COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

RESPONSE OF NORTHERN KENTUCKY WATER DISTRICT TO ORDER OF FEBRUARY 4, 2005

Northern Kentucky Water District, by counsel, files its response to the Commission's order to show cause why its proposed tariff revisions should be accepted. The Order requires the District (1) to show cause why the revised tariff should not be rejected as unreasonable for failure to comply with the order in Case No. 2001-00202 or why the proposed revisions to the tariff should not be stricken and the remaining portions allowed to become effective; (2) to show cause why the proposed revisions should not be stricken as vague or extraneous; and (3) to show cause why the provisions relating to implementation of multi-family and residential cross connection program should not be rejected as premature.

BACKGROUND

The cross connection tariff originally filed by the District was in response to the Natural Resources and Environmental Protection

Cabinet's (NREPC) regulation that prohibits all cross connections for public water suppliers. 401 KAR 8:020 § (2), states:

> 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. The 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 the public health. Every public water system shall determine if or where cross connections exist and shall immediately eliminate them.

Commission regulations - 807 KAR 5:066(3)- require all utilities to comply with NREPC regulations. The District filed a tariff on July 1, 1997 in compliance with those regulations. Subsequently, it was revised on June 1, 2000. Those tariffs required customers of the District to install an appropriate, approved, cross connection protection device to eliminate the possibility of contamination of the general water supply provided to the public by the District. The Commission reviewed this regulation on two occasions and found it to be in conformity to the requirements of the NREPC and its own requirements.

The District's original tariff recognized the service differences between various types of customers. It classified customers into industrial, commercial, governmental and multi- family to identify those services that are most likely to create potential cross contamination problem. The underlying premise of the tariff is that the larger the meter size serving a particular customer or class of customers, the greater potential for the type of cross contamination that the NREPC has prohibited. The tariff recognizes the relationship of potential contamination to meter size when

on page 28 it says that it prioritizes the implementation of the policy based upon meter size and consumption.

The NREPC notified the District that its policy was in compliance with the Cabinet's regulation and is a model for others to follow. It specifically recognized the District's effort to prioritize enforcement and to categorize customers by size. (See NKWD Response to Crestbrook's Interrogatories, June 7, 2002, Item 2, copy attached as exhibit 1)

That original tariff said in part:

> All new commercial, industrial, multi-family, and governmental accounts will be required to meet the district's standards for cross connection control upon notification from the district. Water service for new commercial and industrial accounts will not be turned on until the water district requirements are met.
>
> All existing commercial, industrial, multi-family, and governmental accounts will be required to meet the district's standards for cross connection control upon notification from the district. Existing accounts will be prioritized by the largest meter size and consumption for that meter size, inspection will start with the largest meters and consumption.
>
> The district shall require the use of an approved protective device on the service line serving the premises to assure that any contamination that may originate in the customer's premises is contained therein. The type of protective devices to be installed shall correspond to the degree of hazard as determined by the district. All protective devices shall be listed and approved by the foundation for cross connection control research, University of Southern California and the district.
>
> Where cross connection, interconnections, auxiliary intakes, or bypasses are found that constitute an extreme hazard of immediate concern of contaminating the public water system, the district shall require that immediate corrective action be taken to eliminate the threat to the public water system. ...

After years of successful enforcement of this tariff, which had been approved by the Commission and the Division of Water, a complaint was filed against the District by Crestbrook Properties, LLC on June 22, 2001. The Complaint alleged that the District's enforcement of a valid regulation was discriminatory because it treated multi-family customers differently than single family customers. This was Case No. 2001-00202.

After discovery, a hearing was held on August 6, 2002. Subsequently, the Commission issued an order holding the case in abeyance pending a Court of Appeals decision involving a related matter in the Kenton Circuit Court. The Commission issued its final order on June 16, 2003, holding that the tariff was discriminatory between multi-family and residential customers. It directed the District to file an amended cross connection tariff within 60 days. It also allowed the District to request an informal conference to attempt to resolve some or all of the outstanding issues.

The District filed for rehearing on July 3, 2003. That request was denied on July 23, 2003. Between that date and March 1, 2004, the District requested and was granted several extensions of time to file its tariff, pending the scheduling of an informal conference as the June 16 and July 23 orders allowed. On March 1, 2004, an informal conference between the parties and others, including the Rural Water Association, Louisville Water Company and the Division of Water was held to discuss possible changes to the tariff. No consensus was reached as to how to

address the various interests of the participants. Among the issues discussed were types of cross connection prevention devices, enforcement concerns, and various regulatory agency requirements.

On April 13, 2004, the District sent a letter to the Commission requesting that the Commission begin a review of the cross connection issue and to include the participants of the informal conference in that review. The District also sought deferral of the filing of the tariff pending such review.

On May 6, 2004, the Commission responded that the tariff should be filed as soon as possible. The District submitted its revised tariff on July 9, 2004. The Commission then initiated Case No. 2004-00309 to deal with the revised tariff. On August 5, 2004, the Commission suspended the enforcement of that revised tariff for five months until January 7, 2005. On August 8, 2004, the Commission closed Case No. 2001-00202.

On August 30, 2004, the District requested a procedural schedule be established so that all parties could attempt to resolve the issues through an informal conference or otherwise as the orders in Case No. 2001-00202 had suggested. No action was taken by the Commission to set a procedural schedule or to schedule a conference. At the end of the suspension period, no action had been taken by the Commission and the tariff became subject to implementation. The tariff remained under Commission review for a total of seven months until February 4, 2005, when an order was issued rejecting the District's revisions to the tariff.

The District believes that the language in the revised tariff has been misinterpreted and that the effect of the Commission's order is to force the District into the position of either violating the DOW regulation or violating the tariff language suggested by the order of February 4, 2005.

The first section of questionable language that the order addresses 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.

The Commission seems to take a portion of this section out of context of subsequent limitations stated in the tariff. Specifically citing the phrase: "the District maintains the ability to proceed at its discretion with multi-family and residential cross control program in a logical progression that may be based on meter size, degree of hazard or other criteria that might be deemed appropriate.", the Commission asserts that this language will give the District the discretion to implement a multi-family program prior to a residential one, which would violate the order in Case 2001-00202.

This interpretation ignores the limitation on implementing a multi-family and residential program in the next paragraph of the tariff.

> 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.

Read together, the tariff clearly indicates that no multi-family or residential program will begin until the appropriate regulatory agencies, namely DOW and EPA, develop standards for such programs. The discretion retained by the District is limited by the actions of these agencies. Thus, there is no suggestion in the tariff that the District will or can proceed to enforce the tariff against multi-family customers.

Further emphasizing the limits on the District's intention to enforce any program against multi-family or residential is the following language:

> All existing commercial, industrial, governmental, multi-family, and residential accounts will be required to meet the District standards for cross-connection control **as specified in paragraph 1 above** upon notification from the District. (Emphasis added).

There should be no question that the purpose of the tariff is to defer implementation of any multi-family or residential program until the appropriate agencies establish standards for such programs.

The Commission next assumes that in spite of this very specific limitation on the implementation of multi-family and residential programs that it intends to surreptitiously begin the programs by relying on meter size. The two are totally separate. Having excluded multi-family and residential from implementation pending definitive standards, the District

intends to continue to enforce the tariff against other customers using the same criteria that it has followed from the originally approved tariff.

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.

The New York Public Service Commission rejected a similar claim of discriminatory treatment by the owner of a multi-family apartment, who was billed as a commercial customer. He argued that because his apartment tenants used gas in the same manner as single-family residents, he should be billed at the single-family rate, not the commercial rate. The PSC said on page 3 of its order:

> "It is appropriate for a utility to classify service to multi-unit dwellings differently from service to single-family homes. The loads and characteristics . . . can differ significantly between a multi-family building particularly a large one, and a single family residence, making inclusion of the services in single service classification inappropriate. . . In addition to the differences in load and usage characteristics, the fact that service is provided to a landlord engaged in profit-making enterprise rather than an individual for his own use is a reasonable basis for classifying types of service. . .
>
> It is often true that customers on either side of a dividing line between classifications . . . may appear to be similarly situated, nevertheless, the rate design scheme is not rendered unreasonable as a consequence." Re: Robert and Laura Moore, Case 96-M-0673, Order of December 10,1986, p. 3. (Copy attached as exhibit 2).

The next purported defect the Commission addresses is the vagueness of the implementation date for multi-family and residential customers. 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. Once it does, then notice to the affected customers can be made and the tariff can be revised to reflect the requirements established for those groups of customers. If it would clarify the situation and resolve this matter, the tariff could be revised to state that it will be modified at the time of the development of regulations and will be submitted to the Commission for approval. If additional notice to customers is warranted, that can be addressed at the time of the filing of the revised tariff. However, this concern of the Commission is irrelevant to the issue of discrimination.

In addition to these misunderstandings, the order forces the District to violate DOW regulations and directives or to violate its own Commission

approved tariff. If NKWD accepts the order's directive and deletes the extraneous language about why the tariff was changed and when the multi-family and residential programs will begin, then the tariff will require immediate implementation of the residential program. The evidence in Case No. 2001-00202 shows that the District cannot implement the residential program because of cost, lack of other resources and lack of regulatory guidelines. Therefore, to accept the Commission's directive, the District would have a tariff that it could not enforce at this time. It would 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.

If the District deletes residential (and multi-family) from the tariff, it will be in violation of DOW's regulation that requires elimination of all cross connections. The effect of the order is to place the District in the untenable position of violating either DOW's regulation or its own tariff.

The conflict between the Commission's directive for Northern to implement its cross connection program according to Commission standards and the Commission's authority to interpret DOW's regulation is the center of the issue to be resolved. The Commission's regulation – 807 KAR 5:066(3) - simply requires that utilities comply with all DOW regulations. The Commission cannot enforce DOW's regulations or set standards that have not been set by DOW. The cross connection program of the District has never been questioned by DOW. In fact, it has been

commended as being a model. A letter from DOW dated April 1, 1996 is attached as exhibit 1. More recently, DOW has indicated that the District's use of meter size and its efforts to control cross contamination are consistent with its policies and practices. A letter dated September 24, 2003 from DOW is attached as exhibit 3.

If the agency that has the authority to enact the cross connection regulation has determined that the District is in compliance with its regulation, what authority does the Commission have to rule to the contrary? The District has complied with the Commission's regulation to have a tariff conforming to the requirement of DOW. As long as the District has not violated DOW's standards, the implementation of that program is a matter for DOW enforcement.

Water utilities are required to get DOW approval for certain construction projects and submit those approvals to the Commission. Yet, the requirement to submit copies of the approval letters does not give the Commission authority to question DOW's standards of review of the project or its approval of a project.

On two occasions the District has received notification from DOW that its cross connection program is acceptable and consistent with industry standards. Yet, the Commission has assumed jurisdiction over a purely DOW matter and forced the District to act in a manner that may cause it to violate those approved practices.

In matters of interpretation of administrative powers, specific authority prevails over general. An administrative agency's authority ". . . is limited to implementation of the function assigned to it by the statute." Commonwealth, Board of Examiners of Psychology v. Funk, Ky. App., 84 S.W.3rd 92, 98 (2002). In this case the Court determined that two agencies attempting to regulate the practice of psychology could not do so, and deferred to the agency which had the more specific statutory authority to regulate.

In this case, the DOW has the more specific authority to regulate water quality and specifically cross connections. KRS Chapter 224 deals with water quality in great detail. DOW's regulations specifically address cross connections and their regulation. 401 KAR 8:010 states in part:

> Necessity, Function and Conformity: KRS 224.10-100(30) and 224.10-110 authorize the cabinet to promulgate administrative regulations for the regulation and control of the purification of water for public and semi-public use..."

Section 33 of that regulation defines cross connection. Section 102 defines public water supply. Section 139 defines water distribution system. All of those regulations apply to the District. Additionally, 401 KAR 8:020, section 2(2) deals with the prohibition of cross connections.

In contrast to these specific regulations, the Commission's regulations deal only generally with water quality. 807 KAR 5:066 indicates that its function is to prescribe regulations for the ". .performance of any service or the furnishing of any commodity by the utility..." Section 3 of that regulation states:

> Quality of Water: (1) Compliance with Natural Resources Cabinet. Any utility furnishing water service for human consumption or domestic use shall conform to all legal requirements of the Natural Resources Cabinet for construction and operation of its water system as pertains to sanitation and potability of the water.

Thus, as regards the quality of water and its protection, the Natural Resources Cabinet has authority to enact and enforce regulations. The Commission acknowledges this superior authority in its regulation. It is the NREPC that specifically prohibits cross connections and provides the standards for their elimination. The Commission has no such regulations.

Yet, it is the Commission that is attempting to force the District to comply with standards and legal requirements that are not part of NREPC's regulations and that are in excess of the Commission's own regulations. At most, the Commission's authority extends only to determine if the District has a cross connection program, not to whether that program conforms to the NREPC's regulations. And, it certainly has no authority to determine if that program complies with standards that the Commission believes should be applied to the program. [1]

Finally, the Commission's finding that the tariff discriminates against multi-family customers is in conflict with the position of DOW which equates hazard with size of meter. It also is contrary to the principle

[1] The Commission in its order of July 23, 2003 Case No. 2001-00202 says on page 5 that it will not order NKWD to violate NREPC's regulations or statutes and: "No regulations or laws address the method by which Northern Kentucky should implement its cross connection policy". Yet, in spite of the Commission's acknowledgment of this lack of regulations and laws addressing the method of implementation, it has taken upon itself to enact the method for implementation by directing Northern to establish a tariff that complies with the Commission's notion of what those regulations should be, rather than what DOW has said that they are and in spite of the obvious lack of authority for the Commission to establish and enforce such methods.

that administrative agencies cannot rule on constitutional issues. The question of whether the classification of customers and priority of implementation of the program discriminates against Crestbrook is a matter for the court. See for example, Popplewell's Alligator Dock No. I, Inc. v. Revenue Cabinet, Ky., 133 S.W.3rd 456 (2004). In fact, a court, has ruled that the implementation of the District's cross connection program is not discriminatory. See Kenton Circuit Court, Action No. 00-CI-02149, *Order Granting Plaintiff's Motion for Summary Judgment*, July 25, 2001, attached as exhibit 4.

For these reasons, The District asserts that its proposed tariff is valid, and is in conformity with all established DOW regulations and applicable Commission regulations.

Submitted by:

John N. Hughes
124 West Todd St.
Frankfort, KY 40601
Attorney for Northern
Kentucky Water District

Certificate:

I certify that a copy of this Response was served on Jeffrey Greenberger, Katz, Greenberger &b Norton LLP, 105 E. Fourth St., #400, Cincinnati, OH 45202, and Mark Dobbins, Tilford, Dobbins, Alexander Buckaway & Black LLP, 401 W. Main St. # 1400, Louisville, KY by first class mail, the 24th day of February, 2005.

John N. Hughes

EXHIBIT 1

BICKFORD
SECRETARY

PAUL E. PATTON
GOVERNOR

COMMOMWEALTH OF KENTUCKY
NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
DEPARTMENT FOR ENVIRONMENTAL PROTECTION
FRANKFORT OFFICE PARK
14 REILLY RD
FRANKFORT KY 40601

Richard
F.Y.I.

APR 4 1996

April 1, 1996

Mr. John Scheben, Jr.
Kenton County Water District #1
PO Box 17010
Covington, KY 41017

PWSID # 0590220
RE: Cross Connection Control

Dear Mr. Scheben:

Kentucky drinking water regulation 401 KAR 8:020, Section 2, paragraph 2, prohibits cross connections and requires the Kenton County Water District #1 to "determine if or where cross-connections exist and shall immediately eliminate them."

Your cross-connection control program was submitted to this office for review and was consistent with other cross connection programs in the Commonwealth of Kentucky, the AWWA guidelines and with the requirements of other states.

Almost all cross connection programs begin with the highest hazards affecting the largest number of people, as you are doing, and work down to the lowest hazards affecting the smallest number of people such as individual residences.

We have used your cross-connection control program as a model for other communities to use in establishing their programs.

Sincerely,

Don DeKoster
Plans Review Section
Division of Water

DDK:mrg

EXHIBIT 2

PUR Slip Copy
(Cite as: 1996 WL 765259 (N.Y.P.S.C.))

Re Mr. Robert and Ms. Laura Moore
Case 96-M-0673

New York Public Service Commission
December 10, 1996

STATE OF NEW YORK PUBLIC SERVICE COMMISSION

*1 At a session of the Public Service Commission held in the City of Albany on November 26, 1996

Before O'Mara, chairman, Zeltmann, Jerry, Jr., Cotter and Dunleavy, commissioners.

CASE 96-M-0673 -- Joint Petition filed by Mr. Robert Moore and Ms. Laura Moore for a Declaratory Ruling Concerning Niagara Mohawk Power Corporation's Assignment of Tariff Classification for Electric and Gas Service.

ORDER DENYING PETITION FOR A DECLARATORY RULING

(Issued and Effective December 10, 1996)

BY THE COMMISSION:

SUMMARY

Robert and Laura Moore, owners of a six-unit apartment building, seek a declaratory ruling that Niagara Mohawk Power Corporation's gas and electric tariffs, which assign the common space heating and common area lighting to Service Classification (SC)-2, Small General Service, rather than SC-1, Residential Service, violate their right to equal protection of the laws under the United States Constitution and discriminate among customers contrary to the provisions of Public Service Law (PSL) §65. Because we find that Niagara Mohawk's service classifications, as they pertain to the Petitioners, are rationally based on distinct types and purposes of the use of gas and electricity, we decline to issue such a ruling.

BACKGROUND

Robert and Laura Moore are the owners of a six-unit dwelling in Schenectady, New York and reside in one of the units. Each individual apartment receives separately metered electric service provided by Niagara Mohawk under SC-1, Residential Service. That particular service is not at issue here. Common areas, such as the

laundry and hallways, are served through a separate meter, and that common-area electricity service is assigned by Niagara Mohawk to SC-2, Small General Service. Gas for water heating and steam radiator heating for the entire building is provided through a single meter and is assigned by Niagara Mohawk to SC-2, Small General Service, rather than SC-1 for residential service.

On July 22, 1996, the Moores filed the instant Petition, in which they complain that Niagara Mohawk's service classifications violate subsections 2, 3, and 5 of PSL §65 and subsection 14 of PSL §66, as well as the **equal protection** clause of the 14th Amendment of the United States Constitution. The Moores concede that distinguishing between residential use and nonresidential use is a rational distinction for service classification purposes (Moore Petition at 4). However, the Moores assert that, because their building contains only dwelling units, all of the gas and electricity used within the building is used by 'residents' for 'residential use.' The Moores assert that gas and electricity **services** in multi-unit dwellings serve residential purposes whether there are one, two, three, or six units in the building. Consequently, there is no basis for distinguishing between a two-unit dwelling, which is classified under SC-1 in Niagara Mohawk's gas and electric tariffs, and a six- unit building, which is not eligible for SC-1 **service**.

*2 In response, Niagara Mohawk states that the Moores' assumption that all gas or electric services provided to a multi-occupancy building are for residentialuse is erroneous (Niagara Mohawk's Response at 4). Niagara Mohawk refers to the definition of 'residential customer' in §11.2(a)(2) of the Commission's Rules of Procedure (16 NYCRR) to assert that, 'In order to be properly considered as a residential customer, it is necessary that the gas and/or electric service provided be primarily used for the customer's own purposes. Conversely, if the service is primarily used by others, the use does not qualify as residential.' (Niagara Mohawk Response at 5). According to Niagara Mohawk, 'Services provided by a landlord to a tenant in an apartment building is [sic] an income producing expense incurred in a commercial activity.'Id. Noting that PSL §§65 and 66 provide that service classifications may be based upon the purpose for which service is used, Niagara Mohawk asserts that its service classifications are rationally based on residential versus nonresidential use and are not in violation of the Public Service Law.

The Moores submitted a 'rebuttal' to Niagara Mohawk's response on August 20 and August 29, 1996. In their rebuttal, the Moores point out that the definition of 'residential customer' in 16 NYCRR §11.2 is a somewhat arbitrary definition, which does not address the issue of whether similarly situated customers are receiving gas or electric service for 'residential purposes' under different service classifications and rates. The Moores reiterate that tenants of buildings having two units are similarly situated to tenants in buildings having four units, yet they receive that service through different service classifications. This distinction, the Moores argue, has no rational basis.

Niagara Mohawk filed a response to the Moores' rebuttal on August 30, 1996. Niagara Mohawk interpreted the Moores' rebuttal as challenging 16 NYCRR §11.2 and set forth a defense of that section of the regulations. In addition, Niagara Mohawk's response points out the distinction between service provided to an individual tenant in his own name versus service provided to landlords for the purpose of operating their apartment buildings and generating profits therefrom.

The Petitioners filed an additional rebuttal on September 2, 1996, in which they largely repeat the arguments previously made. They note that landlords of buildings containing only two or three units are also engaged in a profit- seeking enterprise but are nevertheless eligible for the SC-1 rate. They assert that it was not their intent to challenge the validity of 16 NYCRR §11.2. Finally, the Moores argue that the State of New York apparently intended to arrange preferential rates for gas and electricity supplied for the domestic use of individuals and, if so, individuals residing in buildings containing multiple units should be entitled to the same rate preference as individuals in single-unit dwellings.

DISCUSSION

*3 In considering this matter, we have relied not only upon the above- summarized pleadings of the Petitioners and Niagara Mohawk, but also upon our expertise in reviewing gas and electric tariffs generally, our understanding of Niagara Mohawk's gas and electric service classifications in particular, and our experience in executing the anti-discrimination provisions of the Public Service Law. We conclude that Niagara Mohawk's gas and electric service classifications, as set forth in its respective gas and electric tariff leaves, are rationally based as applied to Petitioners, and we therefore will deny Petitioners' request for a ruling declaring those service classifications to be invalid.

It is appropriate for a utility to classify service to multi-unit dwellings differently from service to single-family homes. The loads and characteristics of gas and electricity usage -- and their cost impacts -- can differ significantly between a multi-unit building, particularly a large one, and a single-family residence, [FN1] making inclusion of the services in a single service classification inappropriate. In addition to the differences in load and usage characteristics, the fact that service is provided to a landlord engaged in a profit-making enterprise rather than an individual for his own use is a reasonable basis for classifying types of service. For example, the Moores' provision of laundry facilities to their tenants can be likened to the operation of a laundromat which tenants would otherwise use, but which would not be eligible for service under SC-1.

As the Moores point out, Niagara Mohawk has not chosen to draw the line at single-family residences for inclusion in SC-1 Residential Service under its gas and electric tariffs. Rather, dwellings having two units are also eligible for electric service under SC-1, and dwellings containing up to three units are eligible for residential service under the SC-1 gas tariff. Whether the line for inclusion in SC-1 should be drawn between buildings containing two versus three units, or three versus four units, probably cannot be determined with absolute precision, but such precision is not required. It is often true that customers on either side of a dividing line between classifications, such as those based on a particular demand level, may appear to be similarly situated; nevertheless, the rate design scheme is not rendered unreasonable as a consequence. A long line of case law provides that a rate design scheme will not be disturbed by the courts if a rational basis can be found for such classifications. [FN2] A review of the history of Niagara Mohawk's gas and rate tariffs demonstrates that the service classifications at issue here have been scrutinized and found by us to be

reasonable and rationally based.

The gas service classifications, which include three-unit but not four-unit buildings in SC-1, have, according to Niagara Mohawk, existed at least since 1968. In a case dating from the mid-1970s, [FN3] in which the issue was raised by Mr. Moore, the Administrative Law Judge found:

*4 There was no evidence as to the original reason for making the distinction [regarding the number of units eligible for residential service] although [company witness] Mr. Chaney hazarded a guess that it came about as the result of conversion of older one-family residences into apartments. Mr. Chaney stated that, if he were designing the rate at the outset, he would have included all multi-unit residences in SC-2. However, he felt that NMP's break point was reasonable and did not recommend a change. [DPS Staff] Mr. Streeter felt that one or two families should be the limit for SC-1 residential service through a single meter. He was of the opinion, however, that there were insufficient data to make a final determination....' [FN4]

The Administrative Law Judge concluded that the single service, single meter concept was a good one but that the matter should be explored more fully than could be accommodated in that rate case. [FN5] The Commission adopted the ALJ's ruling on these issues, including the recommendation to study the matter further. [FN6] Consequently, no change was made at that time.

As for the electric tariffs, Niagara Mohawk's tariff limited SC-1 residential service to single-family dwellings until 1990. At that time, the company, Staff, and other intervenor parties, including the Public Utility Law Project (PULP), agreed to expand the SC-1 residential class to include two-family residences, at PULP's request. [FN7] The change was justified on the basis that two-family residences exhibited load characteristics that were more similar to the residential class than to other uses within the SC-2 service classification. [FN8] The accommodation to PULP in this regard was made as part of an overall settlement agreement.

Whatever the justifications for drawing the line around the residential class at one-, two-, or three-unit dwellings, the precise point at which the demarcation should be made is not presented by the Moores' petition. The Moores' building contains six units, and evidence and arguments presented by the Moores and the company in this matter or by other parties in past cases before us do not point to any reason for expanding the SC-1 residential class so widely as to include dwellings of as many as six units.

We note that, in 1974, Mr. Moore appeared as a party and testified regarding the identical issues raised in the present petition in Cases 26594, et al. At that time, according to the Recommended Decision, 'Mr. Moore contended that no reasonable basis for the distinction [between SC-1 and SC-2 according to the number of units in the building] had been shown and argued that all apartment buildings should be served under SC-1 since they are residential in nature. ' [FN9] Mr. Moore's argument was rejected by the Administrative Law Judge and the Commission at that time. In their present petition, the Moores offer no new evidence or reason for changing a decision made on an issue raised by them 22 years ago.

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As for the electric tariffs, Niagara Mohawk's tariff limited SC-1 residential service to single-family dwellings until 1990. At that time, the company, Staff, and other intervenor parties, including the Public Utility Law Project (PULP), agreed to expand the SC-1 residential class to include two-family residences, at PULP's request. [FN7] The change was justified on the basis that two-family residences exhibited load characteristics that were more similar to the residential class than to other uses within the SC-2 service classification. [FN8] The accommodation to PULP in this regard was made as part of an overall settlement agreement.

Whatever the justifications for drawing the line around the residential class at one-, two-, or three-unit dwellings, the precise point at which the demarcation should be made is not presented by the Moores' petition. The Moores' building contains six units, and evidence and arguments presented by the Moores and the company in this matter or by other parties in past cases before us do not point to any reason for expanding the SC-1 residential class so widely as to include dwellings of as many as six units.

We note that, in 1974, Mr. Moore appeared as a party and testified regarding the identical issues raised in the present petition in Cases 26594, et al. At that time, according to the Recommended Decision, 'Mr. Moore contended that no reasonable basis for the distinction [between SC-1 and SC-2 according to the number of units in the building] had been shown and argued that all apartment buildings should be served under SC-1 since they are residential in nature. ' [FN9] Mr. Moore's argument was rejected by the Administrative Law Judge and the Commission at that time. In their present petition, the Moores offer no new evidence or reason for changing a decision made on an issue raised by them 22 years ago.

CONCLUSION

*5 Based upon the foregoing, the Petitioners' request for a declaratory ruling in their favor should be denied.

The Commission orders:

1. The Petition of Robert and Laura Moore is denied.

2. This proceeding is closed.

FOOTNOTES

FN1 For example, utility service for multi-unit dwellings is normally used to heat and light common areas which require the installation of larger, more costly distribution facilities. The load characteristics of smaller multi-unit dwellings are more akin to a single-family residence.

FN2 See, e.g., New York State Council of Retail Merchants, Inc. v. Public Service Commission, 45 N.Y.2d 661 (1978).

FN3 Cases 26594, 26595 & 26596, Niagara Mohawk Power Corporation -- Rates.

FN4 Cases 26594, et al., Niagara Mohawk Power Corporation -- Rates, Recommended Decision of Hearing Examiner Furlong (issued December 11, 1974) at 64-65.

FN5 Id.

FN6 Opinion No. 75-4 (issued February 25, 1975), Cases 26594, et al..

FN7 Cases 29327, Temporary Rate Agreement (filed November 7, 1990), Appendix A, 'Joint Stipulation and Agreement on Revenue Allocation and Rate Design, ' approved by Commission Order, issued December 27, 1990.

FN8 Id.

FN9 Recommended Decision, Cases 26594, et al., supra, at 64.

END OF DOCUMENT

EXHIBIT 3

Northern Kentucky Water District

July 25, 2003

Ms. Donna S. Marlin
Department for Environmental Protection
Division of Water
Frankfort Office Park
14 Reilly Road
Frankfort Ky 40601-1189

Dear Ms. Marlin,

Thank you for meeting with the representatives of the Northern Kentucky Water District on July 2, 2003 to discuss cross-connection control. Please provide answers to the following questions that the District has prepared regarding the Division of Water's requirements related to cross-connection control:

1. Is a dual check valve, that is a valve that cannot be tested, an approvable device for the elimination of a cross connection as required by 401 KAR 8:020 section 2(2)?

   a. If yes, is it approvable for all applications?
   b. If not approvable for all applications, what are the limitations for its use, i.e. customer classification, meter size, type of potential hazard?

2. The definition for cross connection in 401 KAR 8:010 section 1(32) refers to two otherwise separate systems, one containing potable water and the other of unknown or questionable safety. Does every customer connection to the District's water system constitute a physical connection between a potable source (the District) and unknown source (the customer)?

   a. What criteria would a customer's system have to meet to be considered potable?

3. Does the Cabinet consider a residential facility with multiple units served through a meter larger than two inches, i.e. a triplex or larger residential apartment building, with no other source of increased risk such as a swimming pool, commercial business operations or separate fire suppression system, to be a greater risk for cross connection contamination than a single family residence served through a 5/8 inch meter?

Northern Kentucky Water District • 3049 Dixie Highway P.O. Box 17010 • Covington, Kentucky 41017
859-578-9898 • 859-578-5456 Fax

a. What are the Cabinet's criteria for assessing potential degree of hazard from cross contamination?
b. Is meter size and volume of consumption a factor in assessing degree of hazard?
c. If all other factors were equal, would meter size alone constitute a greater potential for cross contamination?

4. To comply with the Cabinet's cross connection elimination regulations, must the device be the first device (connection) on the customer's side of the meter?

a. Does the Cabinet require that the utility own and maintain the cross connection device or is the installation, ownership and maintenance of the device a matter for the utility to determine?

Thank you for your assistance in this matter. Please feel free to contact me at (859) 578-5458 If you have any questions.

Sincerely,

Richard Harrison

Richard Harrison
Vice President of
Engineering & Distribution

Northern Kentucky Water District

August 26, 2003

Ms. Donna S. Marlin
Department for Environmental Protection
Division of Water
Frankfort Office Park
14 Reilly Road
Frankfort Ky 40601-1189

Dear Ms. Marlin,

Thank you for delaying your response to the Northern Kentucky Water District's July 25, 2003 correspondence requesting guidance for its cross-connection control program. The Northern Kentucky Water District is in the process of revising the cross-connection control portion of the District's tariff that is filed with the Kentucky Public Service Commission to comply with the PSC's order dated July 23rd, 2003. In that order, which is attached, it references the Division of Water's Regulations and Statutes. We would appreciate input from your organization before we file our amended tariff, which is due September 20, 2003.

Question 1 of the District's July 25, 2003 letter, may be viewed as being too narrowly focused and confusing. We want to clarify that a residential dual check valve as referenced in the United States Environmental Protection Agency's Cross-Connection Control Manual is testable by removing and inspecting the device. We further want to clarify that when we reference "dual", we are referring to a device that is not furnished with test cocks and gate valves versus "double", which is furnished with test cocks and gate valves for in line testing.

To avoid limiting the District's options and the Division of Water's scope of review of the District's proposed use of a cross connection prevention device, the District requests that the Division of Water answer revised question 1 listed below instead of Question 1 that was included in the July 25, 2003 letter.

Northern Kentucky Water District • 3049 Dixie Highway P.O. Box 17010 • Covington, Kentucky 41017
859-578-9898 • 859-578-5456 Fax

1. Is a residential dual check valve an approvable device for residential customers?

    a. If yes, because there are a number of types of valves called "dual check", it would be helpful if you would provide a definition of the type of dual check valve that is approvable. For any device to be included in the tariff applicable to all residential customers that must be filed with the Public Service Commission, it must be one approvable by your Department.

We have enclosed a copy of the July 25, 2003 letter. Please provide answers to revised question number 1 listed above and questions 2 through 4, which are included in the enclosed copy of the letter that was sent dated July 25, 2003.

Thank you for your assistance with this matter. Any information or guidance that you can provide, in a timely manner, will be greatly appreciated.

Sincerely,

Richard Harrison

Richard Harrison
Vice President of
Engineering & Distribution

HENRY C. LIST
SECRETARY

PAUL E. PATTON
GOVERNOR

COMMONWEALTH OF KENTUCKY
NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET
DEPARTMENT FOR ENVIRONMENTAL PROTECTION
FRANKFORT OFFICE PARK
14 REILLY RD
FRANKFORT KY 40601

September 24, 2003

Mr. Richard Harrison
Vice President of Engineering and Distribution
Northern Kentucky Water District
3049 Dixie Highway
P.O. Box 17010
Covington, Kentucky 41017

Dear Mr. Harrison,

This is in response to your letters dated July 25, 2003 and August 26, 2003 concerning cross-connection control. At your request, we waited until the August letter was received before replying. In response to your specific questions, including the revised question 1, we offer the following:

1. No, not as you have explained it.

1. a. A residential check valve for cross connection control must be readily testable while in line, without requiring removal for physical examination.

2. Yes, at least potentially.

2.a. 401 KAR 8:010 Section 1(88) defines "Potable water" as "water which meets the provisions of 401 KAR Chapter 8, the quality of which is approved by the cabinet for human consumption." Therefore, a customer which is another public water system in compliance with drinking water regulations would be a potable system. Otherwise, the Kentucky Division of Water, in the absence of a problem, allows the local public water system to determine what degree of safety is necessary in connecting to their customers.

3. Yes, larger service lines serving more people would be a higher risk than the typical single family residence since there are more people to potentially create an inadvertent dangerous cross connection, and the larger line would allow a more rapid rate of contamination.

3.a. The Kentucky Division of Water, in the absence of a problem, allows the local public water system to determine what degree of safety is necessary in connecting to their customers.

3.b. These criteria would appear to be logical concerns for a local public water system to use in assessing the risk for a cross connection.

3.c. Yes, a larger connection could allow more rapid contamination in the case of loss of, or reversal, of water pressure.

4. This is an issue for the public water system to determine. The Cabinet takes no position so long as potential contamination is contained.

4.a. Again, this is a determination to be made by the public water system, in consultation with the Public Service Commission if applicable.

I hope this letter answers the questions that you raise. Thank you for the opportunity to clarify the Cabinet's position on this matter. If you have further questions, or need additional clarification, please feel free to contact me.

Sincerely,

Donna S. Marlin

Donna S. Marlin, Manager
Drinking Water Branch

DSM:RS

C: Facility File
Florence Regional Office

EXHIBIT 4

COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
FOURTH DIVISION
CASE NO. 00-CI-02149

NORTHERN KENTUCKY WATER SERVICE DISTRICT — PLAINTIFF

v.

CRESTBROOK PROPERTIES, LLC — DEFENDANT

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

FINDINGS OF FACT

This cause was heard on the Plaintiff's Motion for Summary Judgment. The Court, being sufficiently advised, holds there is no genuine issue as to any material fact concerning this matter. Plaintiff's Cross Connection Control Policy was adopted by the Water Service District to implement a regulation of the Kentucky Natural Resources and Environmental Protection Cabinet, and approved by the Public Service Commission. Defendant, a multi-family account with the Water Service District, admits that the Policy applies to multi-family accounts and is valid as applied to those accounts.

CONCLUSION OF LAW

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.

This is a final and appealable order and there ~~is no just~~ cause for delay.

Patricia M Summe

PATRICIA M. SUMME, JUDGE

Copies to:

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50 E. RiverCenter Blvd., Ste. 650
Covington, KY 41011
Counsel for Plaintiff

Carlo R. Wessels, Esq.
John Jay Fossett, Esq.
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1881 Dixie Highway, Ste. 350
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Counsel for Defendant

COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
FOURTH DIVISION
CASE NO. 00-CI-02149

NORTHERN KENTUCKY WATER SERVICE DISTRICT — PLAINTIFF

v.

CRESTBROOK PROPERTIES, LLC — DEFENDANT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, the Northern Kentucky Water Service District, by counsel, and pursuant to Rule 56 of the Kentucky Rules of Civil Procedure moves this Court to enter summary judgment for the Plaintiff on the grounds that there is no genuine issue as to any material fact, and the Plaintiff is entitled to judgment as a matter of law.

A Memorandum of Law in support of this Motion is attached hereto.

Respectfully submitted,

H. Lawson Walker II (KBA #73807)
Rachel Hamilton (KBA #87409)
FROST BROWN TODD LLC
50 E. RiverCenter Blvd., Suite 650
Covington, KY 41011
(859) 431-5550
(859) 431-2191 - Facsimile
Counsel for Plaintiff

NOTICE

Please take notice that the foregoing Motion For Summary Judgment will come on for hearing before the Honorable Patricia Summe on Tuesday, May 21, 2001, at the hour of 9:00 a.m., in the Kenton Circuit Court, Fourth Division, Kenton County Courthouse, 230 Madison Avenue, Covington, Kentucky or as soon thereafter as counsel may be heard.

H. Lawson Walker II

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion for Summary Judgment was served upon the following by U.S. first-class mail, postage pre-paid, on this the 25th day of April, 2001:

Carlo R. Wessels, Esq.
John Jay Fossett, Esq.
James P. Walsh, Esq.
1881 Dixie Highway, Suite 350
Fort Wright, KY 41011

Counsel for Defendant

H. Lawson Walker II

COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
FOURTH DIVISION
CASE NO. 00-CI-02149

NORTHERN KENTUCKY WATER SERVICE DISTRICT — PLAINTIFF

v.

CRESTBROOK PROPERTIES, LLC — DEFENDANT

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, the Northern Kentucky Water Service District, by counsel, submits this Memorandum in support of its Motion for Summary Judgment.

I. Introduction

The issue in this matter is whether Defendant, a multi-family account, must install a cross connection control prevention device to comply with Plaintiff's Cross Connection Policy, which was adopted by Plaintiff and approved by the Public Service Commission in order to implement a regulation of the Kentucky Natural Resources and Environmental Protection Cabinet.

II. Statement of Facts

Plaintiff is a water service district organized pursuant to KRS Chapter 74 and existing under the laws of the Commonwealth of Kentucky, which provides the public water supply to Defendant, a multi-family account. (Complaint ¶ 1, Defendant's Answer and Counterclaim ¶ 2). On or about July 1, 1997, Plaintiff filed a Cross Connection Control Policy (the "Policy") with the Public Service Commission of Kentucky to eliminate cross connections within its public

water system in order to comply with the requirements of 401 KAR 8:020 §2(2) and 807 KAR 5:066 §3(1). (Complaint ¶ 6; Defendant's Answer and Counterclaim ¶ 4). The Policy requires all existing commercial, industrial, multi-family, and governmental accounts to comply with the Plaintiff's standards for cross connection control upon notification from the Plaintiff. (Complaint ¶ 7; Defendant's Answer and Counterclaim ¶ 4). These facts are undisputed.

Defendant denies that it is required to install a cross connection prevention device. (Defendant's Answer and Counterclaim ¶ 5). But Defendant does not dispute that it is an "existing commercial, industrial, multi-family, [or] governmental account" within the meaning of the Policy. (Defendant's Answer and Counterclaim ¶ 5).

Defendant admits receiving each of the letters referenced in Plaintiff's Complaint. (Complaint ¶¶ 9, 11, 12, and 13; Defendant's Answer and Counterclaim ¶¶ 6, 8, and 9). These letters were sent to Defendant in compliance with the Policy, which requires that notices of pending inspection, which are prioritized on the basis of meter size and water consumption, be sent to owners, lessees, and occupants prior to the inspection. (*See* Complaint: Exhibit 1, Sheet 28). In the event that the Water Service District finds a deficiency, an existing commercial, multi-family, industrial or governmental account must install a cross connection device within six months of notice by the Water Service District. (Complaint: Exhibit 1, Sheet 28). Defendant admits that it did not, and has not, complied with the requirements of the Policy. (Complaint ¶ 14; Defendant's Answer and Counterclaim ¶ 10).

III. ARGUMENT

Summary judgment may be granted when there is no genuine issue as to any material fact, thereby entitling the moving party to judgment as a matter of law. *Steelvest v. Scansteel Service Ctr.*, 807 S.W.2d 476 (Ky. 1991).

A. Plaintiff is entitled to relief because the Policy is valid as applied to multi-family accounts.

As a water service district organized pursuant to KRS Chapter 74, Plaintiff is authorized to "do all acts necessary to carry out the work" of the Water Service District. KRS 74.070. Plaintiff is also subject to regulation by the Public Service Commission, which requires Plaintiff to "conform to all legal requirements of the Kentucky Natural Resources and Environmental Protection Cabinet for construction and operation of its waster system as it pertains to sanitation and potability of the water." 807 KAR 5:066 §3(1). Consequently, Plaintiff must comply with 401 KAR 8:020 §2(2), which states, in its entirety:

> Cross connections prohibited. 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 or where cross connections exist and shall immediately eliminate them.

Contrary to Defendant's assertion, 401 KAR 8:020 §2(2) does not require Plaintiff to "bear the cost of eliminating cross-connections." (Defendant's Answer and Counterclaim ¶ 5). Plaintiff is only required to maintain its lines within the street right of way, or up to the customer's property line. 807 KAR 5:066 §12(1)(b). Moreover, pursuant to the Public Service Commission regulations, it is the customer's responsibility to:

> furnish and lay the necessary pipe to make the connection from the point of service to the place of consumption and the [customer] shall keep the service line in good repair and *in accordance with such reasonable requirements of the utility as may be incorporated in its rules and administrative regulations.*

807 KAR 5:066 §12(2) (*emphasis added).*

In order to comply with the Natural Resources and Environmental Protection Cabinet's regulation 401 KAR 8:020 §2(2), Plaintiff filed its Policy with the Public Service Commission on July 1, 1997. Defendant admits that the Policy requires all existing commercial, industrial, multi-family, and governmental accounts to comply with the Plaintiff's standards for cross connection control upon notification from the Plaintiff. (Complaint ¶ 7; Defendant's Answer and Counterclaim ¶ 4). Likewise, Defendant does not challenge Plaintiff's authority to promulgate the Policy as it relates to commercial, industrial, governmental and multi-family accounts, such as Crestbrook Properties, LLC. (*See generally* Defendant's Answer and Counterclaim). Since Defendant does not dispute the validity of the Policy and does not dispute that it applies to multi-family dwellings, there is no material issue of fact to be decided in this case. Consequently, Plaintiff is entitled to relief as a matter of law and Defendant must be ordered to comply with the Policy and install a cross connection control prevention device.

B. Defendant's Counterclaim must be dismissed because it fails as a matter of law.

Defendant instead alleges that the Policy "arbitrarily, capriciously, and irrationally requires multi-family dwelling customers to install cross connection devices ("the Devices"), yet exempts similarly situated residential customers from having to install the Devices." (Defendant's Answer and Counterclaim ¶ 5). Simply put, Defendant's argument is not whether the Policy should exclude multi-family accounts, but whether the Policy must include residential, or single-family, accounts to be enforceable against the Defendant.

1. Exempting single-family accounts from the requirement to install cross connection devices does not violate constitutional or statutory provisions.

Cross connections may result from any connection, regardless of whether the source is a single-family, commercial, multi-family, governmental, or industrial account and, for that

reason, the Policy prohibits any cross connection, regardless of whether the account is a single family, commercial, multi-family, industrial or government account. (Complaint: Exhibit 1, Sheets 28-9).

Plaintiff has the authority to "make and enforce reasonable rules and regulations" necessary for the operation of public water system, *Hazard v. Minge,* 92 S.W.2d 768, 769 (Ky. 1936), especially, where, as here, the protection of the public water system is necessary to protect public health. *See also Adams, Inc. v. Louisville and Jefferson County Bd. Of Health,* 439 S.W.2d 586, 591 (Ky. 1969) (*citing Roe v. Commonwealth, Ky.,* 405 S.W.2d 25, 27 (Ky. 1966) (test for the validity of a regulation is its "reasonableness").

Constitutional rights are not violated by a political subdivision, such as a water district, requiring compliance with public health regulations. *Kentucky v. Do, Inc.,* 764 S.W.2d 519, 521 (Ky. 1984). In determining whether an administrative policy or rule is "reasonable," a court will grant broad discretion to an agency carrying out its administrative duties. *Sanitation Dist. No. 1 v. Campbell,* 249 S.W.2d 767, 770 (Ky. 1952). And, notably, regulations enacted to protect public health "are liberally construed in order to effectuate their purpose." *Id.* Therefore, "[t]he validity of a statute, ordinance or regulation is to be determined by its general purpose and efficiency to accomplish the end desired rather than its effect in a particular application or operation." *Id.*

The Natural Resources and Environmental Protection Cabinet has determined that requiring commercial, industrial, multi-family and governmental accounts to install cross connection control devices is a reasonable and efficient method of protecting public health and maintaining the integrity of the public water system. Plaintiff's Policy has been implemented to comply with the Natural Resources and Environmental Protection Cabinet's regulation 401 KAR

8:020 §2(2). Consequently, exempting single-family accounts from the requirement to install cross connection devices does not violate constitutional or statutory provisions.

2. Exempting single-family accounts from the requirement to install cross connection devices is not arbitrary, capricious, or an abuse of discretion.

Pursuant to KRS 278.030(3),

> Every utility may employ in the conduct of its business suitable and reasonable classifications of its service, *patrons* and rates. The classifications may, in any proper case, take into account the nature of the use, the quality used, the time when used, the purpose for which used, and any other consideration.

(*emphasis added*). Employing distinctions between classes of patrons is acceptable, especially here. Based on the criteria set forth above, Defendant is more like a commercial account than a single-family account. Since Plaintiff may reasonably maintain distinctions between classes of its patrons, including the Defendant, there is no violation of KRS 278.170, which prohibits unreasonable preference or advantage only "as to rates or service." The requirement to install a cross connection device does not alter the rate paid by, or services provided to, customers of the water service district.

3. Plaintiff's classification of its patrons has a fair relationship to the purpose of the policy and is not arbitrary or capricious.

Unlike taxation issues, classification of users of property do not "fall within the strictness of the constitutional provisions requiring uniformity of taxation." *Louisville & Jefferson County Metropolitan Sewer Dist. V. Joseph E. Seagram & Sons*, 211 S.W.2d 122, 126 (Ky. Ct. App. 1948). All that is required is that the classifications of property users, like Plaintiff's customers, have a "fair relationship to the grounds or classifications." *Id.* at 127. For that reason, classifications based on a "natural and reasonable basis, with a logical relation to the purpose and

objectives of the authority granted, do[] not offend the principles of equal rights under law." *Id.* at 125.

These principles were applied by the court in *Louisville & Jefferson County Metropolitan Sewer Dist. V. Joseph E. Seagram & Sons*, which considered whether the Metropolitan Sewer District could charge different rates for customers who lived outside the city limits. *Id.* There, the court found that Sections 2 and 3 of the Kentucky Constitution were not violated by different rates for customers within the city and those who resided in the county. In deciding questions concerning an agency's classification system, the court stated that "courts will exercise caution in declaring such an act invalid because it rests upon discretion vested in public officers, chosen directly or indirectly by the people." *Id.* at 125. Consequently, establishing reasonable classifications, as Plaintiff has done, is not arbitrary or capricious.

The Policy does not distinguish between multi-family accounts, but treats all within that class equally and without distinction. *Commonwealth v. Moyers*, 272 S.W.2d 670,672 (Ky. Ct. Appeals 1954) (it is arbitrary and unreasonable to exclude one or more of a class without a reasonable basis). Defendant only alleges that exempting single-family accounts from installing cross connection control devices is arbitrary and capricious. As previously established, exempting single-family accounts from installing cross connection control devices is a legitimate exercise of Plaintiff's authority. Defendant makes no allegation that Plaintiff is exempting other multi-family accounts, but not Defendant, from installing cross connection control devices. Consequently, Defendant has not established that Plaintiff has excluded any other "similarly situated" multi-family account. Therefore, Plaintiff's classifications are not arbitrary or capricious.

Moreover, because enforcement priorities are generally left to the discretion of the Agency, *N. Kentucky Emergency Med. Ser., Inc. v. Christ Hosp. Corp.*, 875 S.W.2d 896, 899 (Ky. Ct. App. 1993), and, because Plaintiff has made a reasonable distinction between single-family accounts and multi-family, commercial, industrial and governmental accounts, Plaintiff has not acted arbitrarily in enforcing its regulations.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment must be granted and the Defendant's Counterclaim dismissed.

Respectfully submitted,

/s/ Lawson Walker II

H. Lawson Walker II (KBA #73807)
Rachel Hamilton (KBA #87409)
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