

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ALLEGED FAILURE OF THE CITY OF)
DANVILLE TO COMPLY WITH KRS 278.160) CASE NO.
AND 278.180 AND THE COMMISSION'S) 2008-00176
ORDER OF AUGUST 10, 1994 IN)
ADMINISTRATIVE CASE NO. 351)

AND

PARKSVILLE WATER DISTRICT)
COMPLAINANT)
V.) CASE NO.
CITY OF DANVILLE) 2007-00405
DEFENDANT)

O R D E R

This case involves an investigation of the alleged failure of the city of Danville, Kentucky ("Danville") to comply with certain provisions of KRS Chapter 278. At issue is whether Danville willfully failed to file with the Commission its adjusted rates to provide wholesale water service to Parksville Water District ("Parksville"), Garrard County Water Association ("Garrard County"), and Lake Village Water Association, Inc. ("Lake Village") and adjusted its rate for such service without proper notice to the Commission. Finding in the affirmative, the Commission assesses Danville a total penalty of \$3,000, to be suspended.

The procedural schedule in *Parksville Water District v. City of Danville*, Case No. 2007-00405, has been held in abeyance pursuant to our Order of June 11, 2008, as the issues in that case were included as issues in the above Case No. 2008-00176. Since these issues will also be addressed as part of this final Order, Case No. 2007-00405 shall also be closed as part of this final Order.

PROCEDURE

Finding that prima facie evidence existed that Danville had violated KRS 278.160, KRS 278.180, and the Commission's Order of August 10, 1994 in Administrative Case No. 351¹ by failing to notify the Commission of its proposed increase in rates for wholesale water service prior to implementing such increase to Parksville, Garrard County, and Lake Village, the Commission ordered Danville to show cause why it should not be penalized for its alleged failure and why it should not be required to refund all monies collected from Parksville, Lake Village, and Garrard County in excess of the rates set forth in its contracts. Danville responded to this Order on July 18, 2008, and an informal conference was held with the parties on August 19, 2008. On December 19, 2008, the Commission established a procedural schedule which set discovery deadlines and scheduled a formal hearing for March 10, 2009.

STATEMENT OF THE CASE

Danville, a city of the third class,² is located in Boyle County, Kentucky. It owns and operates a water treatment and distribution system that provides, *inter alia*,

¹ Administrative Case No. 351, Submission of Contracts and Rates of Municipal Utilities Providing Wholesale Service to Public Utilities (Ky. PSC Aug. 10, 1994).

² KRS 81.010(3).

wholesale water service to Parksville, Garrard County, and Lake Village,³ all jurisdictional public utilities. Danville is subject to the Commission's rates and service regulations as they pertain to these three utilities.⁴

Parksville is a water district organized pursuant to KRS Chapter 74 and is a utility subject to Commission jurisdiction.⁵ It owns and operates facilities that are used in the distribution of water to the public for compensation to approximately 1,599 customers in Boyle, Casey, and Lincoln counties, Kentucky.⁶ It purchases its water supply exclusively from the City of Danville Water Department.⁷

Garrard County is a non-profit corporation organized under the provisions of KRS Chapter 273 and is a utility subject to Commission jurisdiction.⁸ It owns and operates facilities used in the distribution of water to the public for compensation to approximately 5,355 customers in Garrard, Lincoln and Madison counties, Kentucky.⁹ It purchases

³ City of Danville's Response to the Allegations of the Commission's Order dated May 22, 2008 at 1.

⁴ See *Simpson County Water District v. City of Franklin*, 872 S.W.2d 460 (Ky. 1994).

⁵ KRS 278.010(3)(d); KRS 278.015.

⁶ Annual Report of Parksville Water District to the Public Service Commission of the Commonwealth of Kentucky for the Calendar Year Ended December 31, 2009, at 5 and 27.

⁷ *Id.* at 29.

⁸ KRS 278.010(3)(d); KRS 278.012.

⁹ Annual Report of Garrard County Water Association, Inc. to the Public Service Commission of the Commonwealth of Kentucky for the Calendar Year Ended December 31, 2008, at 5 and 27.

water from three vendors: City of Lancaster, City of Berea and the City of Danville Water Department.¹⁰

Lake Village is a non-profit corporation organized under the provisions of KRS Chapter 273 and is a utility subject to Commission jurisdiction.¹¹ It owns and operates facilities used in the distribution of water to the public for compensation to approximately 2,040 customers in Boyle and Mercer counties, Kentucky.¹² It purchases water from three vendors: the City of Lancaster, the City of Harrodsburg Water Department, and the City of Danville Water Department.¹³

On September 13, 2007, Parksville filed a formal complaint against Danville alleging that, on or after August 2005, Danville began billing at a rate for wholesale water service that deviated from its filed contract rate.¹⁴ Parksville claimed that, beginning with Danville's August 2005 invoice, no notice of the increase in rates was

¹⁰ *Id.* at 29.

¹¹ KRS 278.010(3)(d); KRS 278.012.

¹² Annual Report of Lake Village Water Association, Inc. to the Public Service Commission of the Commonwealth of Kentucky for the Calendar Year Ended December 31, 2008, at 5 and 27.

¹³ *Id.* at 29.

¹⁴ Case No. 2007-00405, *Parksville Water District v. City of Danville* (Ky. PSC complaint filed Sept. 13, 2007). On June 11, 2008, we directed that the record of Case Nos. 1999-00353, 2007-00405, and 2008-00109 be incorporated by reference into the record of this proceeding.

given by Danville as required.¹⁵ Danville has admitted that it has adjusted its wholesale rates three times since September 1, 2005.¹⁶

On April 14, 2008, Garrard County applied to the Commission for approval to adjust its rates to reflect increases in the wholesale rates of its suppliers, pursuant to the purchased water adjustment procedure.¹⁷ In partial support of its application, Garrard County stated that, at an unknown date but after February 14, 2000, Danville increased its wholesale rate from \$1.38 per 1,000 gallons to \$1.60 per 1,000 gallons.¹⁸ From February 14, 2000 to the time of Garrard County's application, Danville had not filed with the Commission any revisions to its water purchase contract with Garrard County

¹⁵ *Id.* at 1-3.

¹⁶ *Id.* See Response of Danville to Parksville's Data Requests, Item 2 (filed May 6, 2008). Danville acknowledged that increases to wholesale rates were calculated September 16, 2005, September 6, 2006, and August 17, 2007 and applied on invoices sent to Parksville for water delivered during the periods beginning September 1, 2005, September 1, 2006, and August 1, 2007, respectively. The increases were applied to all of its wholesale customers. Commission records do not reveal any evidence that Danville provided the required notice of these rate revisions.

¹⁷ KRS 278.012; 807 KAR 5:068. See Case No. 2008-00109, *Purchased Water Adjustment of Garrard County Water Association* (Ky. PSC May 15, 2008). Garrard County tendered its application for a purchased water adjustment on March 26, 2008. The Commission rejected this tender because the application failed to comply with certain provisions of 807 KAR 5:068. The application was accepted on April 14, 2008, when Garrard County cured these deficiencies.

¹⁸ Letter from Paul Reynolds, Manager, Garrard County Water Association, to Stephanie L. Stumbo, Executive Director, Public Service Commission (Mar. 25, 2008).

or a revised schedule of rates for wholesale water service.¹⁹ Since Danville had not provided the Commission with notice of any rate change as required by KRS 278.180, its rate adjustment was not effective or lawful. As such, the rate could not be assessed and could not serve as the basis for a purchased water adjustment.²⁰ Garrard County's proposed rates reflecting the increased rate that Danville had been charging were thus denied.²¹

On May 22, 2008, as a result of Parksville's complaint against Danville²² and Garrard County's request for an adjustment of its rates,²³ both based on Danville's increase in its wholesale rates outside its filed rates and without prior notice, the Commission opened this investigation and directed Danville to show cause why it should not be subject to penalties prescribed in KRS 278.990(1) and why it should not be required to refund all monies collected from its wholesale public utility customers in

¹⁹ On July 23, 1999, Danville and Garrard County executed a water purchase contract under which Danville agreed to provide wholesale water service to Garrard County. This contract provided for a declining block rate schedule for wholesale water service. On February 14, 2000, the Commission approved the rates set forth in this contract. See Case No. 1999-00353, *An Investigation Into the Proposed Wholesale Water Contract Between the City of Danville, Kentucky and Garrard County Water Association* (Ky. PSC Feb. 14, 2000).

²⁰ The Commission's Executive Director advised Danville that it must comply with KRS 278.180 and 807 KAR 5:011 to adjust its wholesale water service rate to Garrard County. Letter from Stephanie Stumbo, Executive Director, Public Service Commission, to Hugh Coomer, Mayor, City of Danville (April 21, 2008).

²¹ Case No. 2008-00109, *Purchased Water Adjustment of Garrard County Water Association* (Ky. PSC May 15, 2008).

²² Case No. 2007-00405, *Parksville Water District v. City of Danville*, filed Sept. 13, 2007.

²³ Case No. 2008-00109, *Purchased Water Adjustment of Garrard County Water Association* (Ky. PSC May 15, 2008).

excess of rates set forth in water purchase contracts with those customers for allegedly failing to comply with KRS 278.160. Danville was also ordered to immediately cease charging its wholesale public utility customers rates that differed from those in its water purchase contract with those customers.²⁴ Lake Village was added as a party based on its also being a wholesale customer of Danville.²⁵ Danville acknowledged that the rate increases to all of its wholesale customers had initially been made by a new employee to conform with a wholesale rate increase authorized by ordinance and that the rates that were in effect for Parksville, Lake Village, and Garrard County, pursuant to special contracts, were changed along with those in effect for other wholesale customers.²⁶

On March 10, 2009, the Commission conducted a formal hearing in this matter.²⁷ Evidence at the hearing established that Danville increased the wholesale water rates it charged to public utilities without notice and without seeking or receiving the approval of the Commission. The evidence further demonstrated that the increase occurred when a Danville employee failed to make the specific, required exception to the standard account operations.

²⁴ Order dated May 22, 2008 at 6-7.

²⁵ Annual Report of Lake Village Water Association, Inc. to the Public Service Commission of the Commonwealth of Kentucky for the Calendar Year Ended December 31, 2008, at 29.

²⁶ This acknowledgment was made by Danville in this case at an informal conference on August 19, 2008 and in its Response to Parksville's Data Request, Item 2 (filed May 6, 2008) in Case No. 2007-00405.

²⁷ An Order was entered March 4, 2009 designating Thomas L. Self as hearing examiner to conduct the scheduled hearing and to perform all actions necessary to ensure the orderly conduct of this hearing, to include administering oaths, receiving evidence, and ruling on motions and objections raised during this hearing.

Following the March 10, 2009 hearing, Danville entered into settlement agreements with Parksville, Garrard County, and Lake Village. These settlement agreements have been filed with the Commission.²⁸

DISCUSSION

KRS 278.010(3) effectively exempts facilities owned, controlled, operated, or managed by a “city” from Commission regulation by excluding such municipal utilities from the definition of a “public utility.”²⁹ In *Simpson County*, however, the Kentucky Supreme Court held that this exemption did not extend to contracts for utility service between a municipal utility and a public utility. The Court ruled that “where contracts have been executed between a utility and a city . . . KRS 278.200 is applicable and requires that by so contracting the [c]ity relinquishes the exemption and is rendered subject to . . . [Commission] rates and service regulation. . . . [T]he statutory definition of utility is not to serve as an impenetrable shield to afford the City immunity.”³⁰

KRS 278.200 provides:

The commission may, under the provisions of this chapter, originate, establish, change, promulgate and enforce any rate or service standard of any utility that has been or may be fixed by any contract, franchise or agreement between the utility and any city, and all rights, privileges and

²⁸ On June 1, 2009, Danville and Parksville filed a Motion for Acceptance of Proposed Settlement Agreement, with Danville agreeing to pay Parksville the sum of \$38,171.18. Also on June 1, 2009, Danville and Lake Village filed a Motion for Acceptance of Proposed Settlement Agreement, with Danville agreeing to pay Lake Village the sum of \$28,845.14. On June 4, 2009, Danville and Garrard County filed a Motion for Acceptance of Proposed Settlement Agreement, with Danville agreeing to pay Garrard County the sum of \$18,270.44. With each agreement, the parties involved “agree to compromise all disputes, issues and questions about usage, charges, billings and payments up through and including the month of April 2009”

²⁹ See *McClellan v. Louisville Water Company*, 351 S.W.2d 197 (Ky. 1961).

³⁰ *Id.* at 1-2.

obligations arising out of any such contract, franchise or agreement, regulating any such rate or service standard, shall be subject to the jurisdiction and supervision of the commission, but no such rate or service standard shall be changed, nor any contract, franchise or agreement affecting it abrogated or changed, until a hearing has been had before the commission in the manner prescribed in this chapter.

Simpson County effectively subjects all contracts between municipal utilities and public utilities to the Commission's jurisdiction, requires all municipal utility transactions with a public utility to comply with the provisions of KRS Chapter 278, and makes Commission approval a prerequisite to any change in a rate that a municipal utility assesses a public utility for wholesale utility service.

Pursuant to *Simpson County*, the Commission, in Administrative Case No. 351, directed that all municipal utilities that provide wholesale utility service to a public utility "file with the Commission a copy of their contracts with the public utility and a schedule of their rates for wholesale service." It further directed that "[a]ny municipal utility wishing to change or revise a contract or rate for wholesale utility service to a public utility shall, no later than 30 days prior to the effective date of the revision, file with the Commission the revised contract and rate schedule."³¹ KRS 278.160(1) and (2) and KRS 278.180(1) supported and required this directive.

KRS 278.160 provides:

(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

³¹ *Id.* at 2.

service from any utility for a compensation greater or less than that prescribed in such schedules.

KRS 278.180(1) provides in pertinent part:

[N]o change shall be made by any utility in any rate except upon thirty (30) days' notice to the commission, stating plainly the changes proposed to be made and the time when the changed rates will go into effect. However, the commission may, in its discretion, based upon a showing of good cause in any case, shorten the notice period from thirty (30) days to a period of not less than twenty (20) days. The commission may order a rate change only after giving an identical notice to the utility. The commission may order the utility to give notice of its proposed rate increase to that utility's customers in the manner set forth in its regulations.

The evidence demonstrates that Danville violated KRS 278.180(1) when it raised its wholesale water rates to Parksville, Garrard County, and Lake Village on three separate occasions without obtaining Commission approval or providing the required notice to the Commission.³²

Danville's proposed settlement agreements with Parksville, Garrard County, and Lake Village should resolve the issues between the parties.³³ The Commission finds that the agreements are in accordance with law, do not violate any regulatory principle, result in a reasonable resolution of this case, and are in the public interest.

³² These increases were calculated September 16, 2005, September 1, 2006, and August 17, 2007, and the increases were applied to invoices for water delivered during the periods beginning September 1, 2005, September 1, 2006, and August 1, 2007, respectively.

³³ See Response of Danville to Commission Staff's Second Data Request at 2-3 (filed July 6, 2010). Danville states that it "hopes that the terms and conditions of the Proposed Settlement Agreements can be appropriately brought forward and approved by the Commission and thus resolve all disputes . . . and if the amounts in par. 4 of the respective Proposed Settlement Agreements are approved by the Commission . . . Danville reports that it has made provision for payment of the respective amounts within days and would not exercise the 12-month allowance in par. 4 of the Agreements with GCWA and Lake Village."

Notwithstanding, however, the Commission must still determine whether or not Danville should be subject to penalty, pursuant to KRS 278.990(1). Parksville, Garrard County, and Lake Village have not expressed strong positions on this issue, although Danville strongly objects to any penalty being assessed against it.³⁴

The Commission recognizes the steps that Danville has taken subsequent to the hearing in this matter and acknowledges that Danville ceased charging unauthorized rates to Garrard County and Lake Village following receipt of the show cause Order of May 22, 2008 and to Parksville shortly thereafter. The Commission finds, however, that Danville nonetheless failed to comply with the requirements set forth in KRS 278.160(1) and (2) and KRS 278.180(1). In its contractual relationship with these public utilities, Danville is subject to Commission jurisdiction and is required to comply with the applicable laws and regulations of the Commission.³⁵

³⁴ Danville's main arguments are that Danville is not subject to the Commission's jurisdiction; that *Simpson County* should be overturned; that KRS 278.990(1) does not give the Commission the authority to impose a penalty against it; that Danville's actions were not willful; and that Danville has been denied due process.

³⁵ KRS 278.200.

The Commission finds that KRS 278.990(1)³⁶ requires the assessment of a penalty in this matter. In determining the amount of this penalty, the Commission has considered the appropriateness of the penalty with respect to the gravity of Danville's violations and its efforts to comply with KRS Chapter 278 following the initiation of this proceeding. We find that Danville should be assessed a penalty of \$1,000 each for its actions pertaining to Parksville, Garrard County, and Lake Village, or a total penalty of \$3,000, but that this penalty should be suspended.

SUMMARY OF FINDINGS

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

1. Danville has a water purchase agreement with Parksville dated October 7, 1994; a water purchase agreement with Garrard County dated July 23, 1999; and a

³⁶ 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 of 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 any 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.

water purchase agreement with Lake Village dated May 29, 1969, as amended; and each agreement is on file with the Commission.

2. Each agreement sets forth the terms and conditions, specifically including rates, for water sold by Danville to each utility.

3. Pursuant to the *Simpson County* decision, the rates and service provisions of these agreements are subject to Commission jurisdiction. KRS 278.180 further required Danville to notify the Commission of any change in any rate.

4. Danville violated KRS 278.180 by failing to give notice prior to increasing wholesale water rates to each utility for water delivered during the periods beginning September 1, 2005, September 1, 2006, and August 1, 2007, respectively.

5. Danville failed to file rate schedules reflecting these increased rates with the Commission as required by KRS 278.160.

6. Following a formal hearing on March 10, 2009, Danville entered into settlement agreements with each utility. These settlement agreements are filed in the record of this case along with separate motions seeking Commission approval.

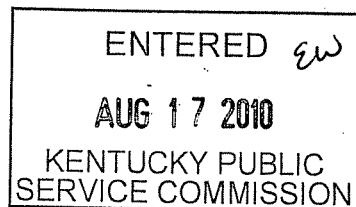
7. Danville should be assessed a penalty of \$3,000 for its failure to comply with KRS 278.160 and 278.180. This penalty should be suspended for a period of one year from the date of entry of this Order. If, at the end of that year, Danville has complied with the provisions of KRS 278.160 and 278.180, this penalty will be vacated.

8. Case No. 2007-00405, Parksville Water District v. City of Danville, should be closed and removed from the docket.

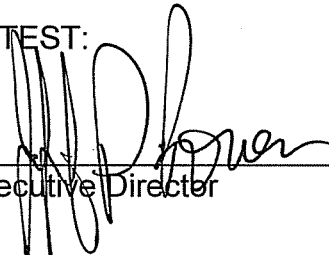
IT IS THEREFORE ORDERED that:

1. The Settlement Agreements between Danville and Parksville, Danville and Garrard County, and Danville and Lake Village, which have been filed in the record of this matter, are incorporated into this Order as if fully set forth herein.
2. The terms and conditions set forth in these Settlement Agreements are adopted and approved.
3. Danville is assessed a penalty of \$3,000 for its violations of KRS 278.160 and 278.180. This penalty is suspended for a period of one year.
4. Following Danville's compliance with KRS 278.160 and KRS 278.180 during the suspension period, the penalty shall be vacated.
5. This case is closed and removed from the Commission's docket.
6. Case No. 2007-00405, Parksville Water District v. City of Danville, is closed and removed from the Commission's docket.

By the Commission



ATTEST:



Executive Director

Case No. 2008-00176
Case No. 2007-00405

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