COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

K. MICHAEL CRAVENS D/B/A CRAVENS BUILDERS and HOME BUILDERS ASSOCIATION OF LEXINGTON	)	
COMPLAINANTS	)	
v.	)	CASE NO. 2001-139
KENTUCKY-AMERICAN WATER COMPANY	)	
DEFENDANT	)	

O R D E R

On May 11, 2001, K. Michael Cravens d/b/a Cravens Builders and the Home Builders Association of Lexington ("Complainants") filed a formal complaint against Kentucky-American Water Company ("KAWC"). In the complaint, Complainants allege that KAWC misled it and acted unreasonably by informing Complainants on November 15, 2000 that they had until 12:01 a.m. on November 29, 2000 to file applications for tap-ons to avoid incurring a tapping fee. Complainants claim KAWC represented to it that if an application for a tap-on, containing only the address of the tap-on location, was filed with KAWC prior to 12:01 a.m., November 29, 2000, Complainants would not be subject to a tapping fee.

Complainants request that the Commission, pursuant to KRS 278.270,[1] enforce the terms allegedly offered by KAWC despite the Commission's Order of November 27, 2000 approving the new fees to which Complainants object. Additionally, Complainants request that the Commission require that KAWC accept all applications received by it prior to midnight, November 28, 2000, as valid tapping applications to which no tapping fee shall apply, consistent with a written policy furnished to Complainants and dated November 15, 2000.

On May 22, 2001, the Commission issued an Order directing KAWC to satisfy or answer the matters alleged in Complainants' complaint. KAWC filed its answer on June 4, 2001.

In its answer KAWC specifically denies that it stated it would not begin charging tapping fees until November 29, 2000. Furthermore, KAWC denies that it represented to Complainants that only an address would be sufficient to permit an application to be filed, claiming it had always required more information on its applications.

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[1] KRS 278.270 provides, in pertinent part, as follows:

> Whenever the commission, upon its own motion or upon complaint as provided in KRS 278.260, and after a hearing had upon reasonable notice, finds that any rate is unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of any provisions of this chapter, the commission shall by order prescribe a just and reasonable rate to be followed in the future.

FACTS

On April 28, 2000, KAWC filed a rate case[2] with the Commission requesting, among other things, that it be allowed to charge a $500 tapping fee for new taps on its water lines. Prior to the rate case, KAWC had not charged a tapping fee.

In early May 2000, in order to explain the effect of the requested rate increase, KAWC requested and received a meeting with Complainants. At this meeting Complainants allegedly expressed their concern regarding the effect of the proposed tapping fee on the way contracts for new construction were negotiated and on the way developers funded extensions of water service to new developments. At this meeting, Complainants claim that KAWC stated it would "work with builders" on the manner in which the tapping fee would be administratively handled, including the transition from the current practice to the practice approved by the Commission.[3] Complainants also allege that KAWC specifically stated that the change to charging a tapping fee would not take effect until November 29, 2000, an allegation that KAWC denies.

On or about November 15, 2000, KAWC provided to Complainants a written policy by which it would administer the tapping fee.

On November 20, 2000, KAWC requested and held another meeting with Complainants. At this meeting, KAWC allegedly informed Complainants that it would accept applications for taps without a tapping fee up to 12:01 a.m. on November 29,

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[2] Case No. 2000-120, Adjustment of the Rates of Kentucky-American Water Company.

[3] Complaint at 3.

2000.[4] Additionally, KAWC allegedly told Complainants that all that was needed in the application was an address. KAWC also distributed a written copy of its policy dealing with tap applications received prior to 12:01 a.m. on November 29, 2000. KAWC admits it told Complainants that it would accept applications until 12:01 a.m. on November 29, 2000, but claims this statement applied only "to the extent that if the Order of the Public Service Commission, in Case No. 2000-120, had made rates authorized therein effective for service rendered on and after November 29, 2000, it would accept applications without a tap fee up to 12:01 a.m. on March 29, 2001."[5]

On November 27, 2000, the Commission entered an Order granting KAWC a rate increase and authorizing a tapping fee of $440. In its Order, the Commission found that KAWC should be authorized a tapping fee of $440, but omitted any reference to such fee in the Appendix that contained all approved rates.[6] None of the parties to Case No. 2000-120 noted the omission or requested correction. The tapping fee is not discussed in the Commission's December 12, 2000 Order correcting errors in the November 27, 2000 Order. However, upon learning of the omission, the Commission issued an Order correcting the Appendix *nunc pro tunc* to include the new tapping fee, effective as of November 27, 2000.

On December 14, 2000, KAWC sent to Complainants a letter stating that KAWC was in the process of reviewing all tap applications received on or after November 27,

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[4] This is the last day by which the Commission was statutorily bound to issue an Order on the rates.

[5] KAWC's Answer at 4.

[6] Case No. 2000-120, Order dated November 27, 2000, at 68-70.

2000. KAWC told Complainants that any tap application received after November 27, 2000 would be returned, along with any tap application received that KAWC did not consider a "bona fide" tap application. The letter also contained language which set out the minimum requirements that KAWC deemed necessary for a tap application to be considered "bona fide."

On May 11, 2001, Complainants filed a formal complaint with the Commission alleging KAWC violated KRS 278.030(2) and (3) and asked the Commission, pursuant to KRS 278.270, to enforce KAWC's tapping fee policy that allegedly was established on November 15, 2000.

DISCUSSION

Commission Jurisdiction

KRS 278.260(1)[7] grants the Commission jurisdiction over cases in which a utility's actions are "unreasonable, unsafe, insufficient, or unjustly discriminatory." KRS 278.280 grants the Commission authority to correct any "unreasonable or improper

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[7] KRS 278.260(1) provides, in pertinent part, as follows:

> The commission shall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing made against any utility by any person that any rate in which the complainant is directly interested is unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient. The commission may also may also make an investigation on its own motion. No order affecting the rates or service complained of shall be entered by the commission without a formal public hearing.

practice" of a utility. Upon violation, the Commission has the power under KRS 278.280(1)[8] to prescribe remedial action through "order, rule or regulation."

The tapping fee became effective with the issuance of the Commission's Order of November 27, 2000. There are, then, two questions presented here. The first is whether KAWC acted unreasonably by neither [1] filing with the Commission a copy of the notice to Complainants that the old rates would be available through midnight of November 28, 2000, nor [2] requesting that the applications received in conformity with its November 15, 2000 policy be "grandfathered" pursuant to KAWC's previous practice. The second question is whether, if KAWC did, in fact, act unreasonably, the Commission may grant the relief Complainants seek.

In the complaint, Complainants allege that KAWC's actions are unreasonable and unfair. These are the same words used in KRS 278.260 and KRS 278.280 to describe the situations in which Commission action should be taken in response to certain actions of a utility. However, since the tapping fee went into effect on issuance of the November 27, 2000 Order, Complainants' argument as to the rate issue is without any basis in law. KAWC is, after all, simply collecting a properly tariffed, Commission-approved fee, as it is, in fact, required to do pursuant to KRS 278.160.

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[8] KRS 278.280(1) provides as follows:

> Whenever the commission, upon its own motion or upon complaint as provided in KRS 278.260, and after a hearing had upon reasonable notice, finds that the rules, regulations, practices, equipment, appliances or facilities or service of any utility subject to its jurisdiction … are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices … or methods to be observed … and shall fix the same by its order, rule or regulation.

To the extent that Complainants' claims that KAWC's behavior was tortious and that damages of some nature are necessary, such claims are not within the Commission's jurisdiction. See Carr v. Cincinnati Bell, Inc., Ky.App., 651 S.W.2d 126 (1983) (and cases cited therein) (discussing the line to be drawn between Public Service Commission jurisdiction and that of the courts, and specifically noting the inability of the Commission to award damages).

The Filed Rate Doctrine

According to KRS 278.160(2),[9] a utility must charge its tariffed rates, no more and no less, to all of its customers. Kentucky courts have found that, even if a tort has been committed by a utility, the utility must collect its tariffed rates and charges.

In Boone County Sand and Gravel v. Owen County Rural Electric Cooperative Corporation, 779 S.W.2d 224 (Ky.App., 1989), Owen County RECC brought an action against Boone County Sand and Gravel to recover for amounts that had been underbilled. Boone County Sand and Gravel counterclaimed for damages because it had adjusted its business practices to take into account the rates it was being charged.

Twice during a 13-month period, Boone County Sand and Gravel inquired as to the accuracy of the bills. Both times Owen County RECC assured Boone County Sand and Gravel that the billing was correct and, relying upon Owen County RECC's assurances, Boone County Sand and Gravel adjusted its overhead accordingly. In

[9] KRS 278.160 provides, in pertinent part, as follows:

> 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 to a compensation greater or less than that prescribed in such schedules.

doing so, Boone County Sand and Gravel incurred damages by paying an inflated price for stock when buying back shares from its shareholders.

The Court of Appeals found that, pursuant to KRS 278.160, the utility was entitled to collect the amount underbilled, despite any negligence in underbilling Boone County Sand and Gravel. Equitable estoppel did not apply because application of the doctrine would enable Boone County Sand and Gravel to receive service at a lesser rate than other customers.

Boone County Sand and Gravel clearly applies here.[10] Complainants allege that a tariffed rate should not apply to them because KAWC acted either negligently or unreasonably in implementing its tapping fee policy. However, we need not determine whether KAWC's actions were unreasonable. Even if KAWC had acted unreasonably or negligently, Boone County Sand and Gravel would prohibit the Commission from granting the rates Complainants seek. So, in fact, does KRS 278.170, which prohibits discriminatory rates.

The *Nunc Pro Tunc* Order and the Tapping Fee

In Mike Little Gas Company, Inc. v. Public Service Commission, 574 S.W.2d 926 (Ky.App., 1978), the Court of Appeals of Kentucky found that the Commission had the authority to amend a rate adjustment Order to correct an obvious clerical error. The court allowed the correction through the issuance of a *nunc pro tunc* Order, because the fact that a clerical mistake had been made was plainly shown in the record.

[10] Whether a final tariff was on file on the dates at issue here is irrelevant. It is sufficient that an Order authorizing the disputed charge had been entered. See Commonwealth of Kentucky v. Kentucky Public Service Comm'n, 91 P.U.R. 4th 329, 333-34 (Franklin Circuit Court, 1987).

Here, the same circumstances exist. In the Order issued on November 27, 2000, the Commission authorized KAWC to assess a $440 tapping fee. This authorization was contained in the body of the Order and is clearly part of the record.[11] The tapping fee's absence in the Order's Appendix is merely a clerical error. The *nunc pro tunc* Order amending the Appendix of the November 27, 2000 Order cures any confusion that may have arisen from the inadvertent omission of the fee from the original Order's Appendix.

Complainants are bound by the same rules, rates and charges to which all customers of KAWC are susceptible. Granting the relief for which Complainants pray would be a violation of KRS 278.160 and KRS 278.170.

The Commission, having been sufficiently advised, HEREBY ORDERS that the complaint is dismissed with prejudice and removed from the Commission's docket.

Done at Frankfort, Kentucky, this 23rd day of August, 2001.

By the Commission

ATTEST:

Executive Director

[11] Case No. 2000-120, Order dated November 27, 2000, at 70.