COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AMERICOAL CORPORATION COMPLAINANT VS. BOONE COUNTY WATER AND SEWER DISTRICT DEFENDANT and AN INVESTIGATION OF BOONE COUNTY WATER AND SEWER DISTRICT ALLEGED FAILURE TO COMPLY WITH KRS 278.160(2)	)	CASE NO. 90-108 CASE NO. 91-220

O R D E R

These cases concern charges which Boone County Water and Sewer District ("Boone District") assessed users of its sewer collector lines. At issue is whether Boone District, in violation of KRS 278.160, assessed charges not set forth in its filed rate schedules. The Commission finds that Boone District has violated KRS 278.160 and orders the refund of all charges unlawfully collected.

PROCEDURAL BACKGROUND

On May 14, 1990, Americoal Corporation ("Americoal") filed a complaint against Boone District alleging that it was assessing a sewer tap-in charge which was not contained in its filed rate

schedules and that this charge was excessive and unreasonable. It sought a refund of all tap-in charges collected.

In its answer, Boone District admitted providing sanitary sewer service to Americoal and charging a sewer tap-in fee, but denied that the Commission had jurisdiction over this service. It subsequently moved to dismiss for lack of jurisdiction. This motion was denied.

While Americoal's complaint was pending, the Commission on July 5, 1991 initiated its own investigation of Boone District's sewer fees and ordered Boone District to show cause why it should not be penalized for alleged violations of KRS 278.160. Upon Boone District's motion, this investigation was consolidated with Americoal's complaint.

An evidentiary hearing in this matter was held on September 30, 1991. Edward W. Bessler, president of Americoal; Paul Kroger, manager of Boone District; and William G. Stannard, a consulting engineer, testified at the hearing.

FACTS

Boone District is a combined water and sewer district. Besides providing water to portions of Boone County, it operates several small package sewer treatment plants and several sewer collector lines. These collector lines transport untreated sewage from Boone County into the sewage treatment system of Sanitation District No. 1 of Campbell and Kenton Counties ("Sanitation District No. 1").

In early 1987, the Kentucky Transportation Cabinet requested Boone District's assistance to provide sanitary sewer service to

two planned rest areas along Interstate 75. After a review of the area indicated the potential for development of a sewage transportation system to a regional wastewater treatment plant, Boone District planned and constructed a sewage collector line from the south fork of Gunpowder Creek in Boone County to Sanitation District No. 1's lines. Construction began in late 1987. Service commenced in December 1988. This line, known as the Southeast Line, currently serves approximately 500 customers.

The Southeast Line consists of three major pumping stations with force mains and three gravity trunk lines. All sewage flows are transported to Sanitation District No. 1's Dry Creek Plant for treatment. Boone District operates and maintains the force mains, trunk lines, and pump stations. Internal subdivision lines are connected to these trunk lines.

To recover the capital costs of the Southeast Line and capacity charges assessed by Sanitation District No. 1, Boone District assesses a $1,000 sewer tap-in or "capacity" fee[1] for each residential unit connecting to the line. This fee is calculated on a volumetric basis of $2.50 per gallon of average usage per day per household multiplied by 400 gallons, the U. S. Environmental Protection Agency's estimated daily usage for

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1 Americoal throughout this proceeding has referred to the charge at issue as a "sewer tap-in fee." Boone District refers to it as a "sewer capacity fee." To avoid confusion, the Commission will refer to it as a "sewer capacity fee."

a single-family residential unit. Until October 24, 1991, the sewer capacity fee was not listed in Boone District's filed rate schedules.[2] As of October 23, 1991, Boone District had collected $117,000 in sewer capacity fees. It ceased collecting the fee on July 2, 1991 when the Commission ordered Boone District to cease charging the fee.

In addition to the sewer capacity fee, Boone District also charged Southeast Line customers a sewer inspection fee of $25. This fee is intended to defray the costs of inspecting connections to Boone District's sewer lines. It is assessed not only for connections to the Southeast Line, but to all Boone District's sewage lines. Boone District began charging the fee in May 1987 and continued collecting it until July 1991. As of October 23, 1991, the total amount collected was $6,425. Of this amount, $1,150 was collected from Americoal. During that period, the sewer inspection fee was not listed in Boone District's filed rate schedules.[3]

Americoal is a Kentucky corporation which is developing a 100 lot mobile home park in an area of Boone County known as the Old

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2 On October 4, 1991, Boone District filed a tariff sheet setting forth the sewer capacity fee. The Commission has allowed the proposed fee to be charged subject to refund pending a final decision. Case No. 91-374, Proposed Tariff of Boone County Water and Sewer District for Sewer Capacity Fee (October 22, 1991).

3 Boone District ceased collecting this fee on July 2, 1991. On October 18, 1991, Boone District filed a tariff sheet setting out the sewer inspection fee. The Commission has allowed the fee to become effective. Case No. 91-428, Proposed Tariff Filing of Boone County Water and Sewer District for Sewer Inspection Fee (November 20, 1991).

Lexington Pike Villas. Boone District provides water and sewer service to the park. The park's interior sewer trunk lines are connected to the Southeast Line. Boone District charged Americoal $1,000 sewer capacity fee for each lot. As of September 30, 1991, Americoal had paid $46,000 to Boone District in sewer capacity fees.

DISCUSSION

KRS 278.160 codifies the "filed rate doctrine." It requires a utility to file with the Commission "schedules showing all rates and conditions for service established by it and collected or enforced." KRS 278.160(1). It further states:

> 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 278.160(2).

Interpreting similarly worded statutes from other jurisdictions, courts have held that utilities must strictly adhere to their published rate schedules and may not, either by agreement or conduct, depart from them. Corp. DeGestion Ste-Foy v. Florida Power and Light Co., 385 So.2d 124 (Fla. Dist. Ct.App. 1980) A similar rule applies to the published rate schedules of common carriers. Louisville & N.R.Co. v. Central Iron & Coal Co., 265 U.S. 59 (1924); Sallee Horse Vans v. Pessin, Ky.App., 763 S.W.2d 149 (1988).

The primary effect of KRS 278.160 is to bestow upon a utility's filed rate schedule the status of law. "The rate when published becomes established by law. It can be varied only by law, and not by act of the parties. "The regulation . . . of . . . rates takes that subject out of the realm of ordinary contract in some respects, and places it upon the rigidity of a quasi-statutory enactment." New York N.H. & H.R. Co. v. York and Whitney, 102 N.E. 366, 368 (Mass. 1913). While a utility may file or publish new rate schedules to change its rates pursuant to KRS 278.180, it lacks the legal authority to deviate from its filed rate schedule. It "can claim no rate as a legal right that is other than the filed rate." Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951).

This inflexibility is in part the result of a strong public policy to ensure rate uniformity, to "have but one rate, open to all alike, and from which there could be no departure." Boston & M.R.R. v. Hooker, 233 U.S. 97, 112 (1914). Equality among customers cannot be maintained if enforcement of filed rate schedules is relaxed. For this reason, neither equitable considerations nor a utility's negligence may serve as a basis for departing from filed rate schedules. Boone County Sand and Gravel Co. v. Owen County RECC, Ky.App., 779 S.W.2d 224 (1989). To do so would increase the potential for fraud, corruption, and rate discrimination.

The doctrine is also intended to preserve the Commission's "primary jurisdiction over reasonableness of rates and . . . ensure that regulated companies charge only those rates of which

the agency has been made cognizant." City of Cleveland, Ohio v. Federal Power Comm'n, 525 F.2d 845, 854 (D.C. Cir. 1976). The assessment of rates which the Commission has neither seen nor reviewed represents a serious challenge to the Commission's authority over rates.

While admitting that its sewer capacity fee and sewer inspection fee were not set forth in its filed rate schedule, Boone District contends that KRS 278.160 has not been violated. It advances three arguments in support of this contention: (1) The facilities in question are not under the Commission's jurisdiction;[4] (2) The fees were uniformly assessed and therefore comport with the underlying purpose of the filed rate doctrine; and (3) The fees were charged for services performed.

As to the jurisdictional question, the Commission has previously addressed this issue and found that the facilities involved are subject to the Commission's jurisdiction.[5] Boone District has offered no new argument to disturb that finding. We continue to hold that the facilities in question and the services which they provide are subject to our jurisdiction.

The fact that Boone District applied its unpublished rates in a uniform manner does not excuse its violation. One purpose of the filed rate doctrine is to ensure the reasonableness of utility

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4 This argument extends only to the fees associated with the Southeast Line. It does not address the inspection fees related to the package sewage treatment plants which Boone District owns and operates.

5 Case No. 90-108, Americoal Corporation (October 30, 1990).

rates. Filed rates are presumed to have been reviewed by the Commission and found reasonable. Prior to becoming effective, they may be examined and questioned. This scrutiny is the principal reason for the Commission's existence. In this instance, the sewer capacity and inspection fees were never presented for Commission review. Their reasonableness was never examined.

Although Boone District provided services in return for the fees, it still violated the filed rate doctrine. In Pittsburgh & L.E.R. Co. v. South Shore R. Co., 107 A. 680 (Pa. 1919), a railroad brought suit against another railroad for repair services. The defendant interposed a setoff for switching services provided to the plaintiff. The parties had previously agreed to a rate schedule by which plaintiff was to pay defendant for these services, but the schedule was never filed with the Interstate Commerce Commission as required by a statute similar to KRS 278.160. Rejecting the trial court's decision to allow the defendant to recover for its switching services, the Pennsylvania Supreme Court declared:

> In our opinion under that statute the carrier can neither recover freight charges, nor pay the owner any allowance for services in connection with such transportation, except as provided in schedules previously filed . . . Plaintiff should have filed the tariff of rates, and would have been ordered to do so had application been made to the Commission; but until such schedules were filed, plaintiff could not lawfully pay for the switching services in question, and of course, could not be compelled to do an unlawful act. If the property owner can recover from the carrier for yard service in switching or placing cars, without a schedule of rates therefore being promulgated, then

> discrimination is possible under the guise of claims for terminal services, and that is what the statute seeks to prevent.
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> . . .
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> As the defendant neither filed nor published any schedule of rates, it could not recover for interstate traffic . . . .

Id. at 681-682 (citations omitted).

Based upon a literal reading of KRS 278.160 and overwhelming legal authority, the Commission finds that Boone District's collection of a sewer capacity fee and sewer inspection fee violates KRS 278.160.

Having determined that KRS 278.160 has been violated, the Commission must next determine what remedial actions are required. Americoal argues that the only remedy available for Boone District's violations is the refund of all unpublished fees. It contends that KRS 278.160 requires such refunds.

Boone District advances three arguments against refunds. First, it contends that refunds will pose a severe financial hardship upon the utility and will permit developers, such as Americoal, to be unjustly enriched. This argument is based on equitable considerations. Courts have consistently refused to allow such arguments to defeat the filed rate doctrine. See, e.g., Baldwin v. Scott County Milling Co., 307 U.S. 478 (1939).

Boone District next contends that the Commission lacks the authority to order refunds of the fees collected. The Commission, it argues, is a creature of the legislature and its powers are strictly construed. In the absence of expressed statutory

authority to order refunds, the Commission is limited to the remedies set forth in KRS Chapter 278.

We find no merit in this argument. KRS 278.040 requires the Commission to enforce the provisions of KRS Chapter 278. To enforce KRS 278.160 and prevent the collection of unauthorized rates, the Commission must by necessary implication have the authority to order the refund of unlawfully collected fees. Pub. Serv. Comm'n v. Cities of Southgate, Highland Heights, Ky., 268 S.W.2d 19 (1954). Otherwise, the Commission's ability to perform its statutory duty is nil.

Finally, Boone District argues that a refund would constitute retroactive rate-making. Since the sewer capacity fee was not set forth in Boone District's filed rate schedule, Boone District was never authorized to collect it. By ordering its refund, the Commission is not retroactively setting rates. It is merely requiring Boone District to comply with the filed rate schedule in effect at the time the sewer capacity fee was assessed. That schedule did not contain such fee nor authorize its collection.

The Commission finds that Boone District should refund all unpublished fees collected. To ameliorate the financial impact of such refunds, the improperly collected fees should be refunded, with interest accruing from the date of this Order, over a five year period. However, the assessment of a penalty would serve no useful purpose.

SUMMARY

After reviewing the evidence of record and being otherwise sufficiently advised, the Commission finds that:

1. Between December 1988 and October 23, 1991, Boone District collected sewer capacity fees and sewer inspection fees in the amounts of $117,000 and $6,425 respectively.

2. During the same period, Americoal was assessed by and paid to Boone District $46,000 in sewer capacity fees and $1,150 in sewer inspection fees.

3. Until October 24, 1991, Boone District's published tariff did not provide for a sewer capacity fee or sewer inspection fee.

4. Boone District's assessment and collection of a sewer capacity fee and sewer inspection fee prior to October 24, 1991 violated KRS 278.160.

5. All sewer capacity fees and sewer inspection fees collected by Boone District prior to October 24, 1991 were unlawfully collected and should be refunded with interest.

IT IS THEREFORE ORDERED that:

1. Within five years of the date of this Order, Boone District shall refund all sewer capacity fees and sewer inspection fees collected prior to October 24, 1991. Boone District shall also pay interest at a rate of six percent per annum on all amounts unlawfully collected. Interest shall begin to accrue as of the date of this Order.

2. Within 30 days of the date of this Order, Boone District shall submit to the Commission in writing its plan for refunding all sewer capacity fees and sewer inspection fees unlawfully collected in the period prior to October 24, 1991.

3. Beginning July 1, 1992, and every three months thereafter until July 1, 1997, Boone District shall file a written report stating the amount refunded, amount remaining to be refunded, interest paid, and the names of all persons receiving a refund during the prior three month period.

Done at Frankfort, Kentucky, this 24th day of April, 1992.

PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

Commissioner

ATTEST:

Executive Director