

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

WATER SERVICE CORPORATION OF)
KENTUCKY)
_____) CASE NO. 2007-00092
ALLEGED VIOLATION OF KRS 278.160)

O R D E R

This case involves an investigation of alleged violations of KRS 278.160 by Water Service Corporation ("Water Service"). At issue is whether that water utility assessed and collected rates for service that were not set forth in its filed rate schedule. Finding in the affirmative, we assess the water utility a civil penalty of \$750.

STATEMENT OF THE CASE

Water Service, a Kentucky corporation organized pursuant to KRS Chapter 271B, owns and operates facilities used to treat and distribute water to approximately 7,354 customers in Bell and Hickman counties, Kentucky.¹ It is a utility subject to Commission jurisdiction.²

Kentucky Water Service Company, Inc. ("Kentucky Water") originally owned many of the facilities that comprise Water Service's present operations. Commission

¹ *Annual Report of Water Service Corporation of Kentucky to the Kentucky Public Service Commission for the Year Ended December 31, 2007* at 5, 30.

² KRS 278.010(3)(d); KRS 278.040.

records indicate that Kentucky Water, as early as 1947, provided water service to municipal fire hydrants pursuant to a separate rate schedule for such service.³ In 1949, it began providing service to private sprinkler systems and hydrants under a private fire protection rate schedule.⁴ In subsequent years, it filed revisions to these rate schedules.⁵

In 1985, Aqua Corporation (“Aqua”) acquired Kentucky Water as a wholly owned subsidiary.⁶ The Commission, upon approving the proposed acquisition, required Aqua to adopt Kentucky Water’s existing rates, rules, and regulations.⁷

Five years later, in Case No. 89-340,⁸ Aqua sought to adjust its general service rates, revise certain rate schedules, and assess a surcharge. At the conclusion of this proceeding, the Commission accepted a settlement agreement between the parties to the case and established new general service rates.⁹ Neither the settlement agreement

³ Kentucky Water Service Company, Inc., Municipal Fire Hydrants Rate Schedule, P.S.C. No. 1, Original Sheet No. 1 (effective Dec. 22, 1947; filed Jan. 15, 1954).

⁴ Kentucky Water Service Company, Inc., Private Fire Protection Schedule, P.S.C. No. 1, Original Sheet No. 1 (effective Nov. 9, 1949, filed Jan. 15, 1954).

⁵ See, e.g., Kentucky Water Service Company, Inc., Municipal Fire Hydrants Schedule, P.S.C. No. 2, Revised Sheet No. 2 (effective Apr. 26, 1978); Kentucky Water Service Company, Inc., Private Fire Protection Schedule, P.S.C. No. 1, Original Sheet No. 1 (effective Nov. 9, 1949).

⁶ Case No. 9392, *Application of the Aqua Corporation for Authority to Acquire One Hundred Percent (100%) of the Common Stock of Kentucky Water Service Company, Inc.* (Ky. PSC Sept. 19, 1985).

⁷ Case No. 9431, *Joint Filing Seeking Authority for Kentucky Water Service Company, Inc. to Transfer Its Water Plants Located at Middlesboro and Clinton to the Aqua Corporation* (Ky. PSC Nov. 15, 1985) at 9.

⁸ Case No. 89-340, *The Application and Notice of the Aqua Corporation (Kentucky Water Service Co. Inc.) for an Adjustment of Rates in Middlesboro and Clinton, Kentucky*, at Appendices C and D (Ky. PSC filed Jan. 31, 1990). This case was consolidated with Case No. 1990-00067, which involved Aqua’s application for authority to assess a surcharge. See Case No. 1990-00067, *Kentucky Water Service Company, Inc. Purchased Water Surcharge and Rate Adjustment* (Ky. PSC May 16, 1990).

⁹ Case No. 89-340 (Ky. PSC Oct. 10, 1990).

nor the Commission's Order addressed any rates for fire protection. In showing the total revenues that the utility could obtain if the recommended rates became effective, however, the settlement agreement specifically refers to revenue from public and private fire protection service and sprinklers. In our Order, we expressly directed that all rates not addressed in the Order would remain the same as those in effect prior to the effective date of the Order.

In the Order approving these new rates, the Commission further directed Aqua to file revised tariff sheets that reflected the revised rates within 30 days. Commission records indicate Aqua's compliance with this directive, but fail to disclose the actual tariff sheet.

In August 1992, Aqua filed a revised tariff with the Commission which cancelled its existing tariff¹⁰ and replaced it with a new 41-page tariff.¹¹ This revised tariff contained Aqua's general service rates but did not set forth any rates for fire protection services. It contained specific rules for fire protection service but did not mention any rates for such service.

¹⁰ During a search of Commission tariff records, these tariff sheets were located in a Commission records section for cancelled tariff sheets and were notated as cancelled.

¹¹ There is some dispute over the reason for this tariff filing. In its Motion to Dismiss, Water Service contends that "Aqua/KWS filed revised tariff sheets to reflect the final order in its Case No. 89-340." Motion to Dismiss at 5. Since Aqua had previously filed a tariff sheet to reflect the rate adjustment, this reasoning appears suspect. It appears more likely that Aqua filed the revised tariff to comply with recent revisions to 807 KAR 5:006 and 807 KAR 5:066, which significantly amended the Commission's general rules and rules applicable to water utilities. See 18 Ky. Admin. Reg. 1953; 18 Ky. Admin. Reg. 1968.

Since 1992, the facilities in question have undergone two changes in ownership. In 1998, Utilities of Kentucky, Inc. purchased all of Aqua's stock.¹² Four years later, Water Service acquired the assets of Aqua and its parent, Utilities of Kentucky.¹³

On October 1, 2002, the date that Water Service completed the asset purchase and began providing utility service, it filed with the Commission an adoption notice in which it adopted Aqua's existing rates. This notice provided:

The undersigned Water Service Corporation of Kentucky hereby adopts, ratifies, and makes its own, in every respect as if the same had been originally filed and posted by it, all tariffs and supplements containing rates, rules and administrative regulations for furnishing water service in Bell County and Hickman County in the Commonwealth of Kentucky, filed with the Public Service Commission by Aqua/KWS, Inc. and Utilities of Kentucky, Inc., and in effect on the 1st day of October 2002, the date on which the public service business of the said Aqua/KWS, Inc. and Utilities of Kentucky, Inc. was taken over by Water Service Corporation of Kentucky.

Water Service did not file a new tariff with the Commission as required by 807 KAR 5:011, Section 11; instead, it continued to use Aqua's tariff. It billed customers for fire protection services based upon the rates set forth in the pre-1992 rate schedules.

In Case No. 2005-00325,¹⁴ Water Service applied for a general rate adjustment. In its application, it listed in a proposed new tariff 16 new charges associated with fire protection service. It subsequently amended this proposal into three rate classifications

¹² Case No. 1998-00291, *The Application of Aqua/KWS, Inc. For Approval of Transfer of Stock to Utilities of Kentucky, Inc.* (Ky. PSC July 27, 1998).

¹³ Case No. 2002-00142, *Joint Application of Aqua/KWS, Inc., Utilities of Kentucky, Inc., and Water Service Corporation of Kentucky for Approval of the Transfer of the Ownership of the Assets of Aqua/KWS, Inc. and Utilities of Kentucky, Inc. to Water Service Corporation of Kentucky Pursuant to the Provisions of KRS 278.020(4) and (5) and 807 KAR 5:001(8)* (Ky. PSC June 14, 2002).

¹⁴ Case No. 2005-00325, *Application of Water Service Corporation of Kentucky for an Adjustment of Rates* (Ky. PSC filed May 5, 2006).

for such service,¹⁵ which the Commission eventually approved.¹⁶ During the course of that case, the Commission discerned that Water Service was assessing and collecting fees for hydrant and sprinkler charges that were not included in its filed rate schedules and questioned utility representatives about them. Water Service representatives clarified that these charges were for fire protection and sprinkler systems and acknowledged learning that these charges were not in the utility's filed rate schedules when assembling the utility's rate application.¹⁷

Based upon the information set forth in Water Service's application for rate adjustment, the fire protection rates in question appear to generate approximately \$30,000 annually in revenues for the utility.¹⁸

PROCEDURE

On March 20, 2007, the Commission directed Water Service to show cause why it should not be assessed a penalty for its alleged failure to comply with KRS 278.160 and should not be required to refund with interest all fees and charges collected that were not set forth in its filed rate schedules.¹⁹ Water Service responded in writing to the allegations and requested an informal conference with Commission Staff.

¹⁵ Case No. 2005-00325, Water Service Corporation of Kentucky's Response to Commission Staff's Forth Set of Interrogatories and Requests for Information, Item 3.

¹⁶ Case No. 2005-00325, Order of February 28, 2007. Water Service has filed revised tariff sheets that contain the approved rates.

¹⁷ Letter from John N. Hughes, Counsel for Water Service, to Beth O'Donnell, Executive Director, Public Service Commission of Kentucky (Oct. 5, 2006) at 2.

¹⁸ Case No. 2005-00325, Application, Schedule D (filed Sept. 30, 2005).

¹⁹ In our Order of December 22, 2006, we further directed that the records of Cases No. 1998-00291, No. 2002-00142, No. 2005-00325, and No. 2005-00433 be made a part of the record of this proceeding.

Following a conference with Commission Staff, which was held on September 27, 2007, Water Service moved to dismiss this matter on February 12, 2008. On October 16, 2008, the Commission provided Water Service an opportunity to request a hearing in this matter. We further directed that the matter would stand submitted for decision if Water Service failed to request a hearing in the designated time. No party having requested a hearing, this matter stood submitted for decision on October 30, 2008.

DISCUSSION

The principal issue before us is whether Water Service willfully violated KRS 278.160. That statute provides, in part:

(1) Under rules prescribed by the commission, each utility shall file with the commission, within such time and in such form as the commission designates, schedules showing all rates and conditions for service established by it and collected or enforced. The utility shall keep copies of its schedules open to public inspection under such rules as the commission prescribes.

(2) No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

Water Service does not dispute assessing and collecting fees for fire protection services between October 1, 2002 and February 28, 2007 that were not set forth in its tariff. The utility instead asserts that the tariff sheets that contained the rates in question were improperly and erroneously cancelled. To support this argument, it notes that billing analysis that supported the settlement in Case No. 1989-00340 refers to fire protection rates and to revenues generated from such rates. It further refers to fire

protection policies contained in the revised tariff which Aqua filed with the Commission in 1992 and to various references to fire protection revenues and number of hydrants in the utility's system contained in Aqua's and Water Service's annual reports that were filed with the Commission between 1989 and 2004.

Finally, Water Service argues that because the Commission's Order in Case No. 1989-00340 stated that "[a]ll other rates and charges not specifically mentioned herein shall remain the same as those in effect under authority of the Commission prior to the effective date of this Order," the Commission did not cancel or rescind the fire protection service rates in that case.²⁰ It further suggests that this is supported by the one tariff page with fire protection rates that does not have a notation of being cancelled.

We find this argument unconvincing. First, Commission records show that Aqua filed a revised tariff sheet with the Commission on or about November 9, 1990. The revised tariff that Aqua subsequently filed with the Commission in August 1992, therefore, was not an action to comply with the Order of October 10, 1990 in Case No. 1989-00340 but a completely independent action. The purpose of this action appears to be to replace Aqua's then-existing tariff. The cancelled copy of that tariff, including a cancelled copy of the fire protection rates tariff sheet, supports this interpretation.

Assuming *arguendo* that Aqua mistakenly failed to include a tariff sheet in its 1992 revised tariff or believed that the pre-1992 tariff sheets regarding fire protection service were still effective, such conduct does not relieve Water Service of its obligations under KRS 278.160. When Water Service filed its adoption notice on

²⁰ Case No. 89-340, *The Application and Notice of the Aqua Corporation (Kentucky Water Service Co. Inc.) for an Adjustment of Rates in Middlesboro and Clinton, Kentucky*, at Appendices C and D (Ky. PSC Oct. 10, 1990).

October 1, 2002, the tariff on file at the Commission contained no fire protection service rates and should have been easily known to Water Service had its officials reviewed the filed tariff. The absence of any action on Water Service's part for almost four years indicates that it failed to review the utility's filed tariff or make a comparison between the utility's billing and collection practices and its filed tariff. The lack of any fire protection service rates would likely have been detected had Water Service complied with 807 KAR 5:011, Section 11, and issued and filed in its own name the tariff of its predecessor within 10 days from filing its adoption notice. Water Service did not issue and file a tariff in its own name until 2007.

Water Service charged its customers for fire protection service from October 1, 2002 until February 28, 2007. Because it charged a greater compensation than that prescribed in its filed schedule, it violated KRS 278.160.

A willful violation of any provision in KRS Chapter 278 subjects a utility to a civil penalty.²¹ A willful violation "denotes an act which is intentional rather than

²¹ KRS 278.990(1) provides:

Any officer, agent, or employee of a utility, as defined in KRS 278.010, and any other person who willfully violates any of the provisions of this chapter or any regulation promulgated pursuant to this chapter, or fails to obey any order of the commission from which all rights of appeal have been exhausted, or who procures, aids, or abets a violation by any utility, shall be subject to either a civil penalty to be assessed by the commission not to exceed two thousand five hundred dollars (\$2,500) for each offense or a criminal penalty of imprisonment for not more than six (6) months, or both. If any utility willfully violates any of the provisions of this chapter or any regulation promulgated pursuant to this chapter, or does any act therein prohibited, or fails to perform any duty imposed upon it under those sections for which no penalty has been provided by law, or fails to obey any order of the commission from which all rights of appeal have been exhausted, the utility shall be subject to a civil penalty to be assessed by the commission for each offense not less than twenty-five dollars (\$25) nor more than two thousand five hundred dollars (\$2,500). Each act, omission, or failure by an officer, agent, or other person acting for or employed by a utility and acting within the scope of his employment shall be deemed to be the act, omission, or failure of the utility.

accidental.”²² It “means ‘knowing’ violation or ‘knowing failure to comply’”²³ but does not necessarily and solely entail an “intention to do wrong and inflict injury,” but may include conduct which reflects “an indifference to . . . [its] natural consequences.”²⁴

We find that Water Service’s actions in charging non-tariffed rates without first consulting the tariff on file with the Commission that it adopted is a willful violation. Such conduct reflects an indifference to the natural consequences of charging rates that are not identified in its own tariff. We further find that a civil penalty of \$750 should be assessed against Water Service for its willful violation of KRS 278.160.

Water Service contends that it “should not bear the brunt of some possible failure of a predecessor owner or confusion by the Commission for the lack of clarity of the rates.”²⁵ We assess a civil penalty against Water Service because Water Service charged and collected rates that were not in its filed tariff. The utility’s attempts to shift blame only underscore its own failures to review its predecessor’s filed tariff and to take simple measures to ensure compliance with the law.

The second issue before us is whether Water Service should be required to refund with interest all fees and charges collected from its customers that were not set forth in its filed rate schedules. Having thoroughly examined the record of this

²² *Screws v. United States*, 325 U.S. 91, 101 (1945).

²³ *Oldham v. Kubinski*, 185 N.E.2d 270, 280 (Ill. App. 1962); see *Muncy v. Commonwealth*, 97 S.W.2d 606, 609 (Ky. 1936) (“The word ‘willful’ in its general acceptance means intentionally, not accidentally nor involuntarily.”); *Huddleston v. Hughes*, 843 S.W.2d 901, 905 (Ky. App. 1992) (holding that the term “willful” does not necessarily and solely entail an “intention to do wrong and inflict injury,” but may include conduct which reflects “an indifference to . . . [its] natural consequences.”)

²⁴ *Huddleston* at 905.

²⁵ Motion to Dismiss at 8 (filed Feb. 13, 2008).

proceeding, we concluded that a such a refund is not appropriate and would be counterproductive in this case.

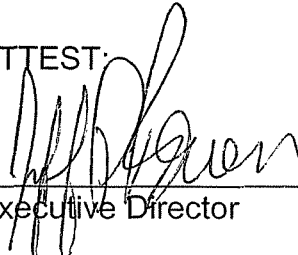
IT IS THEREFORE ORDERED that:

1. Water Service is assessed a civil penalty of \$750 for its failure to comply with KRS 278.160.
2. Within 20 days of the date of this Order, Water Service shall pay the assessed penalty. Payment shall be in the form of a cashier's check made payable to "Treasurer, Commonwealth of Kentucky" and shall be mailed or delivered to: Office of General Counsel, Public Service Commission of Kentucky, 211 Sower Boulevard, Post Office Box 615, Frankfort, Kentucky 40602.
3. This case is closed and shall be removed from the Commission's docket.

Done at Frankfort, Kentucky, this 16th day of March, 2009.

By the Commission

ATTEST:



Executive Director

Honorable John N Hughes
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