American’s Response to LFCUG’s Motion to Strike (filed June 21, 2019) at 1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2, *quoting* LFCUG’s Motion to Strike at 3 (emphasis added.)

LFUCG did not attempt to remedy the discovery dispute until LFUCG raised it in its brief and that LFUCG did not informally contact Kentucky-American or file a motion to compel. Kentucky-American noted that 807 KAR 5:001, Section 4(12)(e), requires parties to attempt to resolve discovery disputes, and therefore Kentucky-American would have provided the information upon LFUCG's request.<sup>12</sup>

In its Reply,<sup>13</sup> LFUCG argues that it has been the Commission's consistent policy to require unredacted copies of invoices to support a request to recover rate case expenses.<sup>14</sup> LFUCG also argues that Kentucky-American has the duty as an applicant to demonstrate that its proposed rates are reasonable and that LFUCG had requested information that the Commission had previously required to demonstrate the reasonableness of rates.<sup>15</sup>

#### DISCUSSION

Kentucky-American's supplemental data responses are not "new" evidence but are rather a more in-depth explanation to already existing evidence. Kentucky-American was not filing evidence on an issue not already raised, it was responding to LFUCG's dissatisfaction of which Kentucky-American was unaware until 18 days after it submitted its responses to LFUCG, with Kentucky-American's response to a particular LFUCG data request. The Commission has addressed a somewhat similar situation in Case No. 2013-

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<sup>12</sup> Kentucky American's Response to LFCUG's Motion to Strike at 5-6.

<sup>13</sup> LFUCG's Reply in Support of Its Motion to Strike (filed June 24, 2019).

<sup>14</sup> *Id.* at 1.

<sup>15</sup> *Id.* at 1-2.

00237,<sup>16</sup> in which intervenors filed a motion<sup>16</sup> to strike several exhibits in the utility's brief that the intervenors claimed were materials that were not part of the record. The Commission granted the intervenors' motion in most part but denied the intervenors' motion to strike. The Commission refused to strike an exhibit that contained testimony of the Attorney General's witness from a previous case. In declining to strike the exhibit, the Commission noted that the utility had requested, via a data request, that the Attorney General provide this particular testimony, which the Attorney General failed to provide. The Commission allowed the testimony in finding that:

Under the circumstances presented here, the Commission will allow submission of this prior testimony based on the AG's omission, perhaps inadvertently, of any reference to such prior testimony in response to WSKY's Request for Information. This prior testimony should not be stricken and will be taken into consideration and given weight based on all other evidence currently in the record.

The scenario in Case No. 2013-00327 is akin to the situation presented to the Commission. In the former, the evidence presented after the close of testimony would have been in the record had the Attorney General filed the requested testimony. In the latter, Kentucky-American was providing information that would have been provided had it satisfactorily responded to LFUCG. LFUCG and all parties were on notice that LFUCG sought this material and no party is at a disadvantage with its introduction.

We note that LFUCG had ample opportunity to develop this issue and ask for these records during discovery prior to the hearing, yet it failed to do so. Had LFUCG's goal been to get at the truth of the matter, i.e., the reasonableness of rate case expenses, it had more than ample opportunity to do so. Furthermore, we note that LFUCG took no

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<sup>16</sup> Case No. 2013-00237, *Application of Water Service Corporation of Kentucky for an Adjustment of Rates* (Ky. PSC July 11, 2014)

effort to resolve the discovery dispute, which, it appears to the Commission, had it genuinely wanted to examine the reasonableness of rate case expenses, LFUCG would have taken the simple steps to contact Kentucky-American to obtain the detailed invoices. LFUCG then would have had ample time to address the unredacted invoices in its post-hearing brief. LFUCG could have filed a motion to compel with the Commission. Instead, LFUCG waited until the last minute to raise the issue with the Commission and Kentucky-American. As we noted above, LFUCG had ample opportunity to request this information during the course of this proceeding. LFUCG's failure to raise the issues then or ask for the unredacted invoices forestalls its right to object to the information being placed in the record in response to its eleventh-hour request. Any "harm" that LFUCG alleges is self-inflicted.<sup>17</sup>

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<sup>17</sup> We have previously noted, in denying a motion to strike and finding no due process violations, that the ability to conduct discovery, or take other action to gather the necessary information, afforded a party procedural due process.

We find that Bracken District has been afforded all of the due process that it is legally entitled to receive, since it had ample opportunities to pursue an examination of Ms. Hendrix. As noted previously, Bracken District, which introduced the financial statement at issue into the record, could have subpoenaed Ms. Hendrix pursuant to KRS 278.320. Further, if Bracken District had wanted to examine Ms. Hendrix, it could have also: 1) sought deposition rights pursuant to KRS 278.340; 2) asked for a continuance upon the Commission's denial of its Motion to Strike at Hearing in order to request her attendance at a hearing or secure it by process; or 3) pursued additional discovery concerning Ms. Hendrix, including a request for an additional evidentiary hearing. Bracken District did not pursue any of these options.

"Procedural due process is not a static concept, but calls for such procedural protections as the particular situation may demand."<sup>47</sup> We find that the various options that were available to Bracken District to pursue an examination of Ms. Hendrix were more than adequate to allow Bracken District to confront and challenge Ms. Hendrix through a live examination and that Bracken District has been afforded procedural due process. We find that Bracken District fails to demonstrate a denial of procedural due process.

Case No. 2015-00039, *Proposed Adjustment of the Wholesale Water Service Rates of the City of Augusta* (Ky. PSC Feb. 3, 2016) at 15. (Citations omitted.)

IT IS THEREFORE ORDERED that LFUCG's motion to strike is denied.

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By the Commission

ENTERED  
JUN 27 2019  
KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:



Executive Director

Case No. 2018-00358

\*Andrea C Brown  
Lexington-Fayette Urban County Government  
Department Of Law  
200 East Main Street  
Lexington, KENTUCKY 40507

\*Honorable Lindsey W Ingram, III  
Attorney at Law  
STOLL KEENON OGDEN PLLC  
300 West Vine Street  
Suite 2100  
Lexington, KENTUCKY 40507-1801

\*Honorable David J. Barberie  
Managing Attorney  
Lexington-Fayette Urban County Government  
Department Of Law  
200 East Main Street  
Lexington, KENTUCKY 40507

\*Larry Cook  
Assistant Attorney General  
Office of the Attorney General Office of Rate  
700 Capitol Avenue  
Suite 20  
Frankfort, KENTUCKY 40601-8204

\*Kentucky-American Water Company  
2300 Richmond Road  
Lexington, KY 40502

\*Linda C Bridwell  
Director Engineering  
Kentucky-American Water Company  
2300 Richmond Road  
Lexington, KY 40502

\*James W Gardner  
Sturgill, Turner, Barker & Moloney, PLLC  
333 West Vine Street  
Suite 1400  
Lexington, KENTUCKY 40507

\*Melissa Schwarzell  
Kentucky-American Water Company  
2300 Richmond Road  
Lexington, KY 40502

\*Janet M Graham  
Commissioner of Law  
Lexington-Fayette Urban County Government  
Department Of Law  
200 East Main Street  
Lexington, KENTUCKY 40507

\*Monica Braun  
STOLL KEENON OGDEN PLLC  
300 West Vine Street  
Suite 2100  
Lexington, KENTUCKY 40507-1801

\*Justin M. McNeil  
Office of the Attorney General Office of Rate  
700 Capitol Avenue  
Suite 20  
Frankfort, KENTUCKY 40601-8204

\*Rebecca W Goodman  
Assistant Attorney General  
Office of the Attorney General Office of Rate  
700 Capitol Avenue  
Suite 20  
Frankfort, KENTUCKY 40601-8204

\*Kent Chandler  
Assistant Attorney General  
Office of the Attorney General Office of Rate  
700 Capitol Avenue  
Suite 20  
Frankfort, KENTUCKY 40601-8204

\*M. Todd Osterloh  
Sturgill, Turner, Barker & Moloney, PLLC  
333 West Vine Street  
Suite 1400  
Lexington, KENTUCKY 40507