

STATE OF INDIANA

UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF KINGSBURY)
UTILITY CORPORATION FOR A NEW SCHEDULE OF) CAUSE NO. 44590 U
RATES AND CHARGES FOR WASTEWATER SERVICE)

KINGSBURY UTILITY CORPORATION'S REPLY
TO OUCC's RESPONSE ON REQUEST FOR RECONSIDERATION

Kingsbury Utility Corporation ("KUC" or "Company") respectfully submits this Reply to the Office of Utility Consumer Counselor's ("OUCC") August 6, 2018 Response to KUC's Request for Reconsideration of the July 5, 2018 Order in this Cause ("July 5 Order"). In Reply, KUC states as follows:

I. OUCC's Misplace Claim of "Final" Order

In its Response, the OUCC attempts to recast the January 17, 2018 Interim Order ("Interim Order") as providing KUC only "temporary relief". (OUCC Response, at 1). To support its argument, the OUCC raises and cites the Black's Law Dictionary's definition of an "interim order" rather than looking to the actual Interim Order itself. The actual Interim Order states that:

Based on the evidence presented by the parties in their filings, we find that KUC's proposed interim Phase 2 rates are reasonable and in compliance with the Phase 1 Order. Therefore, we approve KUC's request to implement, on an interim basis, a Phase 2 rate increase of 38.88% to produce additional operating revenues of \$76, 171. (Interim Order, at 2)(emphasis added).

The OUCC also incorrectly asserts that the July 2018 Order ("July Order"), is a final Order, which it obviously is not. The July Order does review and address some of the remaining capital projects not previously reviewed and approved in the Interim Order. However, the Commission only denied KUC's request for and inclusion of certain additional capital project

costs. More importantly, the July Order also cross-referenced and reaffirmed the amounts previously approved and authorized under the Phase 1 Order. (July Order, at 3). Finally, and fatally to the OUCC's claim, is the fact that the July Order clearly requires further action on and leaves open the equally highly contested issue of the influent flow meter. This is therefore not a "final" order.

The OUCC's interim-final order argument must also fail because the OUCC only looked at a half of the appropriate definitions. Black's Law Dictionary defines a "final order" as an order: "which terminates the litigation between the parties and the merits of the case and leaves nothing to be done but enforce by execution what has been determined." (Black's Law Dictionary, Fifth Edition, p. 567) (emphasis added). In this case, the Commission clearly has not issued a "final" order as there are additional the matters related to the influent flow meter to be addressed. The Commission specifically directs that further actions be taken by KUC and then sets forth how and when the OUCC may respond. Accordingly, the July Order does *not* end or terminate the litigation between the parties and leaves this material influent flow meter¹ issue to be addressed and resolved. Consequently this is not a final order and thus it cannot and should not supersede the Interim Order.

II. The OUCC's Suggested Proposal Does not result in Fair and Just Rates

The Commission has now found and made determinations on the in service and used and useful status of all the Phase 1 capital projects, except for the OUCC's proposed influent flow meter. Utility assets such as these capital projects that have been placed in service and found by

¹ KUC notes that on August 3, 2018 it filed a supplemental Report and information as directed by the Commission in the July Order, related to the still unresolved influent flow meter issue.

the Commission to be used and useful for the benefit of the KUC customers² now require the Commission, as it did in the Interim Order, to correspondingly allow KUC to recover these costs in its fair, just, and reasonable rates.

The concept of fair, just, and reasonable rates under Ind. Code §8-1-2, *et seq.* has at its foundation two key elements: the timely recovery of costs that are prudently incurred, and the right to earn a reasonable return on investments in used and useful utility property. These concepts are based upon two bedrock utility regulatory cases decided by the U.S. Supreme Court. In *Federal Power Commission et al v. Hope Natural Gas Co.* (“Hope”), 320 U.S. 591, 603 (1944), which provides that regulated utilities are entitled to a reasonable opportunity to recover their prudently-incurred costs. The second key regulatory principle was established in another U.S. Supreme Court landmark case, *Bluefield Water Works and Improvement Co. v. Public Service Commission of West Virginia* (“Bluefield”), 262 U.S. 679 (1923). *Bluefield* provides that regulated utilities are also entitled to earn a fair and reasonable rate of return on their capital investments. To suggest that the Commission’s July Order constitutes a “final” order that provides fair, just, and reasonable rates as the OUCC is suggesting flies in the face of both *Hope* and *Bluefield*.

The Commission’s Interim Order and the July Order each reviewed the capital project investments that had been originally discussed and approved in the Phase 1 Order. All but the previously mentioned influent flow meter have now been installed, placed in service, reported on, reviewed, and approved by the Commission. Neither the Interim Order nor the July Order have been appealed by the OUCC and thus the findings regarding the used and useful status of

² The OUCC even acknowledges in its August 6th Response that it was, “...undisputed that the projects included in the interim rates were authorized projects, were in service, and did not exceed authorized amounts.” (OUCC Response, at 2).

these capital investments made by KUC has been established. Having been found to be used and useful and in service, then Commission is legally bound to find and allow KUC the ability to recover, through rates, its prudently-incurred costs associated with those investments along with a fair and reasonable rate of return on them consistent with *Hope* and *Bluefield*. To now attempt to claim and interpret the Commission's July Order as being "final" and the implication that it has denied phase 2 rate relief to KUC, not only contradicts common sense but this violates the *Hope* and *Bluefield* standards. What the OUCC is apparently inviting this Commission to do is to improperly and illegally determine that the July Order is now a final determination which fails to grant KUC legitimate Phase 2 rate relief. (See OUCC Response, at 2). Based on flawed interpretation or reasoning regarding the July Order, the denial of KUC's Phase 2 rate increase necessarily results in rates that are "confiscatory" and constitute an unjust "taking" of KUC's earnings, revenues and/or legitimate expenses incurred for these used and useful capital investments. As the Commission has again pointed out (in the July Order), the determination on the capital projects was already made in the Phase 1 Order in this cause, which was not appealed. To accept the OUCC Response argument which claims the July Order is "final" results in an unfair and confiscatory taking of KUC's rightful rate relief and property in direct contravention of *Hope* and *Bluefield*. This argument cannot withstand reasonable scrutiny and thus the Commission must reconsider and reaffirm KUC's proper Interim Order rate relief.

III. Phase 1 Order Compliance Requirements Met

OUCC argues that there was insufficient evidence to convince the Commission to alter the Phase 1 Order. KUC has not raised or made such challenges and therefore agrees and submits that is exactly what must be done here – follow the process outlined in the Phase 1

Order. KUC has filed all the required supporting compliance filings³ directed by the Phase 1 Order. Nowhere has the OUCC ever objected to or claimed that KUC failed to comply with the compliance reporting obligations of the Phase 1 Order. The only remaining disputes that were before the Commission were over the additional capital project costs beyond the amounts authorized in the Phase 1 Order and the previously discussed legitimate differing interpretations of the Phase 1 Order language related to the influent flow meter. The July Order does not, however, overturn the Phase 1 Order second phase rate *implementation* process and directives, but rather focuses on and addresses the remaining disputes over the appropriate costs to be included in rates⁴. That being the case, then the ordered Phase 2 rates, including the relief granted in the Interim Order must then be implemented – save the issue related to the influent meter, which the Commission has clearly requested and directed further action on, and KUC has responded to through its August 3, 2018 filings.

IV. What Properly Constitutes the Record.

The OUCC next attempts to cloud the legitimate concerns raised by KUC regarding the May 31, 2018 meeting that was inappropriately relied upon in the July Order. In its Response, the OUCC presents the inaccurate notion that because there was no “evidentiary hearing” in this matter there are apparently no limits on what is the “evidentiary record”. (See OUCC Response, at 2). Remarkably, the OUCC acknowledges that this is a small utility proceeding but conveniently overlooks or ignores the Commission’s detailed small utility process and procedure rules set forth in 170 IAC 14-1, *et seq.* that explicitly set forth the process including what information, i.e. record

³ No where did the OUCC object to or claim that KUC had failed to comply with these portions of the Phase 1 Order.

⁴ KUC reasserts and incorporates its arguments presented in its original July 25, 2018 Reconsideration Request and the related arguments presented in this filing (see *Hope* and *Bluefield* discussions above) as to why the previously granted rate relief in the Interim Order must be reinstated.

evidence, can and should be provided by the parties and when, along with what the Commission can consider in issuing its orders. Further, in this case the Commission has gone to great lengths to carefully follow or supplement the small utility rule process throughout this proceeding by clearly describing the information and dates upon which the parties should file reports and evidence in its Orders. Nowhere under either 170 IAC 14-1 or any subsequent order or entry did the Commission ever properly raise or notify the parties⁵ of the May 31, 2018 meeting. Finally, and more to the point, is 170 IAC 14-1-6(a) sets forth what constitutes the “record” upon which the Commission can issue its order. Section 6(a) requires that:

If no hearing is held, the commission may issue an order on the application for rate change based on the data in the application for rate change, the report filed by the OUCC staff concerning the application for rate change, and any written response of the small utility to the OUCC staff report. (emphasis added).

Thus, since there was no hearing held in this matter, 170 IAC 14-1-6(a) not only defines what the record is, but the extent of and bounds for the evidentiary record upon which the Commission can and must rely in issuing its order. Not only is the May 31, 2018 meeting not part of the specific categories of the acceptable categories of items allowed under 170 IAC 14-1-6(a), but it occurred well after the last item, KUC’s written response filing was made. Therefore, reliance on any information or discussion beyond what is allowed under Section 6(a) runs afoul of the Commission’s own explicit rule and also violates KUC’s due process rights. For all of the above reasons, this portion of the OUCC’s Response is mistaken, contrary to the Commission’s explicit small utility rules and procedures, and so it must be disregarded.

KUC respectfully reasserts its request that the Commission reconsider and correct: (1) the clear error regarding the improper footnote rescission of the unchallenged January 17, 2018

⁵ The OUCC was apparently somehow notified in that one of its representatives was alerted to and attended the May 31, 2018 meeting that was 3 hours away.

Interim Order that authorized and provided for fair, just, and reasonable rates; and (2) clarify and address the problematic issues related to the unnoticed May 31, 2018 meeting that was in violation of 170 IAC 14-1-6(a); and for all other relief appropriate and proper in its premises.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Reply to OUCC's Response on KUC's Petition for Reconsideration and Clarification filed by the Kingsbury Utility Corporation was electronically served on the Office of Utility Consumer Counselor by electronic delivery on this the 10th day of August 2018.

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