

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THOMAS E. GUPTON)	
)	
COMPLAINANT)	
)	
V.)	CASE NO. 2010-00045
)	
TODD COUNTY WATER DISTRICT)	
)	
DEFENDANT)	

ORDER

Thomas E. Gupton has filed a formal complaint against Todd County Water District ("Todd District") in which he alleges that the water district has unlawfully billed him for water service. At issue is whether the water district may lawfully bill Mr. Gupton for water service to a new structure when the water district has constructed a tap to serve the structure but no meter has been installed. Finding that the water district acted properly in assessing a bill for water service, we deny the complaint but direct Todd District to clarify its service regulations to avoid customer confusion.

PROCEDURE

On February 2, 2010, Mr. Gupton filed his complaint with the Commission in which he alleged that Todd District has unlawfully billed him for water service. Answering the complaint on March 12, 2010, Todd District denied the allegations of unlawful billing and asserted that its actions were fully consistent with its filed rate schedules. During the following months, Commission Staff submitted two requests for information to Todd District. After Todd District's responses to these requests were

received, the Commission, on October 29, 2010, issued our preliminary findings of fact and directed both parties to file any objections to those findings. We further advised the parties that, if no objections to the preliminary findings were filed, the case would stand submitted for decision based upon those findings. Neither party objected to the findings.¹

STATEMENT OF THE CASE

Todd District, a water district organized pursuant to KRS Chapter 74, owns and operates facilities that distribute water to approximately 3,276 customers in Logan, Todd, and Muhlenburg Counties.²

In 2009, Mr. Gupton was constructing a home at 1060 Scott Road, Sharon Grove, Kentucky. On July 17, 2009, he and Todd District executed a contract for water service to that site. At the same time, Mr. Gupton paid a tap fee of \$550.00 to Todd District for the site. Mr. Gupton states that, when he entered the contract for water service, he informed Todd District officials that he was residing in Clarksville, Tennessee. Todd District asserts that Mr. Gupton informed its employees at that time that he would be installing a mailbox at the construction site within a month.

On August 14, 2009, Todd District installed a meter box and vault at the Scott Road site, but did not install a water meter. It asserts that no meter was installed because Mr. Gupton had failed to provide a plumbing permit. On September 14, 2009,

¹ We find that, in light of the issues that are presented in the Complaint and the efforts to afford both parties the opportunity to be heard, a hearing is not necessary in the public interest or for the protection of substantial rights.

² *Annual Report of Todd County Water District to the Kentucky Public Service Commission for the Calendar Year Ending December 31, 2009* at 5 and 27.

Todd District mailed a request for a copy of the plumbing permit to Mr. Gupton at 1060 Scott Road, Sharon Grove, Kentucky.

On or about September 22, 2009, Todd District issued a bill to Mr. Gupton for \$20.22 for water service to 1060 Scott Road for the period from August 8, 2009 to September 3, 2009. The total amount represented Todd District's minimum monthly bill for water service received through a 5/8-inch meter plus utility tax of \$0.63. The due date for payment of this bill was October 10, 2009. Todd District mailed this bill through the U.S. Postal Service to 1060 Scott Road, Sharon Grove, Kentucky. The U.S. Postal Service subsequently returned this bill to Todd District as "undeliverable."

On or about October 13, 2009, Todd District mailed a new bill to Mr. Gupton at the same address for the same water service but included a late fee of \$1.96. The due date for payment of this bill was October 26, 2009. U.S. Postal Service also returned this bill to Todd District as "undeliverable."

On or about October 21, 2009, Todd District issued another bill to Mr. Gupton for water service to 1060 Scott Road. This bill, which was for the amount of \$42.40, represented a charge of \$19.63 for service provided for the period from September 3, 2009 to October 2, 2009, utility tax of \$0.59, and the previous balance of \$22.18. Due date for payment of this bill was November 10, 2009. Todd District also mailed this bill through the U.S. Postal Service to 1060 Scott Road, Sharon Grove, Kentucky. U.S. Postal Service also returned this bill to Todd District as "undeliverable."

Mr. Gupton states that on or about November 4, 2009, he discovered that a meter had not been installed at the Scott Road site and contacted Todd District. He further states that he advised the water district that only a meter box was currently

located at the property. Mr. Gupton further states that the water district's representative advised him that a copy of the plumbing permit was needed before a meter could be installed.³ The following day, Mr. Gupton's plumber transmitted a copy of the plumbing permit to Todd District by facsimile. Todd District installed a meter at the 1060 Scott Road location the same day.

According to Mr. Gupton, on November 5, 2009, Todd District's representative advised him by telephone of the overdue bill for water service to the 1060 Scott Road location. Mr. Gupton visited Todd District's office the same day,⁴ advised its office employees that any bill should be sent to another address,⁵ and complained about being billed for water service prior to the installation of a meter.

On or about November 13, 2009, Todd District issued a bill to Mr. Gupton for \$44.36 for water service to 1060 Scott Road for the period from September 3, 2009 to October 2, 2009. The total amount represented the previous balance of \$42.40 and a late fee of \$1.96. Payment of this bill was due upon receipt. On or about November 20, 2009, Mr. Gupton paid \$20.00 to Todd District for water service.

On or about November 20, 2009, Todd District issued a bill to Mr. Gupton for \$44.58 for water service to 1060 Scott Road for the period from October 2, 2009 to November 3, 2009. The total amount represented a prior balance of \$24.36, a charge of

³ Mr. Gupton asserts that his plumber provided Todd District with a copy of the plumbing permit on August 13, 2009.

⁴ Todd District asserts that this visit occurred on November 6, 2009.

⁵ According to Todd District, Mr. Gupton provided the mailing address of 915 Dulas Drive, Clarksville, Tennessee. On December 16, 2009, this address was changed to 915 Dumas Drive.

\$19.63 for service provided for the period from October 2, 2009 to November 3, 2009, and utility tax of \$0.59. On or about December 15, 2009, Todd District adjusted this account for water service to reflect the addition of a late fee of \$1.96.

On or about December 21, 2009, Todd District issued a bill to Mr. Gupton for \$66.76 for water service to 1060 Scott Road. This amount represented a prior balance of \$44.58, a late fee of \$1.96, a charge of \$19.63 for service provided for the period from November 3, 2009 to December 2, 2009, and utility tax of \$0.59. Due date for payment of this bill was January 11, 2010. Todd District mailed this bill through the U.S. Postal Service to 915 Dumas Drive, Clarksville, Tennessee.

On December 29, 2009, Todd District disconnected water service to 1060 Scott Road for non-payment. The water district's records do not indicate any payment received after the payment of \$20 on or about November 20, 2009 until January 29, 2010, when Mr. Gupton made a payment of \$71.54 to Todd District. This payment included payment for a \$25.00 disconnection fee. On January 29, 2010, Todd District restored water service to 1060 Scott Road.

Mr. Gupton contends that as no meter was installed prior to November 5, 2009, no water service was available and Todd District could not lawfully bill him for such service. He further contends that, as he could not lawfully be charged for any service prior to November 5, 2009, the late payment fees and charges related to the disconnection of service resulting from pre-November 5, 2009 billings are unlawful. He requests that such fees paid to the water district, as well as any charges for water service allegedly received prior to November 5, 2009, should be refunded.

DISCUSSION

The question before the Commission is: Did Todd District lawfully bill Mr. Gupton for water service to 1060 Scott Road prior to the installation of a water meter at that location?

Mr. Gupton contends that Todd District unlawfully billed him for water service prior to the installation of a meter on November 5, 2009 and unlawfully disconnected him for failure to pay charges assessed for water service prior to the meter's installation. Mr. Gupton implies that he neither received nor used any water at the 1060 Scott Road location prior to November 5, 2009.⁶ He asserts that, without the presence of a meter, water service was not available to him, and the water district could not lawfully charge for water service.

Disputing these allegations, Todd District argues that the provisions of its tariff required Mr. Gupton to be billed upon completion of the connection. Rule 10 of its tariff states:

Billing and notices relating to the conduct of the business or residence will be mailed to the customer at the address listed on the user's agreement unless change of address has been filed in writing with the District; and the District shall not otherwise be responsible for delivery of any bill or notice nor will the customer be excused from payment of any bill or any performance required in said notice.

Bills for water service are payable at the office of the District on the date of issue. The due date shall be the tenth of the month of issue.

On a new tap-on, the billing for this new service shall begin at the time the District makes water available to the customer,

⁶ In his Complaint, Mr. Gupton reports that as of January 25, 2010, the house at 1060 Scott Road was still under construction and no water fixtures had been installed.

regardless of whether the consumer is connected to the meter.

Todd District argues that Rule 10 requires it to bill a customer for water service as soon as it makes water available. According to Todd District, water service became available when it excavated the ground, installed a tap-on connection to its water main, and set a meter vault. Therefore, upon installation of the meter box on August 14, 2009, Todd District was required to bill Mr. Gupton a minimum bill for water service. Todd District further argues that the actual installation of a meter, which did not occur until November 5, 2009, was not a determining factor. It noted that a meter could not be installed without a plumbing permit and that sole responsibility for obtaining such permit belonged to Mr. Gupton. His failure to obtain the permit did not prevent the billing for water service.

Rule 10 of Todd District's tariff provides that billing for service to a new tap-on "shall begin at the time the District makes water available to the customer, regardless of whether the customer is connected to the meter." Once Todd District completed the tap-on connection to Mr. Gupton's residence, water service was available. The rule did not require that the residence be connected to the connection or that a meter be installed.

Rule 10 properly allocates the responsibility for service connections between the water district and the applicant for service. It allows the water district to begin billing for service when it has completed all actions within its legal authority to provide water service and creates an incentive for the applicant to either timely complete its responsibilities or to delay its request for a service connection until it is capable to perform those responsibilities. As of August 14, 2009, Todd District had performed all

actions necessary to serve Mr. Gupton's residence. The remaining actions that were necessary to serve the residence - connecting the residence to the meter box and obtaining a plumbing permit to authorize the meter installation - were solely within Mr. Gupton's control.

In *Paland v. Brooktrails Tp. Community Services Dist. Bd. of Directors*, 102 Cal.Rptr.3d 270, the California Court of Appeals addressed the issue of when water service is available. A customer, who was contending that a minimum service charge was an assessment and not a charge for service, argued that water service is not available unless the customer "can twist the tap and turn on the water." Rejecting this position, the Court found that the water service was "immediately available" when the utility had taken all actions necessary to provide service:

[T]he "immediately available" requirement is logically focused on the agency's conduct, not the property owner's. As long as the agency has provided the necessary service connections at the charged parcel and it is only the unilateral act of the property owner (either in requesting termination of service or failing to pay for service) that causes the service not to be actually used, the service is "immediately available."

Id. at 279.

A utility may "establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service."⁷ It is prohibited from giving "any unreasonable preference or advantage to any person or . . . [subjecting] any person to any unreasonable prejudice or disadvantage . . . for doing a like and contemporaneous service under the same or substantially the same

⁷ KRS 278.030(2).

conditions.”⁸ Todd District has published Rule 10 to govern an aspect of its provision of water service. It must apply that rule uniformly and may not apply that rule differently to similarly situated customers. Accordingly, Todd District was required to begin billing Mr. Gupton for water service upon the installation of the meter setting.

Mr. Gupton’s lack of water usage is not relevant. Todd District’s rate schedule provides for a monthly minimum charge of \$19.63 regardless of a customer’s usage. The monthly minimum charge includes the use of 2,000 gallons of water, but is assessed even if a customer fails to use any water during the month.

While another result might be warranted if the water district failed to inform Mr. Gupton of when billing would begin or made some misrepresentation to him, the record contains no allegation or evidence that Mr. Gupton was not informed or that misrepresentations were made. The contract for water service expressly provides that the purchaser’s rights are subject to the rules and regulations that the water district may prescribe. Mr. Gupton, therefore, had notice of Rule 10 and that water service would be billed as soon as service became available. If he wished to avoid the premature assessment of charges for water service, he should have delayed his application for water service or, when entering his service agreement with the water district, expressly instructed the water district to make no connection until the construction of his residence was near completion.

In summary, Todd District properly followed its rules and performed all actions necessary for the customer to take water service. Water service, therefore, was available to Mr. Gupton and could be properly billed. That the water district began

⁸ KRS 278.170(1).

billing for service when Mr. Gupton's residence was not ready to take or use water was in large measure due to Mr. Gupton's decisions. He must accept responsibility for the consequences of those decisions.

While the record does not suggest that Todd District acted improperly or unreasonably, we find that Todd District should revise Rule 10 to clarify when water service is available to avoid potential customer confusion and future complaints. The revised rule should clearly and unmistakably state that, upon installation of the meter service, the customer will be subject to billing for water service. If the water district requires assistance in making these revisions, it should consult with Commission Staff.

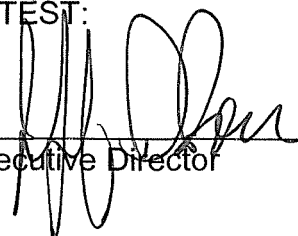
IT IS THEREFORE ORDERED that:

1. Mr. Gupton's Complaint is denied.
2. Todd District shall, within 30 days of the date of this Order, file with the Commission revisions to its Rule 10 and to any other appropriate rule that more clearly state when water service is available upon a request for service connection and when a customer's liability for monthly service begins.

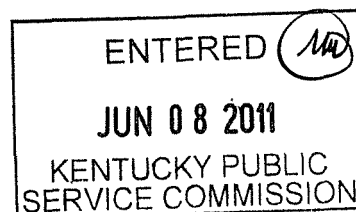
By the Commission

Vice Chairman Gardner dissents.

ATTEST:



Executive Director



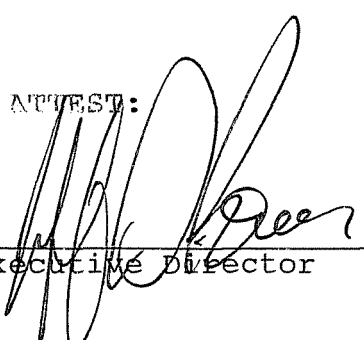
SEPARATE OPINION OF VICE CHAIRMAN
JAMES W. GARDNER DISSENTING IN PART AND CONCURRING IN PART

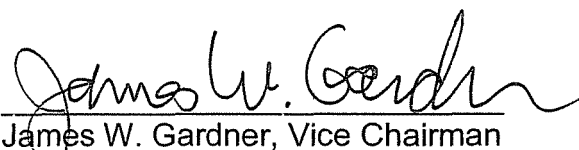
According to Rule 7 of the water district's rules, a copy of the State Plumbing Inspector's Plumbing Permit must be filed with the water district "for each service before **water service begins** [emphasis added]." As Todd District did not receive a copy of the plumbing permit for Mr. Gupton's residence until November 5, 2009, the water district could not lawfully make water service available to him until that date. It, therefore, could not begin billing him for service before that date.

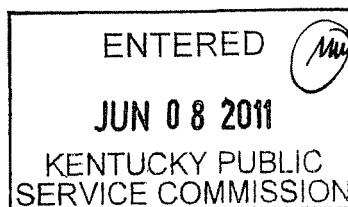
While I fully understand and appreciate the majority's concerns in denying the Complaint, Todd District's service regulations are ambiguous and conflicting. As Todd District is the drafter of these regulations, the Commission should interpret any ambiguity in those regulations against the water district. See, e.g., *Spurlock v. Begley*, 308 S.W.3d 657, 660 (Ky. 2010) ("Courts in this state have long held that 'when a contract is susceptible of two meanings, it will be construed strongest against the party who drafted and prepared it'").

For these reasons, I respectfully dissent from the majority's decision to deny the Complaint. As I find Rule 7 and Rule 10, when read together, to be ambiguous and confusing, I concur in that portion of the majority's decision to require Todd District to revise that Rule.

WITNESSED:


Executive Director


James W. Gardner, Vice Chairman



Separate Opinion
Case No. 2010-00045

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Chairman
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