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March 15, 2005

RECEIVED  
MAR 13 2005  
PUBLIC SERVICE  
COMMISSION

Kentucky Public Service Commission  
Docket Section  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, Kentucky 40601

**RE: Crestbrook Properties, LLC v. Northern Kentucky Water Service District;**  
**Case No: 2001-202**


Dear Sir or Madam::

Enclosed please find an original and ten (10) copies of Complaint's Reply to Response Submitted by the Northern Kentucky Water District.

Also, I have enclosed a copy for file-stamping and a self addressed stamped envelope for you to return the copy to me.

If you have any questions or comments, please give me a call. Thank you.

Sincerely,



SANDRA F. KEENE

Enclosures

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RECEIVED

MAR 16 2005

PUBLIC SERVICE  
COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

CRESTBROOK PROPERTIES, LLC, )  
 )  
 Complainant, )  
 )  
 vs. )  
 )  
 NORTHERN KENTUCKY WATER )  
 SERVICE DISTRICT, )  
 )  
 Defendant. )  
 )

Case No. 2001-202

**COMPLAINANT’S REPLY TO RESPONSE SUBMITTED BY  
THE NORTHERN KENTUCKY WATER DISTRICT**

Comes the Complainant, Crestbrook Properties, LLC, by counsel, and for its Reply to the Response to Commission’s Show Cause Order filed by the Northern Kentucky Water District states as follows.

**PROCEDURAL BACKGROUND**

The Natural Resources and Environmental Protection Cabinet (“NREPC”) regulations prohibiting cross connections for public and semi-public water systems were adopted in 1972. The Water District took no action to implement a cross-connection policy until 1997, at which time the Water District submitted a tariff to the Commission which contained a cross connection control policy.<sup>1</sup> The tariff expressly applied to “all new commercial, industrial, and multi-family and governmental accounts ... and to severe high hazard accounts.”

Thereafter, the Water District notified Crestbrook that, pursuant to the cross connection control policy, Crestbrook would be required to purchase, install and maintain a double check

<sup>1</sup> The Water District asserts that the Commission reviewed cross connection control policy and found it to be in compliance. There are no such findings in the record. To the contrary, the Water District’s only witness, Richard Harrison, testified that there were no public hearings regarding the cross connection control policy, nor were there any discussions regarding the policy with Commission staff prior to the Water District’s implementation of its policy. (Transcript of Hearing, page 99).

control valve for the master meter located on its property. Crestbrook objected and asserted that its residents posed no greater threat of cross-contamination than any of the Water District's numerous single family residents, who never had been required to take any action to eliminate cross connections. Despite Crestbrook's objections, the Water District refused to treat Crestbrook's residents the same as other residential customers.<sup>2</sup>

On or about June 19, 2001, Crestbrook Properties, LLC ("Crestbrook") filed a formal Complaint with the Commission against the Northern Kentucky Water Service District ("Water District")<sup>3</sup>. Crestbrook asserted that the Water District's cross connection control policy was invalid and unenforceable against Crestbrook and other multi-family residential customers because, in violation of KRS 278.170, it imposed a condition of water service requirement upon one kind of residential customer, but not upon others, thereby resulting in unreasonable prejudice or disadvantage to those customers made subject to the policy; that the policy established an unreasonable classification between multi-family and single-family residential customers that bears no rational relationship to the prevention of cross connection contamination of the water system; that the policy was arbitrary and unreasonable in that the Water District performed no objective analysis of the risks/hazards associated with the groups to which it applied its policy; and that the policy constitutes an unpublished rate and therefore is unauthorized per KRS 278.160.

The Commission issued an Order on April 05, 2002, finding that issues of fact were in dispute and that a formal hearing would be held to resolve those issues. The Order set forth a procedural schedule which permitted the parties to serve requests for production of documents and written interrogatories upon one another and directed that each party file, in verified form, the

---

<sup>2</sup> Crestbrook takes issue with the Water District's assertion that it had successfully enforced its cross connection policy "for years" prior to Crestbrook's complaint to the Commission. There is not evidence in the record to support such an assertion. To the contrary, Crestbrook and other similarly situated property owners objected immediately upon notification of the policy and met on several occasions with Water District Officials. See Prefiled Testimony of Bernie Wessels, PCS Case No. 2001-202.

<sup>3</sup> PSC Case No. 2001-202

direct testimony of each witness it expected to call at the formal hearing or any evidence which the parties intended to introduce at the hearing. Crestbrook prefiled the testimony of Warner A. Broughman, III, P.E., Charles Tassell, James Ruh, and Bernie Wessels. The Water District submitted only the testimony of one of its engineers, Richard Harrison.

The Commission held a formal hearing on August 06, 2002. Msrs. Broughman, Tassell, Ruh, Wessels, and Richardson each appeared and testified at the hearing. A summary of the evidence offered at the hearing is set forth in Crestbrook's post-hearing brief, pages 3-23. After observing the witnesses, hearing all of the testimony and considering the parties' extensive briefing of the issues, the Commission issued its Order finding that "there is no reason to classify multi-family residences differently from single-family residences for cross-connection purposes." The Commission found that no evidence supported a conclusion that multi-family residences present any greater threats than do single-family residences and therefore, the Water District's classification is arbitrary and puts a significant burden on the owners of multi-family residences that owners of single family residences need not bear. Commission's Order of June 17, 2003, page 7. Further, the Commission noted that the documents submitted by the Water District in support of its position demonstrated that meter size is *not* a factor to be considered when defining degrees of hazard, but rather, hazardous use and actual cross-connections were the appropriate factors. Commission's Order at 6.

The Water District Petitioned the Commission for Rehearing, claiming that the Commission's Order was "unclear" and "contrary to the evidence of record." The Water District's petition did nothing more than attempt to re-argue its position. The Commission denied the Petition for Rehearing by Order of July 23, 2003. The Water District did not pursue review of the Commission's decision by the Franklin Circuit Court, thus said Order became final on August 12, 2003.

The Water District filed its "revised" tariff on or about July 09, 2004. Section XXIII(1) and (2) of the revised tariff continued to refer to "multi family" accounts as being distinct from

“residential” accounts. The revised tariff also provided that “existing accounts will be prioritized by the largest meter size and consumption for that meter size. Crestbrook, joined by the Greater Cincinnati Northern Kentucky Apartment Association (“GCNKAA”), filed objections to the revised tariff on the basis that continuing to distinguish between multi-family customers and other residential customers was a violation of the Commission’s Order of June 17, 2003. Crestbrook and the GCNKAA also pointed out that the Commission’s (now final) order specifically found that the evidence submitted during the discovery/hearing process demonstrated that meter size is not a factor to be considered when defining degrees of hazard.”

On February 04, 2005, the Commission issued an Order directing the Water District to show cause why the tariff should not be stricken in its entirety, or in the alternative, certain specified provisions should not be stricken from the proposed tariff. The Commission noted that despite its express rejection of the meter size as a basis upon which to implement cross-connection control, the proposed revised tariff continues to be based upon meter size. Because the proposed revised tariff would grant the Water District the discretion to implement its cross connection control policy for multi-family structures while deferring implementation of any enforcement program for residential structures, the Commission found that the revised tariff retained the same discriminatory effects as the tariff. For the reasons set forth herein, Crestbrook respectfully submits that the proposed revisions to the Water District’s cross connection control policy violate the Commission’s Order and therefore should be stricken from the tariff.

#### ARGUMENT

The gist of the Water District’s response to the Commission’s show cause order is that the revised tariff is not discriminatory because using meter size as a criterion for implementing its cross connection control policy is not discriminatory. The issue of implementation of the policy according to meter size, with respect to customers such as Crestbrook, was raised by Crestbrook at the very beginning of this action and was at the heart of Crestbrook’s Complaint in PSC Case 2001-202. During that case, the parties obtained discovery and presented expert testimony at the

formal hearing. Any evidence the Water District had, including testimony from the Division of Water and/or the NRECP, should have been submitted during the hearing process as directed in the Commission's procedural schedule. However, the Water District chose to present as its only witness, its own engineer, Richard Harrison.

After reviewing all of the evidence presented and having had the opportunity to observe the witnesses and consider their testimony, the Commission found that there was no evidence to support the Water District's assertion that meter size should be a factor in determining risk of cross contamination. That finding of fact became final in August 2003 when the time for seeking judicial review of the Commission's Order in Case No. 2001-202 expired. Said Order and all issues of fact determined therein are *res judicata* and, therefore, not properly advanced as support for the Water Districts proposed revised tariff. Thus, any argument contained in the Water Districts response related to implementation of meter size must be disregarded by the Commission. *Godbey v. University Hospital of Albert B. Chandler Medical Center, Inc.*, Ky. App., 975 S.W.2d 104 (1998).

The Water District argues that its proposed revised tariff should be accepted because there will be no implementation thereof until the Division of Water and the EPA develop standards. Even if true, this does not alter the fact that the language contained in the proposed revised tariff continues to contain discriminatory provisions and, therefore, violates the Commission's Order.

In reviewing the proposed revised tariff, the Commission correctly determined that the proposed language gives the Water District the discretion to implement a multi-family program prior to a residential one. Crestbrook submits that it is evident from the Water District's conduct throughout these proceedings that it intends to do just that. Despite all of the evidence presented and the Commission's final order regarding the issues, the Water District continues to refer to multi-family customers as a separate classification from other residential customers and that it intends to implement its policy according to meter size.

The Water District attempts to validate its expressed intent to use meter size as a criteria for prioritizing implementation of its policy by stating that it can't implement its policy all at once. Crestbrook submits that it cannot implement it in a discriminatory fashion, either, and this Commission already has determined that using meter size as criteria would have a discriminatory effect on multi-family customers. With respect to the "burden" on the Water District, Crestbrook would point out that the Water District has a meter inspection/replacement policy, which includes residential meters. Within a ten-year time frame, the Water District will have physically changed out all meters and tested them. (Hearing Transcript at 189). Had the Water District implemented its cross connection control policy uniformly for all residential customers, it would be more than half-way through a ten year cycle for inspection/replacement of all meters.

In considering the proposed revised tariff submitted by the Water District, the Commission needs only to consider (1) whether the cross-connection control policy contained therein impermissibly creates a separate classification for multi-family residential property owners and single family residential property owners; and (2) whether the policy will be implemented in a way that will result in multi-family property owners being treated differently than any other residential property owner.

With respect to the first consideration, any distinction made in the policy that makes multi-family property owners a separate class is discriminatory. The Commission issued a final order concerning this issue and the Water District did not appeal the Commission's finding. The proposed tariff continues to refer to "multi-family" customers as distinct from "residential" customers. Any such distinction should be stricken from the tariff and multi-family customers should simply be included as residential customers.

With respect to the second consideration, the proposed tariff provides:

District maintains the ability to proceed at its discretion, with a multi-family and residential cross-connection control program in logical progression that may *be based on meter size*.

Emphasis added.

The Commission issued a final order determining that meter size was not an appropriate criterion for determining how to implement the Water District's cross-connection control policy. The Water District did not appeal that finding. Any language indicating that meter size will be used as the criterion for determining how to implement the Water District's policy must be stricken from the record, as such would be expressly contrary to the Commission's final order.

In a last-ditch effort to reargue its case and obtain a different decision from the Commission, the Water District asserts that the Commission is forcing the Water District to violate DOW regulations and directives and that the Commission lacks jurisdiction to determine whether the Water District's policy is discriminatory. Nothing in the Commission's order violates DOW regulations. The regulations require the Water District to implement a cross-connection control policy and to eliminate all cross connections. Until Crestbrook brought its complaint to the Commission, the Water District didn't have a cross-connection control policy for residential customers other than multi-family customers, despite the fact that the regulations requiring such a policy have been in effect for thirty-some years. The Water District can hardly complain that its failure to comply with cross connection regulations has anything to do with this Commission's Order.

Requiring the Water District to refrain from creating two classifications of residential customers does not conflict with any administrative regulation, nor does directing the Water District to refrain from using meter size as a criterion for prioritizing implementation. The absence of any citation to such a regulation is evidence that there are no such conflicts.

Lastly, the Water District asserts that there is a conflict between the Commission's Order and the Commission's authority to interpret Division of Water regulations. Crestbrook submits that the Water District is a day late and a dollar short in challenging the Commission's jurisdiction over this matter. The issues before the Commission were crystal clear to all parties from the very beginning of these proceedings. At no time did the Water District object to the



Commission's assumption of jurisdiction. It is too late to do so now that a final order has been issued. Crestbrook submits that such a challenge is nothing more than a ploy by the Water District to re-try its case. The Water District had every opportunity to bring in witnesses from the Division of Water to support its position in the case but failed to do so. It should not be permitted to argue what the Division would/might say regarding the issues.

Furthermore, it is axiomatic that this Commission has exclusive jurisdiction to determine whether a regulated utility's practices and conditions of service are unreasonably discriminatory. Such authority is expressly set forth in KRS 278.170.<sup>4</sup> Despite this express statutory authority, the Water District asserts that the issues of classification of customers and priority of implementation of the program are matters for the court. In support of this assertion, the Water District claims that "[i]n fact, a court, has ruled that the implementation of the District's cross connection control policy is not discriminatory." Not only is this a gross misstatement of the circuit court ruling, which contains no finding regarding discrimination, but it fails to inform this Commission of the actual status of the circuit court case. Had the Water District engaged in such conduct in court, Crestbrook submits that it could have sought sanctions against the Water District under Rule 11 of the Kentucky Rules of Civil Procedure.

In actuality, Crestbrook appealed the circuit court's grant of Summary Judgment to the Court of Appeals. On May 16, 2003, the Court of Appeals issued an Opinion vacating and remanding the circuit court's judgment. In so doing, the Court of Appeals specifically found that the circuit court did not have jurisdiction over the issues then pending before the PSC. The Court held that "it would be manifestly unjust to order Crestbrook to comply with the Water District's policy, before the PSC, *with its specialized knowledge, determines whether the policy is*

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<sup>4</sup> KRS 278.170 provides: "No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions." KRS 278.040(3) authorizes the Commission to adopt regulations to implement the provisions of Chapter 278, investigate the methods and practices of utilities and require them to conform to the laws of this state, and to all reasonable rules, regulations and orders of the Commission.

*discriminatory under KRS 278.170. Case No. 2001-CA-001852 MR, Opinion at 8, attached hereto as "Exhibit A."*

### CONCLUSION

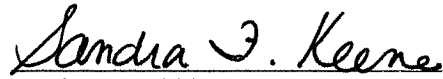
The only issue for consideration is whether the proposed revised tariff violates the Commission's findings and Order in PSC Case No. 2001-202. All issues resolved in that case became final in August 2003 and any attempt to reargue the merits of that case are barred by the doctrine of *res judicata*. *Godbey v. University Hospital of Albert B. Chandler Medical Center, Inc.*, Ky. App., 975 S.W.2d 104 (1998).

The proposed revised tariff submitted by the Water District continues to distinguish multi-family customers from "residential" customers. This distinction clearly violates the Commission's determination that multi-family customers must be treated the same as all other residential customers. Any reference to "multi-family" should be stricken from any cross connection policy/tariff.

The proposed revised tariff which continues to provide for prioritizing implementation of the Water District's cross connection control policy according to meter size also expressly violates the Commission's Order. The Commission found this to be an inappropriate criterion for implementing said policy and any such criterion should be stricken from any cross connection policy/tariff.

For the reasons set forth herein, Crestbrook respectfully submits that the Commission should strike the Water District's cross connection policy in its entirety, or in the alternative, that it strike all provisions therein which violate the Commission Order in Case No. 2001.202.

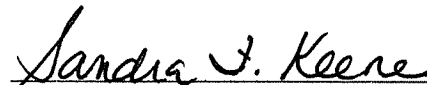
Respectfully submitted,



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Counsel for Crestbrook

**CERTIFICATE OF SERVICE**

It is hereby certified that a copy of the foregoing was served this 15 day of March, 2005, via U.S. Mail, postage prepaid, upon: Jeffrey Greenberger, Esq., Katz, Greenberger & Norton LLP, 105 E. Fourth Street, #400, Cincinnati, OH 45202; and John N. Hughes, 124 West Todd Street, Frankfort, KY 40602



Mark W. Dobbins  
Sandra F. Keene

RENDERED: MAY 16, 2003; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2001-CA-001852-MR

CRESTBROOK PROPERTIES, LLC

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE PATRICIA M. SUMME, JUDGE  
ACTION NO. 00-CI-02149

NORTHERN KENTUCKY WATER  
SERVICE DISTRICT

APPELLEE

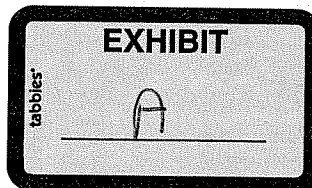
### OPINION

### VACATING AND REMANDING

\*\* \*\* \* \*\* \*\* \*

BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

BARBER, JUDGE: The Appellant, Crestbrook Properties, LLC ("Crestbrook"), seeks review of an order of the Kenton Circuit Court granting summary judgment in favor of the Appellee, Northern Kentucky Water Service District ("Water District"), and dismissing Crestbrook's counterclaim. For the reasons set forth below, we vacate the order of the circuit court, and remand.



On October 17, 2000, the Water District, a public water system organized pursuant to KRS Chapter 74, filed a complaint against Crestbrook, a water service customer, in the Kenton Circuit Court, seeking to enjoin it from violating its cross-connection control policy and directing Crestbrook to install a cross-connection control device in compliance therewith.

A copy of the policy, attached to the complaint, reflects that cross-connections are prohibited by 401 KAR 8:020 §2(2) which provides:

All cross-connections are 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.

The policy further reflects that cross connections are defined at 401 KAR 8:010, § 1(28)<sup>1</sup> as:

[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.

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<sup>1</sup> Now 401 KAR 8:010 §1(32).

On November 6, 2000, Crestbrook filed an answer and counterclaim. Crestbrook explained that it is a Kentucky limited liability company which owns the multi-family dwelling described in the complaint. In its counterclaim, Crestbrook alleged that the Water District's cross-connection control policy, and the enforcement action based upon its policy, constitute arbitrary administrative action. Crestbrook maintained that because similarly-situated (namely, single-family) residential customers were not required to install the devices, the policy violated the equal protection and due process clauses of the 14<sup>th</sup> amendment of the United States Constitution and §§ 2 and 3 of the Kentucky Constitution. Crestbrook also asserted a statutory cause of action under KRS 446.070 for a violation of KRS 278.170.

KRS 278.170(1) provides:

No utility shall, as to any rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially same conditions.

Crestbrook sought to enjoin the Water District from enforcing the policy and sought a declaration that the policy and actions of the Water District were in violation of the United States and Kentucky Constitutions.

On April 25, 2001, the Water District filed a motion for summary judgment. On June 20, 2001, Crestbrook filed a memorandum in opposition to the motion for summary judgment, contending, *inter alia*, that the circuit court should delay ruling on the motion. Crestbrook explained that on July 29, 2001, it had "sent a Formal Complaint to be filed with the Kentucky Public Service Commission." Crestbrook asserted that the "PSC has 'exclusive jurisdiction over the regulation of rates and services of utilities,' such as the Water District." Crestbrook maintained that the PSC had jurisdiction "to conduct fact-finding as to whether the Water District's policy is unreasonable or discriminatory. . . .However, [the circuit court and] not the PSC retains exclusive jurisdiction over Crestbrook's injunctive and declaratory relief claims that the Water District is violating the U.S. and Kentucky Constitutions." Crestbrook requested that the circuit court delay ruling on the motion for summary judgment until the PSC had completed its fact finding, under the doctrine of primary jurisdiction.

On July 20, 2001, the Water District filed a reply, contending that the doctrine of primary jurisdiction was inapplicable, because Crestbrook's claims were solely constitutional and delay was not required.

On July 25, 2001, the circuit court entered an order granting summary judgment in favor of the Water District:

Plaintiff is entitled to judgment as a matter of law. Defendant is hereby ordered to install a cross connection prevention control device in compliance with Plaintiff's Cross Connection Control Policy. Plaintiff's Motion for Summary Judgment is sustained, at the Defendant's costs.

It is further Ordered that the defendant's Counterclaim is hereby dismissed.

On August 24, 2001, Crestbrook filed a notice of appeal to this Court.<sup>2</sup> On appeal, Crestbrook asserts that the circuit court erred in granting summary judgment, because: (a) the policy's classification of similarly-situated customers bears no rational relationship to preventing cross-connection contamination of the public water system, (b) real issues of material fact existed on Crestbrook's counterclaims; and (c) Crestbrook should have first had an opportunity to complete discovery. Crestbrook also asserts that it had contested the validity of the Water District's policy, contrary to the circuit court's finding.

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<sup>2</sup> By order of this Court entered January 30, 2002, the appeal was held in abeyance pending an attempt to settle the case. By order of April 4, 2002, the appeal was returned to the active docket, settlement negotiations having been unsuccessful.



Although not brought to our attention by the parties, on March 24, 2003, the Kentucky PSC issued the following order concerning Crestbrook's pending formal complaint<sup>3</sup>:

On June 22, 2001 Crestbrook Properties, LLC ("Crestbrook") filed a formal complaint against Northern Kentucky Water District ("Northern Kentucky") alleging that Northern Kentucky's cross-connection policy violates KRS 278.170 by establishing an unreasonable difference or classification among residential customers.

Prior to the filing of Crestbrook's complaint with the commission, Northern Kentucky had filed a complaint against Crestbrook in Kenton Circuit Court, nl [Case No. 00-CI-02149.] seeking a court order requiring Crestbrook to follow Northern Kentucky's cross-connection policy. On July 25, 2001, the Kenton County Circuit Court, finding in favor of Northern Kentucky, granted Summary Judgment and ordered Crestbrook to install a back-flow prevention device. This case is currently before the Kentucky Court of Appeals.

The Commission has original jurisdiction over Crestbrook's complaint. KRS 278.040, KRS 278.260. Specifically, the Commission has jurisdiction to determine whether Northern Kentucky's cross-connection policy, or the application thereof, is unreasonably discriminatory pursuant to KRS 278.170. The end result of an order deciding the issue would be whether Crestbrook must install a backflow-prevention device. However, the Kenton Circuit Court already has ordered Crestbrook to install a backflow-prevention device. In light of this order, we reluctantly conclude that it would be inappropriate to enter a final ruling in this case prior to the determination by the Kentucky Court of Appeals, which currently has the case

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<sup>3</sup> In the Matter of CRESTBROOK PROPERTIES, LLC, COMPLAINANT v. NORTHERN KENTUCKY WATER DISTRICT, DEFENDANT, CASE NO. 2001-00202, Kentucky Public Service Commission, 2003 Ky. PUC LEXIS 205, March 24, 2003.

before it. Crestbrook Properties, LLC v.  
Northern Kentucky Water District, 2001-CA-001852.

IT IS THEREFORE ORDERED that this case be held in  
abeyance pending the ruling of the Kentucky Court  
of Appeals.  
(Emphasis original).

The circuit court never addressed the PSC's jurisdiction or  
the formal complaint pending before it, but simply ordered  
Crestbrook to install a cross-connection control device in  
compliance with the Water District's policy and dismissed  
Crestbrook's counterclaim. The circuit court's ruling  
presupposes the validity of the policy under KRS 278.170;  
however, that is a matter within the exclusive jurisdiction of  
the PSC.<sup>4</sup>

KRS 278.040 is entitled, "Public service commission --  
Jurisdiction - Regulations" and provides at subsection (2):

The jurisdiction of the commission shall extend  
to all utilities in this state. **The commission  
shall have exclusive jurisdiction over the  
regulation of rates and service of utilities, but**  
with that exception nothing in this chapter is  
intended to limit or restrict the police  
jurisdiction, contract rights or powers of cities  
or political subdivisions.  
(Emphasis added)

KRS 278.010 (13) defines service:

**"Service" includes any practice or requirement in  
any way relating to the service of any utility,  
including the voltage of electricity, the heat**

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<sup>4</sup> See Carr v. Cincinnati Bell, Ky. App., 651 S.W.2d 126 (1983).

units and pressure of gas, **the purity, pressure, and quantity of water**, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility;  
(Emphasis added)

Thus, the relief sought in the case *sub judice* is divided between the jurisdiction of the PSC and the circuit court,<sup>5</sup> because the PSC cannot determine the constitutionality of the Water District's policy. The doctrine of primary jurisdiction does not apply, because the circuit court does not have subject matter jurisdiction of the matter pending before the PSC. "The doctrine of 'primary jurisdiction' clearly recognizes that the court has subject-matter jurisdiction but as a matter of judicial policy should not exercise it in instances where proper judicial administration requires that action be deferred by the court until the agency has acted . . . ."<sup>6</sup>

Nevertheless, the proceedings before the circuit court and the PSC are closely intertwined. It is manifestly unjust to order Crestbrook to comply with the Water District's policy, before the PSC, with its specialized knowledge, determines whether that policy, or the application thereof, is unreasonably discriminatory under KRS 278.170. We believe that the circuit court's failure to delay ruling on the summary judgment motion,

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<sup>5</sup> *Id.*

<sup>6</sup> *Preston v. Meigs*, Ky. 464 S.W.2d 271, 274-75 (1971).

pending resolution of Crestbrook's formal complaint before the PSC, constitutes substantial error. CR 61.02.

Accordingly, we vacate the order of the Kenton Circuit Court granting the Water District's motion for summary judgment, entered July 25, 2001, and remand this case to the circuit court with direction that it be held in abeyance, pending a final ruling of the Kentucky PSC.

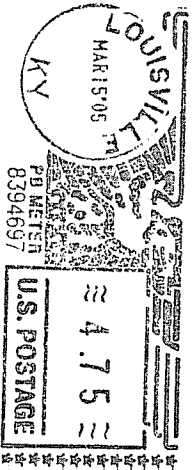
ALL CONCUR.

BRIEFS FOR APPELLANT:

James P. Walsh  
Fort Wright, Kentucky

BRIEF FOR APPELLEE:

H. Lawson Walker, II  
Rachael A. Hamilton  
Cincinnati, Ohio



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