

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE TARIFF FILING OF NORTHERN KENTUCKY)	
WATER DISTRICT TO AMEND ITS CROSS-)	CASE NO. 2004-00309
CONNECTION CONTROL POLICY)	

ORDER

Northern Kentucky Water District (“NKWD”) has submitted revisions to those portions of its existing rate schedules that related to its cross-connection control policies. Finding that these revisions fail to conform to the Commission’s Order in Case No. 2001-00202,¹ and are unreasonable and premature, the Commission rejects the proposed revisions and directs NKWD to submit a revised cross-connection control policy that conforms to its earlier Order.

NKWD, a water district organized pursuant to KRS Chapter 74, owns and operates facilities used to distribute and furnish water service to approximately 79,685 customers in Boone, Campbell, Kenton and Pendleton counties, Kentucky.² It is a utility subject to Commission jurisdiction. KRS 278.010(3)(d); KRS 278.015.

¹ Crestbrook Properties v. Northern Kentucky Water District, Case No. 2001-00202 (Ky. PSC Jun. 17, 2003).

² Annual Report of Northern Kentucky Water District to the Public Service Commission for the Calendar Year Ended December 31, 2005 at 5 and 27.

In Case No. 2001-00202, the Commission found NKWD's practice of requiring multi-family residences, but not single-family residences, to meet the water district's standards for cross-connection³ control was unreasonably discriminatory. It expressly rejected NKWD's contention that connections using larger size meters, which are generally used to serve multi-family residences, pose a higher degree of hazard and thus should be subject to stricter standards. It directed NKWD to amend the cross-connection control provisions of its tariff to "reflect a reasonable and nondiscriminatory cross-connection policy that applies equally to both single-family and multi-family residences."⁴

On July 9, 2004, NKWD filed revised tariff sheets that amend its cross-connection control provisions. The Commission's initial review of these revisions indicated that NKWD had failed to remedy the defects noted in the Order of June 17, 2003 and raised the question of whether the proposed revision should be rejected in its entirety. On February 4, 2005, it directed NKWD to show cause why certain portions of the proposed revision or, in the alternative, the entire submission, should not be rejected. NKWD filed its response to this Order on February 24, 2005. Crestbrook

³ A cross-connection is

a physical connection or arrangement between two (2) otherwise separate systems, one (1) of which contains potable water and the other being either water of unknown or questionable safety, or steam, gas, or chemicals, whereby there may be flow from one (1) system to the other, the direction of flow depending on the pressure differential between the two (2) systems.

401 KAR 8:010 Section 1(33).

⁴ Id. at 9.

Properties, LLC and the Greater Cincinnati and Northern Kentucky Apartment Association submitted their replies to this response on March 16, 2005.⁵

In its Order, the Commission noted its concerns that NKWD continued to base its proposed cross-connection control provisions in part on meter size despite our express rejection of meter size as a basis upon which to implement cross-connection control.

The revised tariff states:

[T]he District maintains the ability to proceed, at its discretion, with a multi-family and residential cross-connection control program in a logical progression that may be based on meter size, degree of hazard, or other criteria deemed appropriate.⁶

Given the differences in meter sizes for multi-family and residential structures, the Commission expressed the concern that this proposed revision would grant NKWD the discretion to implement its previously announced plan for a cross-connection enforcement program for multi-family structures while deferring any enforcement program for residential structures. The Commission has previously found such a result to constitute unreasonable discrimination.⁷

Similarly, while the proposed tariff states that the cross-connection provisions will apply to “[a]ll existing commercial, industrial, government, multi-family, and residential accounts,” it further provides that existing accounts will be prioritized by the largest meter size and that “[i]nspection[s] will start with the largest meters and consumption.”⁸

⁵ The Commission has granted the motions of Crestbrook Properties, LLC and the Greater Cincinnati and Northern Kentucky Apartment Association for leave to intervene in this matter.

⁶ Northern Kentucky Water District Tariff, PSC No. 2, Original Sheet No. 28 (proposed) (emphasis added).

⁷ Crestbrook Properties at 7 (Ky.PSC June 17, 2004).

⁸ Id.

Noting that multi-residential structures generally have larger meters, we expressed concerns that the proposed tariff retained the same discriminatory effects as its predecessor.

NKWD in its response does not deny that meter size is a principal component for program implementation, but instead defends its use as appropriate and reasonable:

The District needs some logical means to identify and select customers for enforcement. **Because there is a correlation, at least in the experience of the District's engineers and DOW, between size and degree of hazard of contamination, this was selected as the most reasonable criteria to use to implement the program.** The District cannot force every customer to comply at the same time. There is not enough staff or resources to deal with every customer at the same instant. Therefore, some customers are affected by the method of prioritizing before others. Meter size has been the primary basis for enforcement since the beginning of the program. It is neither discriminatory, nor unreasonable.

Except for the Commission's misperception that the District is attempting to underhandedly enforce the policy against multi-family customers, **there is nothing in the record to support the conclusion that use of meter size is unreasonable. In fact it has been recognized by other utility commissions as reasonable and as non-discriminatory.**⁹

The Commission expressly rejected this position in Case No. 2001-00202. In that proceeding, it found nothing to suggest that “meter size was the proper way to assess potential hazards due to backflow.”¹⁰ Its review of the evidence in that proceeding, in which NKWD was the principal party, demonstrated that “use, not meter

⁹ NKWD's Response at 8 (emphasis added).

¹⁰ Crestbrook Properties at 4 (Ky.PSC July 23, 2004).

size, was the proper factor to consider when classifying hazards or risks.”¹¹ The principles of *res judicata* prohibit us from affording any weight to NKWD’s argument on this point.¹²

In its Order of February 24, 2005, the Commission further found that the proposed tariff’s provisions relating to the start of implementation of a multi-family and residential cross-connection program appear unreasonably vague. The proposed tariff provides in part:

Implementation of the multi-family and residential cross-connection program will begin when the state and federal regulatory agencies with statutory oversight of cross-connection programs have written rules or regulations specifying the type of device that is approved or approvable for multi-family and residential use and have determined the extent to which such devices must be installed on existing and new multi-family and residential connections.¹³

The Commission noted that the proposed tariff contains no specific date when implementation to these groups will begin and, if allowed to become effective, provides no notice to members of the groups that the program is currently applicable to them.

¹¹ Id.

¹² The doctrine of *res judicata* bars the adjudication of issues that have already been litigated or should have been litigated in a prior case between the same or similar parties. 47 Am. Jur.2d Judgments §464. Kentucky courts have long held that the doctrine of *res judicata* applies to quasi-judicial acts of “public executives, or administrative officers and boards acting within their jurisdiction,” unless there has been a significant change of conditions or circumstances that has occurred between two successive administrative hearings. Williamson v. Public Service Commission, Ky., 174 S.W.2d 526, 529 (1943); Bank of Shelbyville v. Peoples Bank of Bagdad, Ky., 551 S.W.2d 234, 236 (1977).

The doctrine encompasses two sub-parts: claim preclusion and issue preclusion. Yeoman v. Commonwealth, Ky., 983 S.W.2d 459,464 (1998). Issue preclusion, also known as collateral estoppel, prevents parties from re-litigating any issue actually litigated and decided upon in an earlier action. Id. at 465. Issue preclusion bars further litigation when the issues in the two proceedings are the same, the adjudicator in the previous proceeding reached a final decision or judgment on the merits of the case, the estopped party had a fair opportunity to litigate the issue, and the issue in the prior action was necessary to the adjudicator’s final decision. Newman v. Newman, Ky., 451 S.W.2d 417 (1970). All of the elements of issue preclusion exist in this proceeding.

¹³ Northern Kentucky Water District Tariff, PSC No. 2, Original Sheet No. 28 (proposed).

The Commission also noted the proposed tariff revision contained extraneous and unnecessary language “whose sole purpose appears to be one of advocacy for future action by this Commission and other state agencies.”¹⁴ The proposed tariff at pertinent part states:

At the Kentucky Public Service Commission’s direction, the District has revised this cross-connection control tariff. The District is making this change with the understanding that the District maintains the ability to proceed, at its discretion, with a multi-family and residential cross-connection control program in a logical progression that may be based on meter size, degree of hazard, or other criteria deemed appropriate. The District continues to encourage the Division of Water and the Commission to further investigate important issues such as type of approved device, financial impacts, and technical feasibility that has statewide implications on the implementation of a cross-connection control program that includes multi-family and residential customers.¹⁵

In response, NKWD concedes that the implementation date of the proposed tariff’s provisions is unknown. It states:

The date is uncertain because the action of the responsible regulatory agencies is uncertain. Until they enact appropriate regulations, the District cannot proceed. The District cannot predict when that action will occur.¹⁶

It suggests that any deficiency in this regard can be cured with future revisions after the regulatory agencies promulgate new regulations.

NKWD argues that the provisions in question are necessary to ensure that its cross-connection policy remains in compliance with Division of Water regulations. It asserts that deletion of any references to multi-family and residential groups would

¹⁴ Order of February 24, 2005 at 3.

¹⁵ Northern Kentucky Water District Tariff, PSC No. 2, Original Sheet No. 28 (proposed).

¹⁶ NKWD’s Response at 9.

result in its violation of the Division of Water's administrative regulation "that requires elimination of all cross-connections."¹⁷ NKWD, however, does not identify the regulation of which it would be in violation nor does it explain how this violation would occur.

NKWD further asserts that elimination of the "extraneous language" would require it to immediately enforce its cross-connection control program against residential customers. Since it lacks the resources, the funds, and the necessary regulatory guidelines to enforce such a program, NKWD argues, it would be unable to enforce the tariff provisions and thus "be in violation of the tariff and subject to penalties by the Commission as well as possible attacks by multi-family groups for discriminatory enforcement.

This argument is circuitous. Based upon the utility's own representations, the provisions in their current form have no legal or practical effect until an unknown date in the future when the Division of Water promulgates guidelines and administrative regulations. Their presence in the proposed tariff currently appears to serve no apparent purpose.

The Commission fails to comprehend how removal of the provisions in question will place the utility in violation of any Division of Water regulation. NKWD states that until the Division of Water "enact[s] the appropriate regulations, the District cannot proceed."¹⁸ It further states that it cannot implement any multi-family or residential

¹⁷ Id. at 10.

¹⁸ Id. at 9.

program because of the "lack of regulatory guidelines."¹⁹ If the regulations have yet to be promulgated, how can NKWD be in violation of such regulations?

Assuming *arguendo* that the regulation to which NKWD refers is Administrative Regulation 401 KAR 8:020, Section 2(2),²⁰ the Commission finds no basis to support NKWD's arguments. This regulation merely forbids all cross-connections, regardless of the type of structure at which the cross-connection is located. NKWD has not explained nor can the Commission discern how deletion of any reference to multi-family or residential structures in the proposed tariff would trigger a violation of this regulation.²¹

NKWD asserts that the Commission lacks any jurisdiction in the area of cross-connection policy. It asserts that Administrative Regulation 807 KAR 5:066, Section 1(3) merely requires water utilities to comply with all administrative regulations of the Division of Water. The Commission, NKWD argues, cannot enforce these regulations nor establish standards that the Division of Water has not established. NKWD further argues that the Division of Water has more specific authority than the Commission to regulate water quality. Hence, the Commission's authority extends only to determining whether NKWD has a cross-connection program, not whether that program complies

¹⁹ Id.

²⁰ Cross-connections prohibited. All cross-connections shall be prohibited. The use of automatic devices, such as reduced pressure zone back flow preventers and vacuum breakers, may be approved by the cabinet in lieu of proper air gap separation. A combination of air gap separation and automatic devices shall be required if determined by the cabinet to be necessary due to the degree of hazard to public health. Every public water system shall determine if or where cross-connections exist and shall immediately eliminate them.

²¹ Prior to the Commission's Order of June 17, 2003, NKWD did not inspect single-family residences or require the installation of backflow prevention devices on existing single-family residences as part of its cross-connection program. If the logic of NKWD's current argument is accepted, then NKWD's prior tariff failed to comply with 401 KAR 8:020, Section 2(2). Since the Division of Water viewed NKWD's cross-connection program as a "model," this argument lacks any merit.

with the Division of Water's administrative regulations or with "standards that the Commission believes should be applied to the program."

The Commission finds that this argument ignores key statutory provisions. The Commission has "**exclusive** jurisdiction over the regulation of rates and service of utilities."²² "Service" includes "any practice or requirement in any way relating to the service of any utility, including . . . the purity, pressure, and quantity of water."²³ Moreover, the Commission has the statutory duty to enforce the provisions of KRS Chapter 278,²⁴ which includes a prohibition against unreasonable discrimination in rates and service, to investigate complaints regarding utility rates and service,²⁵ and to prescribe measures to remedy any unreasonable utility practice or service.²⁶

NKWD's cross-connection program directly affects the quality and availability of water service. The program is intended to ensure the quality of water service. An applicant or customer's failure to comply with the program significantly limits the availability of water service to that person. The program clearly falls within the definition of service and thus within the Commission's exclusive jurisdiction.

Based on the above discussion, the Commission finds that NKWD has failed to demonstrate that its proposed revisions to those portions of its existing rate schedules that related to its cross-connection control policies conform to the Commission's Order in Case No. 2001-00202 are reasonable and timely. The Commission further

²² KRS 278.040(2) (emphasis added).

²³ KRS 278.010(13).

²⁴ KRS 278.040(1).

²⁵ KRS 278.260(1).

²⁶ KRS 278.280(1).

finds that the proposed revisions should be rejected and that NKWD be directed to submit a revised cross-connection control policy that conforms to its earlier Order in Case No. 2001-00202.

IT IS THEREFORE ORDERED that:

1. NKWD's proposed tariff filing is rejected as failing to conform to the requirements of the Commission's Order of June 17, 2003.
2. Within 30 days of the date of this Order, NKWD shall file with the Commission revised tariff sheets containing a cross-connection policy that conforms to the Commission's Order of June 17, 2003.
3. No further documents shall be filed in the record of this case.
4. This is a final and appealable order.

Done at Frankfort, Kentucky, this 12th day of July, 2006.

By the Commission

ATTEST:


Executive Director