

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF KANSAS**

IN THE MATTER OF )  
THE APPLICATION OF THE CITIES OF )  
HAYS, KANSAS AND RUSSELL, KANSAS )  
FOR APPROVAL TO TRANSFER WATER ) OAH No. 23AG0003 AG  
FROM EDWARDS COUNTY, KANSAS )  
PURSUANT TO THE KANSAS WATER )  
TRANSFER ACT. )

Pursuant to K.S.A. Chapter 77.

**The Cities’ Memorandum in Opposition to  
Water PACK’s Undisclosed Surrebuttal Expert Testimony**

At approximately 6:30 p.m. on July 25, 2023—six days into the hearing on this matter—Water PACK informed the Cities of its intent to call Dr. Andrew Keller as an expert witness. This was the first time Keller had been mentioned as a witness—expert or otherwise. Water PACK’s transparent attempt to gain an advantage by surprising the Cities with a new expert witness *during* the hearing violates not only the Prehearing Order and Procedural Schedule (“Prehearing Order”) entered in this case (and agreed to by Water PACK) but also all rules and norms regarding the conduct of discovery, civil procedure, and the rules of evidence under Kansas law.

The Prehearing Order required all direct expert testimony to be filed by May 29, 2023, and for all rebuttal and supplemental direct expert testimony to be filed by June 28, 2023. The Order also required the parties to disclose all lay witnesses to each other no later than June 23, 2023. The Order makes the consequences of failing to comply with its terms clear: “Any witness not disclosed pursuant to this order may not be permitted to testify at the hearing absent good cause for the lack of prior disclosure.” (Prehearing Order ¶ 8(b) (Apr. 19, 2023).) The Hearing Officer advised the Parties months ago that he was willing to convene additional prehearing conferences at the request of any party. Water PACK filed no motions to add Keller as a witness, gave no indication to the Cities of their intent to do so, and requested no additional prehearing conferences with the

Presiding Officer disclosing their plan. Water PACK cannot show good cause for failing to so much as mention Dr. Keller before July 25, nor provide any justifiable reason why the Presiding Officer should allow testimony that would be excluded in every other judicial forum.

The admission or exclusion of expert testimony—as with all evidence—is within the discretion of the Presiding Officer. *Kan. Gas & Elec. Co. v. Corp. Comm’n of the State of Kan.*, 14 Kan. App. 2d 527, 537 (1990); *see also Fairy Lice Sisters v. Off. of Admin. Appeals*, No. 2018-cv-575, 2019 Kan. Dist. LEXIS 605, \*24 (Shawnee Cnty. Dist. Ct. Aug. 5, 2019) (“Kansas courts have long supported agency discretion in admitting and excluding evidence so long as no arbitrary and capricious conduct occurs. [And,] [w]hen reviewing an agency decision, Kansas courts may apply the harmless error rule.” (citing *Winston v. State Dep’t of Social & Rehabilitation Servs.*, 274 Kan. 396, 418–19 (2002); *Bennet v. State Corp. Comm’n*, 157 Kan. 589, 597 (1943); *Sierra Club v. Mosier*, 305 Kan. 1090, 1124 (2017))). When making such decisions, Kansas agencies often look to the Kansas Rules of Civil Procedure and related case law. *See, e.g., Kan. Gas & Elec. Co.*, 14 Kan. App. 2d at 537 (relying on K.S.A. 60-456 to decide the admissibility of expert testimony before the KCC).

Water PACK’s mid-hearing attempt to bring in a new expert witness is not allowed under those Rules nor under any understanding of discovery or procedural norms adopted by our courts. “[T]he purpose of discovery is to eliminate the element of surprise from trials and to simplify issues by fully disclosing the evidence regarding the issues.” *Unified Sch. Dist. No. 232, Johnson Cty. v. CWD Invests., LLC*, 288 Kan. 536, 563 (2009) (citation omitted). Thus, courts “may exclude evidence that was not timely, or adequately, disclosed—or both.” *Id.* at 566.

Kansas courts are not shy about doing so. As the Kansas Court of Appeals has noted, “[m]any [Kansas] courts have refused to allow the late disclosure of an expert’s opinion when the initial time for such disclosures had passed.” *Walder v. Bd. of Comm’rs of Jackson Cnty.*, 44 Kan. App. 2d 284, 287–88 (2010) (citation omitted). For example, in *Curry v. Klein*, the Kansas Supreme Court affirmed a trial court’s decision to exclude testimony from an expert witness, even though that witness had been disclosed to all parties more than 10 months before trial. 251 Kan. 670, 448 (1992). There, the judge initially assigned to the case granted a motion to exclude the expert 10 months before trial but, four days before trial, the designating party (defense counsel in that case) informed the plaintiff’s counsel that they intended to call the expert at trial anyway. *Id.* at 447. The morning of trial, a different, newly assigned judge heard argument from the parties regarding the admissibility of this expert’s testimony. *Id.* The newly assigned judge, Judge Davis, “stated he had no feelings” about the expert’s “competency or bias and he would not have” automatically excluded the expert “had the matter been raised earlier.” *Id.* However, “Judge Davis refused to permit [the expert] to testify on the basis of surprise and prejudice to plaintiff.” *Id.* And in *Walder v. Board of Commissioners of Jackson County*, the Kansas Court of Appeals affirmed a trial court’s decision to exclude testimony from a timely designated expert because the testimony was not disclosed in the expert’s report or in a supplemental report. 44 Kan. App. 2d at 287–88.

The impropriety of Water PACK’s request for Dr. Keller to testify is more egregious than in *Curry* and *Walder*. Unlike the proposed expert in those cases, Dr. Keller was *never* disclosed as a potential witness in this case, nor has he provided any kind of report that would alert the parties to his anticipated testimony—much less pre-filed testimony in conformity with the Prehearing Order. Thus, the Presiding Officer is well within his discretion to enforce the terms of the

Prehearing Order and exclude Dr. Keller from testifying at the hearing. And, indeed, that would be the only fair outcome to avoid severely prejudicing the Cities.

Water PACK’s final witness list does not amend the Presiding Officer’s Prehearing Order. Water PACK’s argument that it can call Dr. Keller to testify because its final witness list includes the phrase “this list does not include the names of any rebuttal witnesses or potential expert witnesses,” is nonsensical. (Rough Draft July 26, 2023 Hr’g Tr. 9:1–3.) Parties commonly include such designations about rebuttal witnesses in pretrial orders, but their inclusion does not mean they are valid. This is particularly true where, as here, the parties have been warned that failure to disclose a witness will lead to their exclusion from the hearing. (Prehearing Order ¶ 8(b) (Apr. 19, 2023).) As the Hearing Officer has already noted, under Water PACK’s approach, this hearing will devolve into a never-ending stream of direct testimony, rebuttal, surrebuttal, sur-surrebuttal, sur-sur-surrebuttal, and so on.

The Prehearing Order made it crystal clear that all expert witness testimony must be in the form of pre-filed written testimony, which specifically included “any supplemental or rebuttal testimony he or she has *pre-filed*.” (Prehearing Order ¶ 4 (Apr. 19, 2023).) The same paragraph then notes deadlines for filing such testimony, “which the parties had circulated, agreed to, and filed with OAH ....” (*Id.*) Those deadlines have long since passed. The Cities have conscientiously abided by this order. Water PACK should be required to do likewise.

It would be patently unfair and highly prejudicial to the Cities to permit Water PACK to introduce sur-rebuttal testimony from a previously undisclosed expert contrary to the directions contained in the Prehearing Order at this juncture—literally in the middle of this hearing. Dr. Keller should be prohibited from testifying as a witness—expert or otherwise—under any circumstances.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing Preliminary Witness and Exhibit Lists was served this 27th day of July, by uploading it to OAH Case Nos. 23AG0003 and by electronic mail to the following:

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