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PUBLIC SERVICE
COMMISSION

Commonwealth of Kentucky
Before the Public Service Commission

In the Matter of:

APPLICATION OF NORTHERN KENTUCKY)
WATER DISTRICT FOR A CERTIFICATE OF)
CONVENIENCE AND NECESSITY FOR THE)
CONSTRUCTION OF SUB DISTRICT F WATER)
MAIN EXTENSIONS, FINANCING AND)
SURCHARGE)

Case No. 2006-00135
315

ATTORNEY GENERAL'S WRITTEN MEMORANDUM
REGARDING LEGALITY OF PROPOSED SURCHARGE

KRS 278.280 authorizes the Commission to determine the reasonableness of a utility's main extension and extension of service policies. KRS 278.280 provides the Commission with the power to determine a prospective customer's petition to compel the extension of service. The Commission's authority to determine service extension cost assignment and corresponding manner of payment issues is a power necessarily implied through KRS 278.280.¹ Northern Kentucky Water District's proposal of a surcharge for collection of an assignment of cost for the funding of a main extension project is lawful.

¹ In so stating, the Attorney General does not abandon his interpretation of the Franklin Circuit Court's recent Order in *Comm. ex rel. Stumbo v. Public Service Commission*. Specifically, that Order finds that there is neither express statutory nor necessarily implied authority for the AMRP surcharge. The surcharge at issue in the present case pertains to the Commission's implied authority to implement KRS 278.280 rather than any theory of general inherent powers under KRS 278.030 and KRS 278.040. As the Court's Order reflects, the Commission's theory of general inherent authority for the AMRP subsumes a specific statutory process. While the Court denies the PSC any ability to expand jurisdiction under a theory of general inherent power, it did not address much less set aside the legitimate exercise of implied authority under KRS 278.280 for new service extension and cost assignment determinations.

PROCEDURAL OVERVIEW (AND BACKGROUND)

On 22 June 2006, Northern Kentucky Water District filed a Petition seeking an Order authorizing construction of various main extensions in an area known as Sub-District F. The purpose of the project is the extension of 8-inch and 12-inch water mains in order to make water available to approximately 136 persons who do not currently have water service.²

Section XIV of the District's tariffs contains the framework for mainline extensions, and there are three separate scenarios. For each scenario, Section XIV sets forth the District's responsibility for the cost of the extension, the applicants' (or prospective customers') responsibility, and a refund provision.

As described by the District in its Petition for rehearing, the terms of the relevant tariff provision (Section XIV-C) allows the extension of a main but only if the person seeking service pays for 100 feet of the main extension based on the cost of an 8-inch main.³ The cost to each person under such a scenario ranges from \$4,200 to \$5,200, and District requires a lump sum payment at the time of the application for service.⁴

The District believes that extension of service requiring a lump sum payment in this range is cost prohibitive for most of the persons without service.⁵

² Petition, Exhibit A (The project offers enhancement to water quality and fire protection, but these are incidental benefits. The driving force for this project – *raison d'être* – is the extension of mains in order to provide water service to person without service. Also see Order, 20 September 2006, Numbered Paragraphs 5, 9, and 10.)

³ Petition for rehearing, 3 October 2006, page 2;

⁴ Petition for rehearing, 3 October 2006, page 2; NKWD response to PSC (19 Oct 06) Item 4.

⁵ Petition for rehearing, 3 October 2006, page 2.

Thus, District is not seeking to recover the full amount of the financing for the construction of the extensions.⁶ Further, the District is seeking to recover the costs that are the prospective customers' responsibility through a surcharge rather than a lump sum payment. Per the District, this surcharge allows the District to make the main extensions financially feasible.⁷

On 20 September 2006, the Commission entered an Order authorizing the construction of the project. It, however, denied the surcharge proposal. The PSC notes the following conclusions: No rational basis exists to support the proposed creation of the sub-district as drawn; Any rate based solely on a customer's location within the sub-district is unreasonable; The District bears the burden to demonstrate that the proposed rate or charge is reasonable; and The District failed to demonstrate that the formulation and calculation of the proposed surcharge results in fair and reasonable rates.⁸

To be clear, the Commission did not deny the surcharge due to any concern over the PSC's jurisdiction or authority to approve a surcharge for funding (in this instance, partially funding) a mains extension project. Further, at the time of the Commission's 20 September Order, there was no objection by the Attorney General to the approval of the surcharge nor was there any challenge to the Commission's jurisdiction to authorize the charge. The Commission denied the surcharge because the District had not met its burden.

⁶ Order, 20 September 2006, Numbered Paragraph 19.

⁷ Petition for rehearing, 3 October 2006, page 1; Prefiled Supplemental Testimony of Richard Harrison, P.E.; also NKWD response to PSC (19 Oct 06) Item 4.

⁸ Order, 20 September 2006, Numbered Paragraphs 2, 3, 4, and 5.

The District sought rehearing, and on 19 October 2006, the Commission entered an Order granting rehearing. On 13 July 2007, the Commission on its own motion set an informal conference and public hearing. The Order, in part, states: "Before the Commission can approve the applications, it must be satisfied that the surcharge is fair, just, and reasonable and does not unfairly discriminate in comparison to the rates charged to NKWD's other customers."⁹ Again, the qualm for the surcharge was the sufficiency (or lack thereof) of the District's evidence. There was no hesitancy relating to jurisdiction/authority.

On 1 August 2007, the Franklin Circuit Court entered an Order and Opinion in *Commonwealth of Kentucky, ex rel. Gregory D. Stumbo, Attorney General v. Public Service Commission and Union Light, Heat and Power Company, Inc.* (Civil Action 06-CI-0269). On 28 August 2007, the Commission entered an Order requiring the parties to state whether, in light of the August 1st Order and Opinion, the proposed surcharge is lawful.

THE COMMISSION HAS THE AUTHORITY TO DETERMINE THE AMOUNT THAT A UTILITY MAY COLLECT FROM A PROSPECTIVE CUSTOMER FOR AN EXTENSION OF SERVICE, AND IT HAS THE AUTHORITY TO DETERMINE THE MANNER IN WHICH THE UTILITY MAY COLLECT THE AMOUNT.

The issue of whether the Commission should, in fact, approve the surcharge that it denied on 20 September 2006 remains undetermined. Therefore, questions concerning the sufficiency of evidence supporting the request and whether the District has met its burden of proof are for another time.

⁹ Order, 13 July, 2007, page 2 (footnote omitted).

At hand is the question of whether the Commission has the authority (or jurisdiction) to authorize this surcharge. The Attorney General submits that it does have the power. Further, *Commonwealth of Kentucky, ex rel. Gregory D. Stumbo, Attorney General v. Public Service Commission and Union Light, Heat and Power Company, Inc.* is not relevant to this proceeding. Finally, even if the Commission determines that the case is relevant, then the position of the Attorney General is that Commission approval of this surcharge request would not produce a result that is unlawful or unreasonable.

1. The Commission has the authority to determine the amount that a utility may collect from a prospective customer for an extension of service, and it has the authority to determine the manner in which the utility may collect the amount.

KRS 278.280 addresses the Commission's powers regarding the extension of service. Of particular note is the fact that the Commission assesses this statute as the sole statutory basis for its administrative regulation that governs the extension of service to prospective customers. See 807 KAR 5:066. Hence, KRS 278.280 governs all questions relating to the extension of service including by implication the manner in which the utility will collect a cost assignment.

Through Section 11 of 807 KAR 5:066, the Commission sets forth a comprehensive framework addressing cost assignments. For example, the utility

must bear the entire burden of the costs for an extension of 50 feet or less.¹⁰ The utility may require the applicants to pay costs in excess of 50 feet.¹¹

Suffice to convey, the Commission regulation governing the extension of service does not simply cover the question of when to extend service. Section 11 addresses in clear terms the cost assignments for the funding of an extension of service. Additionally, Section 11 also permits, with prior Commission approval, extensions under different arrangements.

It is clear: the Commission considers the assignment of funding costs as part and parcel of its main extension/extension of service framework. Further, KRS 278.280 (2) is the sole source of authority that the Commission relies upon for power to assign costs. The Attorney General agrees. KRS 278.280 (2) - and this statute alone - permits the assignment of costs for extensions of service.

Because KRS 278.280 permits the assignment of costs, then it logically follows that the statute also carries with it the authority to determine the manner in which a utility collects a cost assignment. Consequently, it is unremarkable that the Commission, through Section 11, also specifies refund provisions. Accordingly, the collection of the cost assignment through a lump sum or a surcharge is similar consideration necessarily implied through the same statute.

The judiciary recognizes that the Public Service Commission's power includes authority that exists by necessity or fair implication. *Boone County Water*

¹⁰ 807 KAR 5:066 Section 11 (1)

¹¹ 807 KAR 5:066 Section 11 (2) (a).

District v. Public Service Commission, 949 S.W.2d 588, 591 (Ky. 1997). The express grant under KRS 278.280 authorizing the Commission to determine questions relating to the extension of service - including the ability to order an extension of service - carries with it the implied grant of power necessary to carry out the statute (i. e., assign costs and specify manner of payment).

With regard to the Commission's power to determine the manner in which the District will collect the funding requirement, the Attorney General submits that the Commission's ability to determine manner of payment issues in connection with the extension of service is a necessarily implied power under KRS 278.280. He notes, however, the Commission's implied authority is very narrow. See *Public Service Commission v. Cities of Southgate, Highland Heights, etc.*, 268 S.W.2d 19, 21(Ky 1954). Thus, the Commission's power to determine the manner of payment issues under this analysis is strictly limited to extensions of service. Compare 807 KAR 5:066 (which sets forth KRS 278.280 (2) as sole statutory authority/basis for this administrative regulation).

The manner of payment determination does not have to be customer specific. While it is the case that refunds under Section 11 are customer specific, this is matter of Commission discretion rather than legislative mandate. Therefore, while the District's extension surcharge is property specific rather than customer specific, it does not follow that the result is outside the Commission's discretion. See 807 KAR 5:066 Section 11 (4) (extensions permissible under different, pre-approved, arrangements).

As with cost assignment under Section 11 (that does not rely upon any statute other than KRS 278.280 as its basis, e.g. KRS 278.040), the source of authority for a determination as to the manner of payment is wholly within KRS 278.280. Because the Commission determines the reasonableness of extension of service policies and extension of service requests, it follows that the determination of the reasonableness of all charges and cost assignments under KRS 278.280 is without resort to any other statute.¹²

The General Assembly, through KRS 278.280, empowers the Commission to balance the interests of prospective customers and the utility with regard to questions concerning the extension of service. There is no challenge to the Commission's power to determine, as between a utility and its prospective customers, the cost assignment for funding a main extension. The Attorney General has no challenge to the Commission's exercise of power to determine manner of payment questions that relate to the corresponding cost assignment.

2. *Commonwealth of Kentucky, ex rel. Gregory D. Stumbo, Attorney General v. Public Service Commission and Union Light, Heat and Power Company, Inc.*, is not relevant.

Commonwealth of Kentucky, ex rel. Gregory D. Stumbo, Attorney General v. Public Service Commission and Union Light, Heat and Power Company, Inc. is not relevant to this proceeding. The surcharge in that case is for an accelerated mains replacement cost recovery program, and it does not relate in any way to

¹² For example, a petition to compel an extension under KRS 278.280 (3) is a right separate and distinct from matters that fall under KRS 278.260.

the balancing of interests under KRS 278.280 otherwise inherent in extension of service determinations. Without a recitation of the entire argument applicable to that matter, there is no statutory authority, express or implied, for the AMRP surcharge. In plain terms: It is a completely separate matter.

3. There is no unlawful or unreasonable result.

The Attorney General notes that Northern Kentucky Water District's surcharge is clearly for the purpose of the extension of service. The Attorney General submits that the Commission's authority to approve the charge is necessarily implied through KRS 278.280. As with 807 KAR 5:066 Section 11, KRS 278.280 is the sole basis of authority for the approval of the charge.

If the Commission approves the charge under any other theory, it will approve it over the objection of the Attorney General (and should note the objection). There is, however, no duty for the Attorney General to seek relief from such a determination because the Attorney General considers the result as otherwise lawful and reasonable. See KRS 278.430 compare with *Duquesne Light Company v. Barasch*, 488 U S 299, 109 S Ct 609, 102 L Ed 2d 646 (1989)(a theoretical issue regarding the method that produces a result will not render an otherwise lawful result subject to attack). Otherwise stated, regardless of any difference in view as to why the Commission has authority to approve the charge, the Attorney General's position is that the Commission may approve this charge. The Attorney General limits the analysis to this charge alone. Again, as noted, whether the Commission should approve the charge has yet to be determined.

WHEREFORE, for purposes of the record in this case (and for any other cases in which this position is relevant), the Attorney General submits his Written Memorandum outlining his position.

Respectfully submitted,

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Certificate of Service and Filing

Counsel certifies that an original and ten photocopies of this pleading were served and filed by hand delivery to Beth O'Donnell, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; furthermore, it was served by mailing a true and correct of the same, first class postage prepaid, to John N. Hughes, 124 West Todd Street, Frankfort, Kentucky 40601, all on this 12th day of September, 2007.

David Edward Spenard

Assistant Attorney General