

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

C & L BUILDERS)	
)	
COMPLAINANT)	
v.)	CASE NO. 2000-00460
)	
OLDHAM COUNTY WATER DISTRICT)	
)	
DEFENDANT)	

ORDER

INTRODUCTION

This case, upon which the Commission initially ruled on February 12, 2002, involves the right of a public water supplier to protect the public's water supply from contamination.

On August 28, 2000, C & L Builders (C & L) filed a formal complaint against Oldham County Water District (OCWD) alleging that OCWD improperly refused water service to a subdivision that C & L planned to build. OCWD refused to extend service unless C & L agreed to install a package sewage treatment plant to serve the subdivision. C & L intended to utilize conventional septic tanks.

OCWD based its right of refusal upon the responsibilities imposed upon it by the Environmental Protection Agency (EPA) and the Kentucky Wellhead Protection Program.¹ OCWD argued that it could require C & L to install a package sewage

¹ For a complete review of the Wellhead Protection Act, see the Commission's Order of February 12, 2002, attached hereto as Appendix A.

treatment plant because the proposed subdivision would be located in one of OCWD's Wellhead Protection Areas (WHPA). OCWD subsequently agreed that the use of advanced septic systems would be allowed.

On July 11, 2001, the Commission held a public hearing at which C & L and OCWD presented expert testimony. Based upon the evidence, the Commission issued an Order on February 12, 2002 finding that:

In the absence of conclusive evidence from either witness regarding contamination, the risk still exists; consequently, it is unreasonable to require Oldham County to make an extension of service that might result in contamination of its well .²

C & L subsequently filed a petition for rehearing, in which it requested that the Commission review the report of the Oldham County Water Supply Advisory Team (WSAT), alleged that OCWD had agreed to extend service to two individuals located within a WHPA, and alleged that a high nitrate reading from an October 2000 OCWD water sample that was presented at the July 11, 2001 hearing occurred because of a laboratory error. The Commission granted rehearing on those three issues. Kentucky Rural Water Association (KRWA) and the Oldham County Fiscal Court (Fiscal Court) petitioned for and received full intervention. KRWA filed a brief in this matter together with a motion that the brief be accepted for filing out of time. As the Commission finds KRWA's participation in this proceeding helpful, the motion should be granted and the brief accepted into the record.

After the July 11, 2001 hearing, but prior to the Commission's February 12, 2002, Order, WSAT, at the direction of the Fiscal Court, completed a report regarding

² Commission's Order dated February 12, 2002 at 10.

development within OCWD's WHPAs. The conclusion of the report was that the WHPA could support housing of up to one unit per each acre lot, utilizing conventional septic systems and not risk violating the maximum contaminant levels for nitrates. This varies from OCWD's restrictions on extensions of service³ which specify a minimum density of one house per 2 acres and the use of an advanced septic system.

OCWD is also prepared to extend service to two customers located within the WHPA. Those customers were to receive service upon the condition that they use an advanced septic system. The two individuals in question would actually be outside the WHPA upon OCWD's proposed re-delineation of the WHPA-3.⁴ The fact that OCWD may re-delineate WHPA-3, thereby reducing its size, was not an issue at the first hearing.⁵

In October 2000, a water sample was taken from OCWD's system and revealed a nitrate level over 8 ppm. At the rehearing OCWD introduced evidence that another sample, taken in October 2001, also revealed nitrate levels in excess of 8 ppm.

C & L contends that the October 2000 and October 2001 laboratory readings must have been caused by laboratory errors because no other samples taken from OCWD's system had a nitrate level remotely approaching 8 ppm. C & L argues that if

³ Terms under which OCWD agreed to offer service to C & L. These terms were offered after the February 12, 2002 Order.

⁴ The extension of service was contingent upon the property falling outside of the re-delineated WHPA-3.

⁵ This re-delineation resulted from OCWD planning to shut down a current well. The proposed subdivision would still be located within the re-delineated WHPA.

the October 2000 test was inaccurate, then OCWD has less reason upon which to base its denial of service.⁶

The Commission held a rehearing on the issues on December 12, 2002.

At the hearing OCWD and C & L informed the Commission that they had been conducting settlement negotiations for several months and were very near settlement. Both OCWD and C & L agreed that they had tentatively reached a compromise regarding the extension of service. OCWD, however, requested that the hearing continue to resolve any remaining issues surrounding the complaint.

DISCUSSION

In the case at bar, the Fiscal Court is at odds with OCWD regarding density of development and type of waste disposal system. The Fiscal Court, the local governing body, commissioned WSAT to study water protection. WSAT prepared a report that contained several recommendations for development restriction less stringent than OCWD's findings.

C & L Builders presented no expert testimony to bolster the WSAT report. Tom Davis, the WSAT Chairman and an accountant and Oldham County Planning and Zoning Commissioner, testified to the contents of the report. The WSAT report contains no explanation or reasoning supporting the recommendations contained therein. Without such supporting evidence, the recommendations contained in the WSAT report cannot form the basis for vacating the Commission's previous Order in this case.

⁶ This sample was taken at least 3 months after OCWD's decision to deny service to C & L.

Reasonableness of the Restrictions

The Commission must determine whether the restrictions are reasonable within the meaning of KRS 278.260(1) and KRS 278.280(1).

The restrictions OCWD seeks to place on C & L are as follows:

1. Advanced septic systems must be installed in Lots 2-12 and 14-21. OCWD will pay up to \$4,000 per lot toward the difference between the cost of an advanced septic system and a conventional septic system.
2. OCWD will purchase Lot 1 at its fair market value appraisal.
3. Lot 13 will remain open space as currently proposed.
4. The overall acreage density of Lots 1-21 must be no less than two acres per septic system. This is consistent with the development plan currently proposed.
5. OCWD will provide water service to the proposed large tracts (Lots 22-29) if conventional septic systems are installed on these lots.

These restrictions are not unreasonable and the public's water supply is protected. The reasonableness of these restrictions is further underscored by the fact that C&L agreed to these terms at the December 11, 2002 hearing.⁷ However, the Commission concludes that OCWD should not use ratepayer money to pay for necessary septic systems. C & L should be responsible for its own costs.

Extension of Service to the Individuals Located Within the WHPA

C & L argues that OCWD's offer to extend service to the two individuals located within the WHPA is unreasonably discriminatory because OCWD is offering to extend service within the WHPA when it denied the same to C&L.

The issue of discrimination, whether or not it was originally legitimate, is now moot. OCWD now offers the same conditions of service to C & L that it is offering to the two individuals located within the WHPA.

⁷ Transcript at 36-38.

CONCLUSION

The Commission finds no basis for overturning its original ruling in this case.

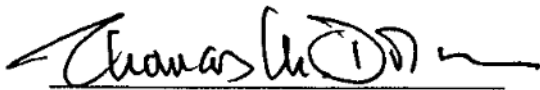
IT IS THEREFORE ORDERED that:

1. The Commission's decision entered in this case on February 12, 2002 is affirmed.
2. OCWD shall extend service to C & L under the conditions agreed to in principle by the parties at the December 11, 2002 hearing, except that OCWD shall not pay C & L any amount toward the difference between the cost of an advanced septic system and a conventional septic system. OCWD shall not make any extension inconsistent with these terms.
3. OCWD shall file with the Commission as part of its tariff its Wellhead Protection Plan, within 30 days of the date of this Order. The current Wellhead Protection Areas and conditions of service shall be included in the Plan.
4. KRWA's motion to file its brief out of time is granted.
5. This case is dismissed with prejudice and is removed from the Commission's docket.

Done at Frankfort, Kentucky, this 23rd day of April, 2003.

By the Commission

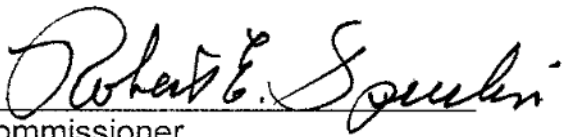
ATTEST:

A handwritten signature in black ink, appearing to read "Charles W. [unclear]", written over a horizontal line.

Executive Director

CONCURRENCE OF COMISSIONER ROBERT SPURLIN

Having heard the case, I would be remiss in not complimenting the former Chairman, James Hall III, and the Oldham County Water District Board for protecting their source of supply. The evidence clearly shows that they were honest and more than reasonable in their efforts to work out an agreement with the Complainant. Further, their efforts have preserved the unique purity of these wells, thereby ensuring that Oldham County Water District's customers receive clean water without having to pay the rates that additional treatment would require.


Commissioner

ATTEST:


Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2000-00460 DATED APRIL 23, 2003

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

C & L BUILDERS)	
)	
COMPLAINANT)	
v.)	CASE NO. 2000-00460
)	
OLDHAM COUNTY WATER DISTRICT)	
)	
DEFENDANT)	

O R D E R

On August 28, 2000, C & L Builders (Complainant) filed a formal complaint against Oldham County Water District (Oldham County), alleging that Oldham County improperly refused water service to a subdivision that Complainant plans to build. Complainant also alleges that Oldham County has the capacity and obligation to extend service. Complainant requests water service from Oldham County.

On October 13, 2000, the Commission issued an Order to Satisfy or Answer to Oldham County. In its answer, Oldham County alleges that it properly denied Complainant service pursuant to the responsibilities imposed upon it by the Environmental Protection Agency (EPA) and the Kentucky Wellhead Protection Program (WHPP). Oldham County further alleges that part of the septic system in Complainant s proposed subdivision is located in a wellhead protection area (WHPA).¹ Oldham County requests that the Commission find that, under federal and state law, it

¹ Oldham County s Answer at 2.

has the right and the obligation to deny water service to any development that will endanger its wellheads.

FACTS

On July 30, 1999, Complainant entered into a contract to purchase the property in question. The terms of the contract allowed Complainant to void the contract before December 17, 1999 if Complainant discovered any defects on the property. Complainant claims that, after signing the contract, it met with all entities involved in approval of the subdivision plans and claims that it never would have bought the property if it knew Oldham County would supply water service only if Complainant installed a sewer system.

On December 7, 1999, Oldham County's board met and expressed its concerns regarding Complainant's proposed subdivision. Oldham County stated: On preliminary observations, we do not feel that any laterals, in any of this development, will be acceptable and that a packaged sewer treatment plant is the only option.² Complainant argues that Oldham County, though expressing its concerns about the use of a septic system, did not take a formal vote in opposing the extension of water service to the subdivision and, consequently, Oldham County did not put Complainant on notice that Oldham County would deny water service unless Complainant installed a sewer plant.

On December 15, 1999, Oldham County sent a letter to the Oldham County Planning and Zoning Commission (Oldham P&Z) stating that it disagreed with both

² Minutes, Ex. 4, Hall Direct Testimony.

plans submitted by Complainant to the Oldham P&Z. The letter did not include information regarding what Oldham County required for approval of the plans. Complainant claims it did not receive the letter until several months later.

On March 30, 2000, pursuant to the contract, Complainant purchased the plat of property located northeast of Westport in Oldham County. Complainant claims that at the time of purchase, it had no notice that the property was located in one of Oldham County's WHPAs.

On February 22, 2000, the Oldham P&Z, after a public hearing, denied Complainant's building permit. Oldham P&Z denied the permit on a variety of grounds, most notably because Oldham County opposed the plan. Oldham County did not appear at the hearing, but sent a letter to the Oldham P&Z stating that Oldham County would be opposed to any extension of water to the subdivision as currently planned. Oldham P&Z also expressed concerns raised by the United States Department of Agriculture regarding possible erosion and by the Fire Department regarding the placement of fire hydrants.

On June 7, 2000, Complainant sent a letter to Oldham County asking whether Oldham County would extend service to the subdivision. Oldham County allegedly did not respond to the letter but attended a July 25, 2000 hearing before the Oldham P&Z that addressed Complainant's application for a building permit. Prior to the hearing, Complainant revised its plans to address the concerns of the other parties regarding the proposed subdivision, but retained its original plan to install a septic system.

At the July 25, 2000 hearing, Oldham County presented evidence from its expert witness to support its contention that if Complainant built a septic system, it would lead

to nitrate pollution of some of its wells. This projected nitrate pollution would compel Oldham County to either take steps mandated by the federal government to remove the nitrates from the water or to close the well and drill a new one. Accordingly, Oldham County stated that it would deny service to Complainant unless Complainant installed a package sewage plant in its proposed subdivision.

Oldham P&Z denied Complainant's building permit. Oldham P&Z stated that it could not approve the building permit if the subdivision would be unable to obtain water service.

DISCUSSION

Oldham County claims it denied service to Complainant because of the mandates of the WHPP.

The WHPP

The WHPP originates from the 1986 amendments to the federal Safe Drinking Water Act.³ The WHPP provided that all appropriate state agencies prepare and present to the EPA a wellhead protection plan by 1993. The Kentucky Division of Water (DOW) drafted and submitted the wellhead protection plan that the EPA approved in 1993. The groundwater branch of the DOW coordinates and regulates the wellhead protection plan through the water supply planning regulations. Administrative Regulation 401 KAR 4:220, Section 2, requires the wellhead protection plan to:

Assess the need to provide increased or alternative water supplies for the water supplier systems within each county, formulate recommendations to protect water supplies, and prepare a water contamination response plan. If increased or alternative water supplies are needed, the planning

³ 42 U.S.C. § 300h-7.

representative shall develop water shortages response plans and evaluate water supply alternatives.

These regulations require that public water systems, like Oldham County, implement a local wellhead protection plan that ensures a continued safe public water supply. The plan must identify the recharge area around the wells that provides the water source, identify potential contaminant sources in the recharge area, and implement groundwater protection strategies for the areas that need protection. These areas are the WHPAs. The purported main objective of establishing these areas is to require water utilities and the communities they serve to protect their drinking water.

In this case, Oldham County prepared its wellhead protection plan (Oldham Plan) in two phases. DOW approved Phase I, which delineates the WHPAs, on November 22, 1999, and Phase II, which includes Oldham County's management strategies to protect its water supplies, in September 2000. Oldham County claims that it provided ample opportunity for community input including notice, public meetings, and opportunity for comment. Complainant disputes that Oldham County provided ample notice when promulgating the Oldham Plan.⁴

The overall objective of the Oldham Plan is to ensure that drinking water meets the standards of the federal and state Safe Drinking Water Act. The Oldham Plan identifies contaminant threats such as underground storage tanks, above-ground storage tanks, septic tanks, and other items that may lead to contamination of the

⁴ Pursuant to KRS 278.040(1), the Commission has exclusive jurisdiction over the rates and services of a utility. Neither KRS 278.040 nor any other statute gives the Commission authority to review a plan promulgated under the directions of another administrative agency. Accordingly, the Commission should not consider the alleged lack of notice in making its final decision.

recharge areas around the wells. The WHPAs delineated by Phase I of the Oldham Plan divide the area surrounding Oldham County's wells into three parts.

WHPA-1 is closest to the wells and includes the area surrounding the wells that is the greatest of a 400-foot radius from each well, or the area from which water will reach the wells within 180 days or less.⁵ Its purpose is to prevent direct introduction of microbial contaminants at or near the wellhead.⁶

WHPA-2 forms a concentric ring outside of WHPA-1 and includes the area from which water will reach the well within 180 days or less. Its purpose is to protect against chemical and radiological contaminants from entering the wellfield and to allow for remedial measures in the case of an environmental accident.⁷

WHPA-3 forms a concentric ring around the other WHPAs and includes the outer limits of the recharge area of the well.⁸ No specific protective procedures are assigned to WHPA-3. At many points, the boundaries of WHPA-3 end at the boundaries of the watershed.⁹ A portion of the proposed subdivision's septic tanks would be within WHPA-3.

Oldham County is concerned with possible nitrate contamination from septic systems located within the WHPAs, and plans to deal with the threat through a combination of aggressive management strategies, regulatory compliance, and public

⁵ Prefiled testimony of Joseph L. Burns at 5.

⁶ Id. at 5.

⁷ Id. at 6.

⁸ Id.

⁹ Id.

education. Oldham County plans to use management strategies to prevent contamination of the aquifer by reducing the number of contaminant sources within the Oldham Plan s area. These strategies are:

1. Submit recommendations to the county s planning and zoning committee, to prevent the growing residential area from using septic tanks, but instead using a wastewater package plant.

2. Discuss options with the newly formed Oldham County Sanitation District for implementation of a wastewater package plant for the development area, and the possibilities for the implementation of a wastewater treatment plant for the town of Westport.

3. Request residents within the protection areas that currently have potential contaminant sources, such as septic systems or above-ground storage tanks, to develop a groundwater protection plan.¹⁰

Noticeably lacking in the management strategies is a specific strategy whereby Oldham County may seek to enforce the Oldham Plan by denying service to a customer.

Oldham County claims that if nitrate levels in its wells exceed the maximum concentration allowed by the EPA, federal standards for drinking water mandate that Oldham County reduce the level of concentration or shut down the well and drill a new one. Oldham County claims that in order to reduce the level of nitrates in a well, it must build a special treatment plant because normal chemical treatment or boiling does not

¹⁰ Water District Response to C & L Builder s Request for Production No. 2, Oldham County Wellhead Protection Plan Phase II at 12.

rid the water of nitrates. Oldham County estimates that the cost of such a treatment plant is between \$3--\$5 million and the annual costs for maintenance and operation are over \$900,000. If Oldham County builds this type of plant, its customers will bear the costs of construction and maintenance.

Notice

Complainant frequently raises the issue that it did not have notice that a portion of the proposed subdivision is located in a WHPA. Complainant emphasizes several instances in which Complainant claims that Oldham County indicated it opposed the subdivision's use of septic systems, but failed to put Complainant on notice regarding this opposition. Furthermore, Complainant claims that it would not have bought the property if it had known that building a sewer treatment plant was a prerequisite to receiving service. As a result, Complainant implies that Oldham County should be responsible to Complainant for damages associated with Complainant's purchase of the property while allegedly lacking notice of the WHPA.

KRS 278.040 grants the Commission exclusive jurisdiction over the rates and services of a utility. The Commission's jurisdiction, however, does not extend to the award of damages. Therefore, the notice that Oldham County may or may not have provided is essentially moot except to the extent that failure to provide notice to prospective landowners as to the location of WHPAs may be an unreasonable practice under KRS 278.260.

KRS 278.160(1): Requirement That Utilities File All Conditions of Service

Complainant argues that Oldham County is bound by its filed and approved tariffs. Complainant relies upon KRS 278.160(1), which provides, in pertinent part, that

each utility shall file with the commission schedules showing all rates and conditions for service established by it and collected or enforced. Complainant argues that since Oldham County did not file its WHPP with the Commission as part of its tariff, it is not effective, and Oldham County may not deny service to Complainant based upon the terms, conditions, and management strategies of the WHPP.

Furthermore, 807 KAR 5:066, Section 5(2), provides, in pertinent part, that a customer who complies with Commission regulations shall not be denied service for failure to comply with the utility's rules which have not been made effective in the manner described by the commission. According to the record in this case, it seems that, absent Oldham County's statement that it would deny service, Complainant complies with all applicable Commission regulations.

Commission Jurisdiction Regarding the WHPP

Oldham County, indisputably, has the capacity to extend service to Complainant. The problem, therefore, is whether the WHPP affects Oldham County's obligation, under the applicable Commission regulations and statutes, to provide water service to Complainant when Complainant complies with such regulations and statutes. The problem is that Oldham County argues that it is prohibited from making such an extension due to its obligations under a regulation of another administrative body. This seems to contravene the Commission's jurisdiction over the rates and services of a utility.¹¹ An extension of service falls under the Commission's service jurisdiction. An extension, however, would not be reasonable and would not therefore be allowed if it contravened DOW requirements. The Commission also requires that a water district

¹¹ KRS 278.040.

maintain its water quality within the standards promulgated by the Cabinet of Natural Resources and Environmental Protection.¹²

Both parties' experts disagreed as to whether the proposed subdivision's use of septic tanks within WHPA-3 would lead to nitrate contamination of Oldham County's wellheads. In the absence of conclusive evidence from either witness regarding contamination, the risk still exists; consequently, it is unreasonable to require Oldham County to make an extension of service that might result in contamination of its wells and a significant financial burden on Oldham County's customers.

Oldham County argued that the use of septic systems within WHPA-3 would lead to nitrate contamination. Oldham County made no similar claim as to the use of septic systems outside of WHPA-3. Thus, Oldham County may not deny service to those proposed structures that are located outside of WHPA-3.

IT IS THEREFORE ORDERED that:

1. Oldham County must extend service to the proposed buildings of Complainant that are not located within WHPA-3.
2. Except to the extent that it does not contravene the previous paragraph, this Complaint is dismissed with prejudice.

¹² 807 KAR 5:066, Section 3.

Done at Frankfort, Kentucky, this 12th day of February, 2002.

By the Commission

ATTEST:

Wilayah Eversole for
Thomas M. Doonan
Executive Director