COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KENTUCKY DAM VILLAGE STATE RESORT PARK, KENTUCKY DEPARTMENT OF PARKS, COMMERCE CABINET	)	
COMPLAINANT	)	
v.	)	CASE NO. 2006-00365
NORTH MARSHALL WATER DISTRICT	)	
DEFENDANT	)	

O R D E R

Kentucky Dam Village State Resort Park ("Kentucky Dam Village") has brought a complaint against North Marshall Water District ("North Marshall") in which it contends that the water district has unlawfully assessed a late payment fee of $944.58. At issue is whether a utility may assess a state agency a fee for late payment of utility service under conditions and terms that differ from those set forth in KRS 45.453 and 45.454. Finding in the affirmative, we deny the complaint.

BACKGROUND

North Marshall, a water district organized pursuant to KRS Chapter 74, owns and operates facilities that distribute and furnish water to the public. It serves approximately 5,176 customers in Livingston and Marshall counties, Kentucky.[1] North Marshall is a utility subject to Commission jurisdiction.[2]

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[1] Annual Report of North Marshall Water District to the Kentucky Public Service Commission for the Calendar Year Ending December 31, 2006 at 5 and 27.

[2] KRS 278.010(3)(d); KRS 278.015; KRS 278.040(1).

North Marshall provides water service under the terms and conditions set forth in its filed rate schedules. These schedules provide, inter alia, that (1) bills will be issued bi-monthly on or about the 20th day of each even-numbered month; (2) payment must be received before the close of business on the 10th day of odd-numbered months; and (3) if payment is not received by this day, it "will be assessed the late payment penalty due and on-file with the Public Service Commission."[3] North Marshall's rate schedule provides for a 10 percent late payment fee.

Kentucky Dam Village is a state park located in Gilbertsville, Kentucky. The Kentucky Department of Parks, an agency of the Kentucky Commerce Cabinet, is responsible for its operation and management.[4] In June 1969 the Department of Parks contracted with North Marshall for the construction of a service connection to Kentucky Dam Village and for water service to the park.[5] The record does not reflect any additional contracts between the two entities.

North Marshall provides water service to Kentucky Dam Village through four distinct metering points.[6] It issues a separate bill for each metering point on a bi-

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[3] North Marshall Water District Tariff, PSC KY No. 4, Original Sheet No. 11.

[4] KRS148.021(1).

[5] North Marshall's Response to Commission Staff's First Data Request, Item 1.

[6] According to the bills rendered to Kentucky Dam Village, North Marshall identifies these metering points as the Riding Stable, Compound/Turbo Mtrs, Cooks Residence, and Campground Meter. See Kentucky Dam Village's Response to Commission Staff's First Data Request, Item 4.

monthly basis. On April 25, 2006,[7] North Marshall mailed to Kentucky Dam Village four bills for water service provided from February through April 2006.[8] On each bill, North Marshall indicated the amount owed and a "due date" of May 12, 2006. It also indicated the amount of penalty "after due date" and the "amount due after due date." The total amount billed was $9,081.17.

TABLE I

APRIL 2006 BILLS TO KENTUCKY DAM VILLAGE			
Metering Point	**Amount Due**	**Late Payment Penalty[9]**	**Amount Due with Late Payment Penalty**
Riding Stable	$ 11.10	$ 1.08	$ 12.18
Compound/Turbo MTRS	9,729.17	944.58	10,673.75
Cooks Residence	19.71	1.91	21.62
Campground Meter	41.19	4.00	45.19
TOTAL	$9,801.17	$ 951.57	$10,752.74

Kentucky Dam Village received these bills on April 28, 2006. Its employee entered a request for payment of the bills into the Commonwealth of Kentucky's electronic bill payment system. After Kentucky Dam Village's manager approved the request, it was forwarded by mail to the Department of Parks for final approval and the issuance of a check. On May 9, 2006, the Kentucky State Treasurer issued a check for payment of the bills and mailed the check to North Marshall the following day through

[7] North Marshall did not complete the reading of its meters until Friday, April 21, 2006. No work was conducted during the following weekend. On April 24, North Marshall employees reviewed the readings, printed the bills and prepared them for mailing. North Marshall placed the bills into the mail the following day. See North Marshall's Response to Commission Staff's Second Data Request, Item 2. North Marshall contends that its actions were consistent with the provisions of its filed rate schedule as the bills were issued "on or about" the 20th day of April.

[8] The bills issued to Kentucky Dam Village indicate that North Marshall read the meters at the four metering points between April 4 and April 6, 2006. The record does not contain the date of the previous meter reading.

[9] The late payment penalty is 10 percent of the water service cost. The amount due is the water service cost plus the utility tax.

the United States Postal Service. North Marshall received this payment on May 15, 2006. As it did not receive the payment by the "due date" listed on the bills, North Marshall assessed Kentucky Dam Village penalties of $951.57. Asserting that KRS 45.453 and KRS 45.454 preclude any assessment of late payment fees, the park refuses to pay the assessed late payment fees.[10]

PROCEDURE

On July 27, 2006, Kentucky Dam Village filed a complaint against North Marshall with the Commission. In its complaint, it contends that the assessment of a late payment fee is contrary to KRS 45.453 and KRS 45.454 and requests a determination that no late payment penalty is owed. On August 14, 2006, North Marshall answered the complaint and denied the allegations that its action was contrary to KRS 45.453 and KRS 45.454.

Neither party has requested a hearing in this matter or the opportunity to conduct discovery. Both parties have submitted information in response to Commission Staff's requests for information. Both parties have submitted written briefs in which they set forth their positions on the issues presented in the complaint.

DISCUSSION

Kentucky law permits a utility to demand and collect fair, just and reasonable rates for the services that it renders[11] and to "establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render

[10] The record does not indicate that Kentucky Dam Village has paid these late payment fees.

[11] KRS 278.030(1).

service."[12] A late payment penalty and the conditions under which a utility assesses such penalty are considered "rates"[13] and are subject to Commission jurisdiction and regulation.[14] The Commission has expressly authorized utilities to assess late payment fees.[15]

Late payment penalties are intended to provide an incentive for customers to pay their bills on time and are generally used throughout the utility industry.[16] Courts have

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[12] KRS 278.030(2).

[13]

> "Rate" means any individual or joint fare, toll, charge, rental, or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege in any way relating to such fare, toll, charge, rental, or other compensation, and any schedule or tariff or part of a schedule or tariff thereof;

KRS 278.010(12).

[14] KRS 278.040(2).

[15]

> A penalty may be assessed if a customer fails to pay a bill for services by the due date shown on the customer's bill. The penalty may be assessed only once on any bill for rendered services. Any payment received shall first be applied to the bill for service rendered. Additional penalty charges shall not be assessed on unpaid penalty charges.

807 KAR 5:006, Section 8(3)(h).

[16] See American Water Works Association, Principles of Water Rates, Fees, and Charges 258 (5th Ed. 2000) ("A *late-payment charge* can be an incentive for prompt payment. This charge recognizes the time value of money and other added costs. It is common practice for a water utility to designate a period during which a bill must be paid to avoid late payment charges.").

found the assessment of such fees reasonable due to the unique nature of utility service[17] and the anti-discriminatory effects of the fee's assessment.[18]

North Marshall has published rate schedules that contain a late payment penalty and provide for its assessment when payment is not promptly made. KRS 278.160(2),[19] which provides that a utility must charge and collect from any person the rates prescribed in its rate schedule for any service rendered, requires North Marshall to assess and collect this penalty from any customer who fails to make timely payment.

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[17] See, e.g., Jones v. Kansas Gas and Electric Co., 565 P.2d 597, 605 (Kan. 1977) ("Utilities cannot refuse to serve a slow-paying customer or a credit risk who might be turned away by a local merchant. In order to compensate for this factor utilities are allowed to require deposits and impose late charges to minimize the risk of bad debts.")

[18] See Coffelt v. Arkansas Power and Light Co., 451 S.W.2d 881, 884 (Ark. 1970) ("The late charge . . . is in fact a device by which consumers are automatically classified to avoid discrimination. Its effect is to require delinquent ratepayers to bear, as nearly as can be determined, the exact collection costs that result from their tardiness in paying their bills."); Low-Income Consumers Union v. Oregon Pub. Util. Comm'n, 946 P.2d 1164, 1166 (Or. App. 1997) (agreeing with the Commission that said, "it is a fair business practice to place the burden of collection costs on those customers responsible for them"). See also State ex. Rel. Utils. Comm'n v. North Carolina Consumers Council, Inc., 198 S.E.2d 98 (N.C. Ct. App.1973)

[19]

> No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

KRS 278.170(1)[20] requires that North Marshall enforce the assessment and collection of this penalty in a uniform and non-discriminatory manner.

Kentucky Dam Village advances two arguments for the position that North Marshall's late penalty is inapplicable in the current case.[21] First, it contends that KRS 278.160[22] cannot be applied to the set of facts at bar because this statute does not expressly apply to state purchases of utility service or otherwise expressly name or necessarily imply the inclusion of the state. In support of this position, it relies upon a rule of statutory construction that provides:

> The state, or the public, is not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless expressly named therein, or included by necessary implication.[23]

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[20] No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions.

[21] Kentucky Dam Village does not argue that payment was timely made; that the time period that North Marshall provided for payment of the bills was unreasonable; or that North Marshall, except in its actual assessment of the late payment penalty to a state agency, acted improperly or unlawfully in its billing practices.

[22] Kentucky Dam Village does not address the application of KRS 278.170 to this case. In reaching our decision, we assume that the arguments that Kentucky Dam Village advances in support of the inapplicability of KRS 278.160 would also apply to KRS 278.170.

[23] Commonwealth v. Allen, 32 S.W.2d 42 (Ky. 1930). See also Commonwealth v. Hale, 348 S.W.2d 831, 842 (Ky. 1961) ("Statutes in derogation of sovereignty should be strictly construed in favor of the state, so that its sovereignty may be upheld and not narrowed or destroyed, and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the legislature to effect this object is clearly expressed.")

Kentucky Dam Village argues that as KRS 278.160(2), which requires a utility to assess and collect the rates published in its filed rate schedule, does not expressly mention the state or any state agency, it does not require a utility to assess its published late payment fee for utility services provided to a state agency nor does it represent the state's consent to the assessment of such fees.

We disagree with this argument. Commentators have indicated this rule of construction has declined in modern usage. One treatise states that "modern authorities are less favorably disposed toward claims of governmental immunity against liability to an individual who seeks a remedy against a government on what would be a valid claim against a private party."[24] There is no doubt that North Marshall would have a valid claim against a private individual who made a late payment.

At least one court has rejected efforts to apply this rule of statutory construction to a state agency's purchase of utility services. In State ex rel. Ashcroft ex inf. Pelzer v. Public Service Commission, 674 S.W.2d 660, 661 (Mo. App. 1984), the Missouri Court of Appeals considered whether "the state as sovereign may be involuntarily subjected to added charges for failure to make timely payment of bills for electric services consumed." Relying upon a statute whose provisions are very similar to KRS 278.160 and 278.170,[25] the court held that "the state is precluded by law from seeking or receiving an advantage not available to other utility customers receiving service under similar conditions" and rejected the Missouri State Government's contention that it could not be subjected to late payment fees for utility service.[26] The court further found that

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[24] Sutherland Statutory Construction § 62:3 (6th ed. 2006).

[25] Mo. Rev. Stat. 393.130.

[26] Ashcroft at 664.

the state consented to the late payment charges by contracting for the service and not making timely payments.[27]

Moreover, KRS 278.035 evidences the General Assembly's intent that all utility rates and terms are applicable to state government entities and that no preferential treatment should be afforded to such entities. It provides:

> Any entity receiving public funds from the Commonwealth of Kentucky, or any political subdivision thereof, for the purpose of offsetting at least fifty percent (50%) of its operational expenses shall not be entitled to preferential retail rates for services provided by utilities subject to the provisions of KRS Chapter 278. This section shall not prohibit the provision of free or reduced rate service under KRS 278.170(3).

Such language is clearly contrary to Kentucky Dam Village's contention that the Commonwealth has not consented to the application of KRS 278.160 and KRS 278.170 to its purchases of utility services.

Kentucky Dam Village next argues that KRS 45.453 and KRS 45.454 govern the transactions in question and that their requirements clearly conflict with KRS 278.160. As a result of this conflict, the park further argues, the rules of statutory construction are applicable and hold that KRS 45.453 and KRS 45.454 control.[28]

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[27] Id. at 663.

[28] First, Kentucky Dam Village argues that any regulatory regime prescribed under KRS 278.160 would have to conform to all other KRS provisions, including KRS 45.453 and 45.454. Second, it contends that if there is conflict between the statutes, KRS 45.453 and 45.454 should prevail because they were enacted later. Third, Kentucky Dam Village asserts that the specific subject matter of KRS 45.453 and 45.454 should apply over the general regulation of KRS 278.160.

Before the Commission can resort to the rules of statutory construction, we must first determine that a conflict between KRS 278.160 and KRS 45.453 and KRS 45.454 actually exists.[29] Based upon our review of these statutes, we find no such conflict.

KRS Chapter 45 addresses state government purchasing practices. Establishing the Commonwealth's broad policy on payment of bills, KRS 45.451 provides that "[i]t is the policy of the Commonwealth that all bills shall be paid on time." KRS 45.453 provides:

> All bills shall be paid within thirty (30) working days of receipt of goods and services or a vendor's invoice except when the purchasing agency has transmitted a rejection notice to the vendor.

KRS 45.454 provides:

> An interest penalty of one percent (1%) of any amount approved and unpaid shall be added to the amount approved for each month or fraction thereof after the thirty (30) working days which followed receipt of the goods or services or vendor's invoice by a purchasing agency.

KRS 278.160, on the other hand, is specifically related to utilities. It requires utilities to file schedules showing rates and conditions of service with the Commission. It further requires utilities to charge the same rates for anyone receiving the same service, and the statute places a similar demand on customers to pay the same rate for equal service.

To the extent that the payment provisions in North Marshall's rate schedules, which KRS 278.160 requires to be filed with the Commission and enforced, are more stringent than those found in KRS 45.453, they are not in conflict with KRS 45.453.

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[29] See Kentucky Off-Track Betting, Inc. v. McBurney, 993 S.W.2d 946, 949 (Ky. 1999) ("There is only a need to use the rules of statutory construction if the statutes actually conflict.").

KRS 45.453 merely establishes a minimum requirement for state government agencies and a default time period in those instances where a vendor has not provided a specific payment period. Payment periods may be shortened. This is the plain meaning of the language "all bills shall be paid within thirty (30) working days." As the purpose of KRS 45.453 and KRS 45.454 and the penalty provisions of North Marshall's rate schedules is to ensure timely payment of bills, there is no conflict with the overriding state policy that "all bills shall be paid on time."

We note the absence of any language within KRS 45.453 or KRS 45.454 that establishes a specific payment period or late payment fee for state government agencies. KRS 45.453 does not provide that the "the state shall have thirty working days to pay its bills" nor does KRS 45.454 provide that "the state shall not pay a late payment fee exceeding one percent." Were such restrictions present, Kentucky Dam Village's argument for the existence of a conflict would be strengthened. In the absence of such language, we fail to find any conflict between the statutes in question.

The Commission recognizes that the accounting procedures of state agencies may create delays in the payment of utility bills and reduce the ability of some state agencies to make timely payment of a utility bill. These procedures do not excuse the agency from compliance with the utility's published rules and regulations[30] but may serve as a basis for a special contract[31] between the utility and the state agency in which a different payment period is provided.

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[30] State v. Office of Pub. Util. Counsel, 849 S.W.2d 864, 870 (Tx. App.1993) ("The fact that the late-payment penalty might place some burden on state agencies is not controlling as long as the penalty has a reasonable basis.").

[31] 807 KAR 5:011, Section 13.

CONCLUSION

Having considered the record and being sufficiently advised, the Commission finds that:

1. On April 25, 2006, North Marshall mailed to Kentucky Dam Village four bills for water service provided from February through April 2006.

2. On each bill, North Marshall indicated the amount owed and a "due date" of May 12, 2006. It also indicated the amount of penalty if the total amount owed was not paid by May 12, 2006 and the amount that would be owed if the bill was paid after May 12, 2006. The total amount billed was $9,081.17.

3. North Marshall did not receive Kentucky Dam Village's payment for the bills until May 15, 2006.

4. Pursuant to the terms of North Marshall's filed rate schedules, Kentucky Dam Village owed late payment fees of $951.57 for its failure to make timely payment.

5. North Marshall's subsequent billing of these late payment fees is not unlawful or unreasonable.[32]

6. A hearing in this matter is not necessary in the public interest or for the protection of substantial rights.

IT IS THEREFORE ORDERED that:

1. Kentucky Dam Village's complaint is denied.

[32] The record of this proceeding indicates that North Marshall Water District may not have complied with the provisions of its filed rate schedules by failing to issue bills on or about April 20, 2006. This potential failure would be contrary to KRS 278.160 and warrants additional Commission inquiry. Accordingly, we have this day established a separate proceeding to determine if any violation occurred and if any administrative sanction should be imposed if any violation occurred.

2. Subject to the filing of a timely petition for rehearing pursuant to KRS 278.400, these proceedings are closed. The Executive Director shall place any future filings in the appropriate utility's general correspondence file or shall docket the filing as a new proceeding.

Done at Frankfort, Kentucky, this 31st day of July, 2007.

By the Commission

ATTEST:

Executive Director