

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ANNETTE D. CALVERT)	
)	
COMPLAINANT)	
)	
v.)	CASE NO. 2005-00356
)	
U.S. 60 WATER DISTRICT)	
)	
DEFENDANT)	

O R D E R

Annette D. Calvert has filed a complaint against U.S. 60 Water District of Shelby and Franklin Counties ("U.S. 60 Water District"). At issue is whether the water district acted unreasonably in demanding as a condition for continuing water service to the Complainant's property an easement across her property for a water main that is not necessary to serve that property. Finding in the affirmative, we direct the water district to cease such practice and to amend its tariff to conform to this Order.

U.S. 60 Water District of Shelby and Franklin Counties, a water district organized pursuant to KRS Chapter 74, owns and operates water distribution facilities that serve approximately 2,145 customers in Anderson, Franklin, Shelby and Spencer counties, Kentucky.¹ As of December 31, 2005, it had net utility plant of \$4,585,027 and total assets and debits of \$6,023,262.²

¹ Annual Report of U.S. 60 Water District of Shelby and Franklin Counties to the Public Service Commission for the Year Ended December 31, 2005 at 5 and 27.

² Id. at 7.

U.S. 60 Water District is currently planning to construct a 12-inch water main along U.S. Highway 60 from the water district's existing water storage tank in Peytona, Kentucky to the Franklin County-Shelby County line.³ Ms. Calvert owns property whose southern border adjoins U.S. Highway 60. U.S. 60 Water District currently provides water service to this property through a water main that is located on Bridgeport Road, a road that runs parallel to U.S. Highway and which borders the northern portion of Ms. Calvert's property.⁴

On February 16, 2005, U.S. 60 Water District contacted Ms. Calvert by mail and requested that she grant the utility a 30-foot easement across the southern portion of her property for the proposed water main.⁵ It subsequently marked the easement location on her property. Until late August 2005, the water district's legal counsel and engineer unsuccessfully negotiated with Ms. Calvert for the easement.⁶ Expressing concerns about the effect of the easement on her property's value, the potential destruction of some trees, and the easement's possible effect on her ability to construct a driveway on the property, Ms. Calvert declined to execute an easement.⁷

On three occasions, the water district advised Ms. Calvert that, if she failed to execute the requested easement, it would terminate water service to her property. In

³ U.S. 60 Water District's Response to Commission Staff's Interrogatories and Requests for Production of Documents at Item 3.

⁴ Id. at Item 7.

⁵ Letter from Donald T. Prather, legal counsel to U.S. 60 Water District, to Annette D. Calvert (Feb. 16, 2005).

⁶ Letter from Donald T. Prather, legal counsel to U.S. 60 Water District, to Annette D. Calvert (Aug. 25, 2005).

⁷ Complaint at 1 – 2.

each instance, the water district referred to a provision in its Rules and Regulations that provides:

Easements. Each customer, together with his/her spouse and all other real estate title owners, shall grant or convey to the District, without cost, any permanent easements reasonably required by the District for the installation and maintenance of the District's meter and water lines, both existing and future, and for reading that meter at a point on the customer's property to be designated by the District for each meter, with right of ingress and egress for these purposes over the customer's property, provided such meter and lines are located on real estate owned, rented or otherwise controlled by the customer and such lines (except for the line leading to the customer's meter) are adjacent and parallel to the right of way for a public roadway. **The failure or refusal to convey such easements shall constitute grounds for discontinuing service.**⁸

In response to this advisement, Ms. Calvert on August 30, 2005, filed a formal complaint with the Commission in which she sought, *inter alia*, an order from the Commission prohibiting the water district from discontinuing water service. On September 2, 2005, the Commission entered an Order in which it directed U.S. 60 Water District answer Ms. Calvert's complaint and to "refrain from any action to discontinue or terminate the Complainant's water service during the pendency" of the proceeding. On March 27, 2006, the Commission held a hearing on the Complaint at which time the parties reached an agreement to resolve their dispute.⁹

⁸ Tariff of U.S. 60 Water District, P.S.C Ky. No. 3, First Amended Sheets No. 2 and No. 3 (emphasis added).

⁹ The Agreement provides that Ms. Calvert will provide a 30-foot, non-transferable easement. The easement is limited to the installation and repair of a water main. The Agreement further provides that the water district will use reasonable efforts to restore Ms. Calvert's property to its original condition after the installation of the water main, will seed grass in any disturbed areas, and will plant several trees at locations that Ms. Calvert determines. The Commission finds that the terms of the agreement are reasonable.

While the parties have resolved their dispute, the Commission finds that U.S. 60 Water District's practice of routinely threatening discontinuance of service should be reviewed. The utility acknowledges that it routinely requires easements from its existing customers for its water mains regardless of whether the water main is necessary to serve the customer's property.¹⁰ It contends that its Rules and Regulations permit such practice and that such practice is necessary to reduce the cost of water main extensions. It further advised the Commission that several U.S. 60 Water District customers "are scheduled to receive a final warning after the Commission renders a decision in the case."¹¹

The Commission has generally limited a utility's ability to require a customer to provide easements for utility facilities. Commission Regulation 807 KAR 5:006, Section 5(3), expressly prohibits a utility from requiring a prospective customer "to obtain easements or rights-of-way on property not owned by the prospective customer as a condition for providing service."¹² The Commission has further held that utility's requirement for a customer to provide an easement across his own property for facilities that are unnecessary to serve that customer is an unreasonable condition of service.¹³

¹⁰ Answer of U.S. 60 Water District at ¶14; U.S. 60 Water District's Response to Commission Staff's Interrogatories and Requests for Production of Documents at Item 9.

¹¹ Id. at Item 13.

¹² A utility may include the cost of obtaining any necessary easements, including the costs of any eminent domain proceedings, in calculating the cost of an extension of water main and the portion of the cost of such extension that should be apportioned to the applicant for service. See, e.g., Regina Lee Jones v. Western Rockcastle Water Association, Case No. 98-332 (Ky.PSC Jan. 26, 1999).

¹³ Harold Ray Thornsberry v. Fleming County Water Association, Case No. 98-062 (Ky.PSC July 1, 1998).

We find that U.S. 60 Water District's current practice of requiring existing customers to provide easements for water main extensions that are unnecessary to serve those customers constitutes an unreasonable condition of service.¹⁴ It effectively requires a select group of existing customers to finance¹⁵ a portion of the cost of new improvements unrelated to the provision of their water service. While other customers receive the benefits of the use of this improvement at no cost, those customers situated along the route of the water main are required to make a forced contribution to the construction or installation of the improvement and yet receive no direct benefit from the improvement. Existing customers should not be required to convey some of their property merely to continue receiving utility service.¹⁶

Other means exist for the water utility to obtain the necessary easement. It may negotiate with the customer for the easement. If it cannot obtain the easement through negotiations, it may exercise the power of eminent domain to secure the easement.¹⁷

¹⁴ U.S. 60 Water District denies that this requirement is a condition of service:

The customer is not "required" to provide an easement. The customer is required to choose between providing the easement or electing not to receive public water service from the utility. If the customer elects not to receive water service, they may install a cistern and/or a plastic tank and haul water from a water sale station.

U.S. 60 Water District's Response to Commission Staff's Interrogatories and Requests for Production of Documents at Item 9.

¹⁵ These customers "finance" the improvement in the sense that they suffer the loss of certain property rights, the use of their property, and the possible diminution of the value of their property to permit the construction of the improvement at a lower cost to the water utility and its other customers.

¹⁶ See, e.g., Walz v. Town of Smithtown, 46 F.3d 162, 169 (2d Cir. 1995).

¹⁷ See KRS 74.090.

U.S. 60 Water District argues that prohibiting its current practice will increase the cost of construction of water facilities. The record does not support this contention. In most instances, water mains are placed on highway rights-of-way. When a customer easement is required, it is usually obtained through negotiation. In many instances, landowners usually grant the easements out of a sense of civic duty or responsibility to their neighbors and the community or out of concern of being ostracized for trying to profit at the expense of the general community. Prohibiting the practice will not increase the cost of the facilities; it will merely shift the cost of the facilities from a select group of water utility customers to all customers.

Having considered the evidence of record and being otherwise sufficiently advised, the Commission HEREBY ORDERS that:

1. The Complaint is dismissed with prejudice.
2. U.S. 60 District shall cease requiring existing customers to provide easements for new facilities that are unnecessary to provide or continue water service to those customers.
3. U.S. 60 District shall cease threatening customers with the discontinuance of water service for failure to provide an easement for facilities that are unnecessary to provide or continue water service to those customers.
4. Within 30 days of the date of this Order, U.S. 60 Water District shall revise Rule I.F of its present filed tariff to conform to the holding of this Order.
5. This case is closed and is removed from the Commission's docket.
6. This is a final Order.

Done at Frankfort, Kentucky, this 2nd day of June, 2006.

By the Commission

ATTEST:

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

Executive Director